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A DIGEST

OF THE

Reports of the Decisions of the Supreme Court

AND OF THE

HIGH COURT OF ERRORS AND APPEALS,

OF THE

STATE OF MISSISSIPPI,

FROM THE ORGANIZATION OF THE STATE, TO THE PRESENT TIME.

BY JAMES Z. GEORGE, Esq.,

LATE REPORTER OF THE HIGH COURT OF ERRORS AND APPEALS.

D

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TO THE MEMORY OF
FRANCIS MARION ALDRIDGE,

WHO FELL AT THE BATTLE OF SHILOH,

This Work is Dedicated.

A profound lawyer—a pure and an honest man—a firm and upright patriot: he offered his life, and its rich and varied gifts, to the cause of his native land.

That cause was to him a faith—and its followers, brothers; and no one was more devoted to its fortunes than he.

Our brethren of the Bar, in this as in all times past, were the stern advocates of freedom, and they staked all upon the issue of that cause, in the bloody arbitrament of battle. Our heroes were vanquished, and the victor is now the judge.

As misfortune endears the sufferer, so he who falls in battle in the defence of his convictions, bears thenceforth a charmed name.

To that cause, which bound up my own most cherished sympathies, and to my professional brethren, who bore so large a share of its burthens, I desire to place the expression of my attachment and admiration upon this record, frail though it may be.

“It is a cause, and not the *fate* of a cause, which is a glory.”

All those who, like ALDRIDGE, whether they fell or survived, gave their best efforts to their country, are enshrined in my recollection; but I here select his name, not because it is the highest or the brightest amongst them all, but because it was to me the best beloved.

J. Z. GEORGE.

P R E F A C E.

THIS work has been produced during the last five years, at such intervals as I could spare from my professional pursuits. From the first, it has been a labor of love, else the magnitude of the undertaking, increased as it was by frequent interruptions, extending at times over many months, during which my mind lost the drift of the work, would have prevented its completion. I was also encouraged to proceed by the approving voice of several members of the bar, who examined parts of the Digest whilst it was in preparation.

I do not claim for the work even that degree of excellence which would result from its filling my own conception of what it ought to be, much less, that it is perfect in itself; yet I feel a consciousness that it will be found accurate and faithful, convenient and useful; that it will greatly lessen the labors and facilitate the investigations of my professional brethren in Mississippi, and will supply to the bar of other States, who have no access to our Reports, a safe guide in respect to the jurisprudence peculiar to this State, as well as furnish them many useful illustrations of the principles of the Common Law and Equity, as they prevail in England and in the States of the American Union.

It will be seen that this Digest is fuller than is usual; for I have endeavored not only to give the general principles which the Court have established or sanctioned, but to make such an application of them to the facts, as to render the meaning of the Court clear and distinct. I have aimed to incorporate the abstract into the concrete, so that the law might be perceived and understood, as it was expounded by the Court. Of course, I have not succeeded in all I have attempted. Probably my abilities were unequal to the task—certainly my time and opportunity were so. I can see plainly enough: after the six thousand pages of manuscript have been put into print, so that they may be inspected and read and compared together, that there are some defects in the Digest, which, with greater care and caution, and more time, might have been corrected,—that there are deviations in it, even from my own plan.

Owing to the rapidity with which the work was—for reasons unnecessary to state here—passed through the press, errors in proper names in the citation of cases may have in some instances escaped notice; these can be readily corrected by the Reports, the references to which have been carefully examined. The Errata in the Text have been corrected so far as they might tend to mislead the reader, or alter the sense. Mistakes of this kind are attributable to me, as the work was printed under my supervision. The typographical errors, however, have been so far corrected in the list of Errata as to prevent danger of misconception.

I am indebted to Judge A. M. Clayton for the entire preparation of the title “Limitation of Estates,” and to W. R. Barksdale, Esq., for the digest of the Criminal Law; the perusal of these titles will cause a very general regret, that the work of these gentlemen is not perceived in other parts of the Digest.

J. Z. GEORGE.

COTESWORTH (near Carrollton), Miss.

October 10th, 1872.

EXPLANATION OF ABBREVIATIONS.

[The Reports are referred to by the name of the Reporter up to Vol. 40, Mississippi. A change is there made because the reports by Reynolds are not numbered in the Reporter's name, and this change was kept up through Morris' Reports, as his initial (M) is the same as that adopted to designate Reynolds' Reports.]

W. . . .	Walker's Reports, 1 vol.	1818 to 1832.
H. . . .	Howard's Reports, 7 vols.	1834 " 1843.
S. & M. .	Smedes & Marshall's Reports, 14 vols.	1843 " 1850.
C. . . .	Cushman's Reports, 7 vols.	1851 " 1855.
G. . . .	George's Reports, 10 vols.	1855 " 1863.
M. . . .	Mississippi Reports.	1864 " 1870.
H. C. . .	Hutchinson's Code.	
H. & H. .	Howard & Hutchinson's Digest.	

ERRATA IN CITATIONS.

<i>Page</i>	<i>13. Sect.</i>	<i>19. for Green</i>	<i>read Geren.</i>	<i>Page</i>	<i>374. Sect.</i>	<i>61. Townsend v. Blewett is in 5 H. 503.</i>
"	17. "	26. " 7 G.	" 8 G. (Ricard v. Smith.)	"	383. "	129 <i>b</i> . for Graves <i>read</i> Puckett
"	18. "	37. " Barnard	" Barnes.	"	387. "	177. Moody v. Nichol is in 4 C. 109.
"	18. "	38 <i>a</i> . " Dunkins	" Dawkins.	"	412. "	180. Fatheree v. Fletcher is in 2 G. 265.
"	20. "	5. " Coleman	" Goleman.	"	432. "	1. for Bingham <i>read</i> Bingham.
"	21. "	21. " Estill	" Estice.	"	441. "	55. " Dickson " Dickson v. Hoff.
"	31. "	51 <i>a</i> . " Lyon	" Ligon.			v. Hoyt
"	34. "	78. " Relf	" Randolph.	"	445. "	89. " Burnet " Jones.
"	42. "	23. " Packet	" Pickett.	"	459. "	40. " Nelson's Case " Nelm's Case.
"	56. "	79. " Sheed	" Speed.	"	482. "	50. " Hayne " Payne.
"	58. "	97. Bank of U.S. v. Steele is in 12 S. & M. 456.		"	486. "	94. Bingham v. Robertson is in 3 C. 501.
"	72. "	26. for Real <i>read</i> Read.		"	523. "	30. O'Reilly v. Hendricks is in 2 S. & M. 388.
"	75. "	51. " Darbig	" Dabney.	"	534. "	26. for Bolton <i>read</i> Holton.
"	81. "	90. " Pickett	" Puckett.	"	554. "	42. " Riley " O'Reiley.
"	81. "	98. " Titman	" Tillman.	"	589. "	94. " Nason v. Given " Naron v. Gwin.
"	82. "	104. " Tanning	" Fanning.	"	612. "	24. " Hunter " Harper
"	82. "	105. " Smith v. Lee	" Davis v. Lee.			v. Archer v. Archer.
"	89. "	164 <i>c</i> . " Tharpe	" Thatcher.	"	624. "	114. " Cooke " Cooper.
"	93. "	225, 228. " Pope	" Polk.	"	637. "	12. " Jobbs " Davis.
"	103. "	9 <i>a</i> . " Handley	" Hundly.	"	638. "	25. " Shultz " Bescher.
"	122. "	39. " Parker	" Barker.	"	654. "	17. " Soggins " Loggins.
"	127. "	47. " Cardiff	" Candiff.	"	690. "	131. Kelly v. Mills is in 41 M. 267.
"	146. "	16. Newell v. Fisher is in 11 S. & M. 431.		"	708. "	3. for Nixon <i>read</i> Mixon.
"	154. "	85. Land v. Wallace is in 2 G. 630.		"	732. "	32. " Burns " Burrus.
"	168. "	10. for Brown <i>read</i> Brower.		"	741. "	101. " Powers " Pouns.
"	199. "	1. " Gilmore	" Jackson.	"	783. "	11. Nations v. Alvis is in 5 S. & M. 338.
"	230. "	130. Cason v. Cason, is in 2 G. 578.		"	799. "	148. for Scraggs <i>read</i> Scaggs.
"	235. "	194. for Wick <i>read</i> Vick.		"	805. "	212. " Gresson " Greeson.
"	238. "	227. " Williams	" Mitchell.	"	805. "	214. " Morrison " Woodsides.
"	246. "	295. " Blauvelt	" Blewett.	"	806. "	221. Johnson's Case is in 7 S. & M.
"	270. "	41. " Philips	" Phipps.	"	807. "	233. for Wilson <i>read</i> Miller.
"	284. "	161. " Brown	" Burns.	"	812. "	277. " Whitting " Whitton.
"	298. "	291. " Harrison	" Haralson.	"	826. "	397. " Hood " Woods.
"	301. "	316. " Henderson	" Herndon.	"	829. "	437. " McMann " McCann.
"	307. "	373. " Miller	" Mellen.	"	837. "	551. " Scraggs " Scaggs.
"	308. "	386. " McCorry	" McCoy.	"	839. "	583. " Shive " Shines.
"	310. "	13. Smith v. Estell is in 5 G. 527.		"	849. "	71. " Miner " Mercer.
"	318. "	33. for Field v. Harrod <i>read</i> Field v. Morse.		"	852. "	97 <i>a</i> . Mobley v. Buchanan is in 1 G. 174.
"	332. "	72. " Parney v. Park " Harney v. Pack.		"	860. "	164. Spears v. Cheatham is in 44 M. 64.
"	339. "	24. " Nesbit	" Nevitt.	"	873. "	297 <i>a</i> . for Skiff <i>read</i> Shipp
"	347. "	8. Ford v. Hurd is in 4 S. & M. 683.				v. Whelers v. Wheless.
"	369. "	15. for Denon <i>read</i> Demoss.		"	875. "	314. Hogan v. Burnet is in 8 G. 617.
"	372. "	39. " Watkin	" Walker.	"	897. "	511. for Rowman <i>read</i> Bowman.

ERRATA IN THE TEXT.

Mere grammatical errors and verbal inaccuracies, which do not change the sense and are readily corrected by the intelligent reader, have not been noted.

Page. Sect. Line.

- 8, 2, 5 omit of *after* rather.
 11, 2, 4 from top, read *final* for *finally*.
 13, 19a, 2 from top, read *avoidance* for *avow-
ance*.
 28, 33, 4 from bottom, read *this* for *the*.
 31, 61a, 2 from bottom, read *amendment* for *aver-
ment*.
 41, 7, 8 from bottom, read *for* for *or*.
 43, 27, 3 from bottom, read *for* for *or*.
 44, 8, 4 from top, read *his right* for *it*.
 58, 93, 4 read *in* for *on*.
 59, 100, 6 from bottom, read *purpose* for *pur-
chase*.
 59, 2, last, insert *not before* necessary.
 61, 23, 4 from top, read *assignee* for *assigner*.
 67, 19, 2 from bottom, read *had* for *tried*.
 74, 45, 14 from bottom, read *unusually* for *usu-
ally*.
 83, 107, 2 from top, read *note* for *notice*.
 83, 115b, 5 & 11 from bottom, read *payee* for *payer*.
 94, 220, 3 from bottom, read *endorsee* for *endor-
ser*.
 103, 10, 2 from bottom, read *estate* for *teste*.
 106, 3, 4 from bottom, read *descriptive* for *de-
scription*.
 115, 14, read *CONTRACT* for *CONDITION*.
 119, 10, 3 from top, insert *and after* State.
 122, 37, 4 from bottom, read *chose* for *case*.
 124, 7, 2 from bottom, insert *for a promise after*
consideration.
 127, 2, 2 from bottom, read *construction* for
contention.
 132, 37, 2 from bottom, read *on* for *or*.
 133, 55, 1 from top, read *judgment* for *judge*.
 134, 57, 11 from top, read *convictions* for *correc-
tions*.
 134, 72, 4 from top, read *or* for *of*.
 144, 2, 3 from bottom, read *avored* for *formed*.
 155, 97, 2 from bottom, read *payee* for *payer*.
 163, 43, 3 from bottom, read *corporators* for *con-
tractors*.
 181, 63, 5 from top, read *it is* for *they are*.
 183, 85, 3 from bottom, read *releasor* for *releasee*.
 185, 92, 4 from bottom, read *last* for *lost*.
 187, 3, 4 from bottom, insert *nou before* *resid-
ent*.
 192, 21b, 4 from bottom, read *accounts* for *de-
mands*.
 224, 78, 5 from top, insert *so after* do.
 226, 93, 5 from bottom, insert *land office after*
general.
 239, 230, 5 from bottom, read *succeed* for *sued*.
 270, 36, 6 from bottom, read *return in* for *retain
on*.
 272, 57, 4 from bottom, read *valid* for *valued*.
 286, 169, 4 from bottom, read *creditor* for *execu-
tor*.
 298, 291, 8 from bottom, read *in and wrong* for
on and money.
 305, 348, 3 from bottom, read *recorded* for *ren-
dered*.
 305, 361, 1 from top, insert *decree* for *the before*
sale.
 306, 371, 2 from top, read *receive* for *recover*.
 307, 371, 4 from bottom, read *receipt* for *right*.
 314, 9, 2 from bottom, read *though* for *if*.
 314, 14, 2 from top, read *defeat* for *defend*.

Page. Sect. Line.

- 322, 8, 3 from bottom, read *secured* for *several*.
 323, 27, 7 from top, read *assigned* for *assessed*.
 328, 51, 14 & 15 from bottom, read *refunded* for *re-
fused*.
 335, 92a, 2 from bottom, read *donee* for *donor*.
 340, 35, 7 from bottom, read *which* for *what*.
 378, 91, 3 from bottom, read *verdict* for *evi-
dence*.
 381, 110, 6 from bottom, read *the* for *this*.
 384, 139, 3 from top, insert *of after* *endorser*.
 403, 103, 3 from top, insert *the law of before* *the
place*.
 404, 108, 7 from bottom, read *when* for *where*.
 430, 48a, 3 from bottom, insert *made before* *de-
fence*.
 457, 30, 6 from top (of page), read *very* for
may.
 462, 8, 4 from bottom, read *se se* for *essi*.
 470, 19, 13 from top, read *arts.* for *acts*.
 498, 19, right hand column, read *conveyances*.
 499, 45, right hand column, read *divergence*.
 499, 61, right hand column, read *devises*.
 501, 29, left hand column, omit *within*.
 501, 30, left hand column, insert *within after*
happen.
 501, 48, left hand column, read *his* for *her*.
 501, 7, right hand column, *after* without *issue*
insert the limitation over.
 501, 32, right hand column, read *Pesson v.*
Wright.
 501, 34, right hand column, for *9 S. & M.* read
9 Simons.
 505, 2, 8 from bottom, read *his bond* for *this
bond*.
 539, read *Non* for *Nom* in the title and
heading.
 557, 62, 2 from top, read *continued* for *contained*.
 557, 68, 5 from top, read *to* for *or*.
 564, 7, 12 from bottom, read *public* for *parties*.
 573, 99, 2 from bottom, read *country* for *contrary*.
 597, 72, 4 from bottom, read *illegal* for *urgent*.
 598, 81, 6 from top, insert *is before* *seut*.
 605, 61, 10 from bottom, read *security* for *surety*.
 608, 83, 4 from top, read *then* for *there*.
 700, 35, 6 from top, insert *and there is before*
a later.
 720, 18, 4 from top, read *setting up* for *selling*.
 737, 83, 1 from bottom, read *Stewart v. Ives,* 1
S. & M. 197 for *lb*.
 757, 1, 3 from bottom, read *where* for *when*.
 768, 33, 5 from top, read *their* for *this*.
 783, 39, 3 from bottom, read *Held bad* for *Held
good*.
 805, 214, 10 from top, read *Woodside's* for *Morri-
son's*.
 807, 233, 18 from top, read *Miller's* for *Wilson's*.
 810, 237, 12 from top, read *673* for *63*.
 823, 387, 3 from top, read *accepted* for *cepted*.
 834, 603c, 3 from top, insert *between the and* *pur-
chaser these words* seller should
believe.
 876, 319, 8 from top, read *float* for *flat*.
 889, 435, 18 from top (of page), read *made no* for
made on.
 893, 466, 7 from bottom, read *judgment* for *in-
junction*.
 905, 622, 3 from top, omit *of after* *morning*.

A DIGEST

OF

MISSISSIPPI DECISIONS.

Abatement.

I. Pleas.	
1. How framed.....	1
2. Pleas to the writ.....	2
3. When sworn to.....	3
4. Pleas under the Act requiring makers and endorsers to be sued jointly.....	4
II. What is abatable matter.....	5
III. How many pleas allowed, and miscellaneous.....	9

I. Pleas in.

1. How framed.

1. *Same.* Courts do not favor dilatory pleas, and require the utmost exactness in framing them; and if the prayer in the plea be that "the declaration and writ should be quashed," when it should be, "whether the defendant should be compelled to answer," &c., the plea will be bad; *West Feliciana R. R. Co. v. Johnson* 5 H. 273; *Babcock v. Scott*, 1 H. 100. They must be technically correct in form and substance; *Babcock v. Scott*, 1 H. 100. And so if a plea in abatement to an attachment commence, "and the said defendant by his attorney comes and makes known to the court here, that the attachment was wrongfully sued out," &c., it is bad, because not pleaded with proper defence; *Proskey v. West*, 8 S. & M. 711.

2. Pleas to the Writ.

2. *Same.* A plea in abatement to the writ which avers that the writ does not bear *teste* of the term next preceding that to which it is made returnable, is defective, unless it also aver that the writ was not sued out within five days of the term next succeeding its issuance; *Hurst v. Strong*, 1 H. 123. If there be no seal of court on the writ, and no statement in it that there is no seal, it will be abated; *Pharis v. Conner*, 3 S. & M. 87. But it is no ground of abatement to the writ that there is a variance between the declaration and the endorsement of the cause of action on the writ, as to the date of the note sued on; *Ib.* But it is essential that the amount actually demanded should be endorsed on the writ (see H. & H. 577, § 5); an endorsement of the amount of the note only will not do; but the court may in its discretion allow an amendment to the endorsement; but if there be two defendants, and one plead to the merits, there will be no abatement as to him;

Foster v. Collins, 5 S. & M. 259. And if the return on the writ is attacked as untrue it must be by plea in abatement; a mere motion to set aside a return, and an offer to prove its falsity will not do; *Mayfield v. Barnard*, 43 M. 270.

3. When sworn to.

3. *Same.* If the abatable matter appear on the record, the plea need not be verified by oath; otherwise, it must be sworn to, or it will be a nullity; *Lillard v. Planters' Bank*, 3 H. 78. And if the character in which plaintiff sues be denied by plea in abatement, the plea may be stricken out as a nullity, unless sworn to; *Prewitt v. Bennett*, 7 S. & M. 101. (Citing *Templeton v. Planters' Bank*, 5 H. 169; *Vicksburg Water Works Bank v. Washington*, 1 S. & M. 536.)

4. Plea under the Act requiring Maker and Endorser to be sued in same action.

4. *Same.* Under the act of 1837 (How & Hutch Code), requiring all the makers, drawers, acceptors and endorsers of a bill or note resident in this State to be sued in the same action, it is not necessary that the plaintiff should aver in his declaration, that the parties not sued are dead, or non-resident; but if they are alive and resident, the objection must be made by plea in abatement; unless it appear from the declaration that they are alive and resident in the State, and then the objection may be made by demurrer; *Lillard v. Planters' Bank*, 3 H. 78. The maker when sued alone may plead in abatement, that the endorsers are not sued; but if there be two endorsers not sued, and he plead in abatement that one is a resident, and say nothing as to the other, the plea will be good, for in that case it will be presumed that the other is a non-resident; *Stevenson v. Walton*, 2 S. & M. 262. But it is now held that the party primarily liable, cannot plead in abatement the non-jointer of a party secondarily liable; *McGrath v. Hoopes*, 4 C. 496; *Duncan v. McNeill*, 2 G. 704. And in an action against the endorsers alone it is no excuse for the non-jointer of the maker, that a judgment has already been rendered against him on the same cause of action in a separate suit; for this was the fault of the plaintiff, and if he has voluntarily

put it out of his power to comply with the statute, the action must, nevertheless, be abated as to the endorser; and from this it results, if the holder get a judgment against the maker in a separate action against him, the endorser being residents, and liable to be sued in that action, they are released; *Agricultural Bank v. Harris*, 2 S. & M. 463. But in that case, the endorser when sued afterwards alone, must plead the non-joinder of the maker in abatement under oath; a special plea in bar, setting up the defence without being sworn to, is a nullity; *Rodgers v. Hunter*, 8 S. & M. 640. But this act does not apply where the note has never been endorsed; in such case the holder may sue one or more of the makers of a joint note in the same action, and omit the others; *Thompson v. Planters' Bank*, 2 S. & M. 476; *Crump v. Wooten*, 41 M. 611.

See ACTION, 15, *et seq.*

II. What is Abatable Matter.

5. *Same.* The right of the trustees of the 16th section to sue, cannot be questioned by plea in abatement; such a plea would amount only to *nul tiel corporation*, which is bad as only amounting to the general issue; *Carmichael v. Trustees, &c.*, 3 H. 84. And that the plaintiff is liable as a maker of the note sued on, is matter in bar and not of abatement; *Stone v. Brooks*, 6 H. 373. The defence to an action on a note, that it has been assigned to the plaintiff by a bank in violation of the statute of 1840, prohibiting banks to assign their credits and choses in action can only be made by plea in abatement; *Planters' Bank v. Sharpe*, 4 S. & M. 17; *Lanier v. Trigg*, 6 id. 641; *Commercial Bank of Columbus v. Thompson*, 7 id. 443.

6. *Nominal plaintiff: Dead.* If the nominal plaintiff be dead when the suit is commenced in his name, it will be abated; and the objection may be made at any time and in any manner—no plea in abatement being necessary; *Humphreys v. Irvine*, 6 S. & M. 205. Still the usee may prevent abatement by an amendment substituting the name of the administrator of the nominal plaintiff; *Denton v. Stephens*, 3 G. 194. But the statute, H. C. 842, provides, that where an action at law has been commenced in the name of one for the use of another, "the same shall not abate by the death of the nominal plaintiff, but shall proceed to final judgment, &c., as if brought in the name of the party for whose use the action is brought;" and in case of the death of the usee before final judgment, "it shall be lawful for the administrator, &c., of such usee to be entered on the records and papers, in place of the usee." Under this statute it was held, that when the usee dies, and the nominal plaintiff still survives, the cause might proceed to final judgment in the name of the nominal plaintiff; for the usee is not a party plaintiff, but is only treated as such in case the nominal plaintiff dies; hence if the usee dies, a judgment rendered in his name "for the use aforesaid" will be good. And so the rule is, that when either the nominal plain-

tiff or usee dies after the suit commences, the suit may proceed to judgment in the name of the other (Citing 4 S. & M. 352); *Lee v. Gardner*, 4 C. 521; *Holt v. Briscoe*, W. 1, 9.

See ACTION, 10.

7. *Misjoinder.* In actions *ex contractu*, if several be sued as joint contractors, and one of the defendants is not a joint contractor, this is matter of abatement to the whole suit; *Gasquet v. Fisher*, 7 S. & M. 313.

8. *Plea to character of party suing.* An objection that the plaintiff cannot sue, or sues by an improper name, must be made by plea in abatement; it cannot be raised by demurrer; *Hudson v. Poindexter*, 42 M. 304.

III. How many Pleas allowed, and Miscellaneous.

9. *Same.* Two distinct pleas in abatement may be pleaded to the same action; *Pharis v. Conner*, 3 S. & M. 87; for the statute allowing a defendant to plead as many pleas in bar as he shall choose, although some of them may be to the party or to the character of the party suing, embraces pleas in abatement; *James v. Dowell*, 7 S. & M. 333. But this statute though allowing pleas in abatement and pleas in bar to be filed together, requires them to be filed at the same time; and if a plea in abatement be filed at one term, and a plea in bar at another, the latter will be a waiver of the former (*James v. Dowell, supra*, declared not inconsistent with this); *Alliston v. Lindsey*, 12 S. & M. 656. See *Deans v. McKinstry*, 2 S. & M. 213.

10. *Confession and waiver of.* If the plaintiff obtain leave to amend his declaration after plea in abatement filed, this is a confession of the plea, and disposes of it; so if the defendant plead in bar after pleading in abatement, it is a waiver of the plea in abatement; *Webster v. Tiernan*, 4 H. 352, S. P.; *Duncan v. McNeill*, 2 G. 704; and if he plead in bar, it is a waiver of abatable matter; *Simmons v. Thomas*, 43, M. 31.

See PLEADING, 182.

11. *Practice.* Under the statute (H. & H. 585), in case of the death of a joint plaintiff or of a joint defendant, it is unnecessary to enter a formal judgment of abatement as to the decedent; it is sufficient if his death be suggested on the record; *Sprawles v. Barnes*, 1 S. & M. 629.

12. *Attachment.* A plea in abatement to an attachment, controverting the grounds upon which it is sued out, is allowable; *James v. Dowell*, 7 S. & M. 333.

And if the plea in abatement be sustained, the attachment will be quashed, notwithstanding the defendant has replevied the property attached; *Montague v. Gaddis*, 8 G. 453.

See ATTACHMENT, 93, *et seq.*

13. *When filed and disposed of.* Under the Act of 1840, a plea in abatement should be disposed of at the appearance term; and if not, and it be withdrawn at the trial term, the defendant will not be allowed to plead further without an affidavit of merits; *Calhoun v. Grimes*, 3 C. 47.

14. *Effect of abatement.* The abatement

of a suit is a complete termination of it, and it is thenceforth to be considered as having answered no beneficial purpose, and it can therefore have no effect on a subsequent suit litigated between the same parties on the same cause of action; *Crane v. French*, 9 G. 503.

15. *Plea after declaration amended.* An amended declaration becomes to all intents a new declaration, and the defendant, though he has pleaded to the merits of the original, may plead either in abatement or in bar to the amended declaration; *Shaw v. Brown*, 42 M. 309.

Abatement of Legacies.

See LEGACIES.

Accord and Satisfaction.

1. *What is.* To constitute an accord and satisfaction, the agreement must not be merely executory, but it must be executed and accepted as such; *Barnes v. Loyd*, 1 H. 584; *Guion v. Doherty*, 43 M. 538. But if the agreement or promise is itself accepted as satisfaction, and be such that it can be enforced by an action, it is good as an accord and satisfaction, though without performance. Thus, where, to an action of trespass *quare clausum fregit*, the defendant pleaded, that since the institution of the suit, he compromised with the plaintiff for the trespass complained of, and thereupon agreed to pay him therefor (on a day named) the sum of \$36 in full satisfaction thereof, and to be responsible for all the costs up to that; and that in conformity with the agreement on the day named for payment, he tendered the sum, \$36 and costs, which the plaintiff refused; it was held the plea was good; *Heirn v. Carron*, 11 S. & M. 361.

See PLEADING, 121a.

2. *Same.* Whenever a contract not being a bill of exchange or promissory note, has been broken, and one of the parties has become liable to an action for the breach, the cause of action can only be discharged by a release under seal, or by an agreement between the contracting parties, that something shall be given or done on the one side and received on the other, in satisfaction of the debt or damages resulting from the breach, and by the execution or fulfilment of the agreement through the gift, performance and acceptance of the thing agreed to be given or done, termed in law accord and satisfaction. Hence a mere verbal promise or declaration of the creditor that he would not require payment of the debt, is not good as a release, nor as an accord and satisfaction; but it seems when the debt is evidenced by bill or note, the delivery by the creditor of the bill or note to the debtor, accompanied by a declaration that he forgives the debt, or would not require payment, would be a valid executed gift of the debt, and a release of it; *Young v. Power*, 41 M. 197.

See RELEASE, 5.

3. *No bar to writ of error.* An accord and satisfaction is no bar to a writ of error, since the judgment may be reversed notwithstanding payment or satisfaction; perhaps the rule would be different where the judgment is for real estate; as in such case a party has no right to maintain error after having parted with his interest in the property; *Gordon v. Gibbs*, 3 S. & M. 473.

4. *Part payment of debt.* An agreement to accept, or the actual acceptance of a less sum than the amount due on a liquidated and undisputed debt, after its maturity, is not a payment of the debt, nor valid as an accord and satisfaction. But this rule is technical and a very slight additional consideration will support the agreement; hence if the debtor pay a less sum at a place different from the one where the debt is payable, the expense and risk of remitting the money to such place may be a sufficient consideration to support the agreement of the creditor to accept a less sum in satisfaction of the whole. Therefore when a debtor owing a debt payable in this State makes an agreement with his creditor that the latter would accept a less sum in New York in payment of the whole debt, and in pursuance thereof sends the money to New York, and the creditor there attached it and refused to accept it as agreed in satisfaction of the whole debt, it was held, that it was a good accord and satisfaction and the debt was extinguished; *Jones v. Perkins*, 7 C. 139.

5. *What is: Case in judgment.* Where a creditor takes from his debtor a receipt for the amount due him, in which the debtor agrees to invest the amount in property for the creditor, this is a satisfaction of the original debt, and the debtor is liable only in the receipt; *Richardson v. Futrell*, 42 M. 525.

Account.

See CHANCERY, sub-division Account.

Account Stated.

See CONTRACT, 78 to 80.

Action.

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I. Legal title necessary.

1. *Same.* A legal right in the plaintiff to the matter in dispute is the necessary foundation of every action at law; *Wilson v. McElroy*, 2 S. & M. 241; *Beard v. Griffin*, 10 S. & M. 586; *Newell v. Fisher*, 2 C. 392; *Dowell v. Brown*, 13 S. & M. 43; *Eckford v. Hogan*, 44 M. 398. And when the suit is on a written instrument, the plaintiff must have the legal title, though he be the equitable assignee, and the defendant after the assignment expressly promised the plaintiff to pay it to him; *Beard v. Griffin*, *supra*. Thus when the book-keeper of a deceased obligee

after his death, assigned a bond to the plaintiff, and the obligor afterwards expressly promised to pay it to the plaintiff before he took it, and there was no administrator of the obligor, it was held that an action on it could not be maintained by the assignee; *Beard v. Griffin*, *supra*. Also, if the payee has endorsed a note, the endorsee cannot bring an action on it in the name of the payee for his use. The whole interest of the payee passes to the endorsee by the endorsement; but if the note had come back to the payee in the course of trade, or he had taken it up, he could have struck out his endorsement and sued on it in his own name; *Lake v. Hastings*, 2 C. 490. And the plaintiff must have the legal title, not only at the trial, but at the commencement of the suit, though he was then the owner of the entire equitable interest, and procured the naked legal title, after action brought, by endorsement from the payee; *Eckford v. Hogan*, 44 M. 398; *Dowell v. Brown*, 13 S. & M. 43. Nor will the plaintiff be able to recover on the common counts, when he has only the equitable title; *Id.* And the legal title must remain in plaintiff till the trial; and hence, if he endorse the note sued on in the interim, he cannot recover; *Scott v. Metcalf*, 13 S. & M. 563. But the owner of personality, entitled to its possession, may sue at law for its recovery, though a mere naked legal title may be outstanding; *Fairly v. Fairly*, 9 G. 280.

1a. *How defence of want of legal title made.* Under the general issue the defendant may show the plaintiff's want of legal title and interest in the suit. By that plea, if the suit be in the name of the payee, the defendant admits only the execution of the note, and that plaintiff is payee; he does not admit that plaintiff has any interest or title in the note; *Lake v. Hastings*, 2 C. 490.

2. Equitable Interests.

2. *Same.* The owner of the legal title may sue, though he has no beneficial interest in the suit; *Ackerman v. Cook*, 5 G. 262; *Anderson v. Williams*, 2 C. 684; *Eckford v. Hogan*, 44 M. 398. Courts of law will recognize equitable interests in the various securities for the payment of money, and give every aid to them consistent with their modes of procedure; but in all cases where assistance is given, the distinction between legal and equitable titles is rigidly observed, and in no case has a party holding only an equitable title been allowed to sue in his own name, but he must always sue in the name of the party holding the legal title; *Anderson v. Williams*, *supra*.

Whilst it is no defence to an action that the plaintiff having the legal title, has no beneficial interest in the suit, yet in such action payments to or set-offs against the party beneficially interested will be allowed; *Huthcock v. Owen*, 44 M. 799.

3. *Same.* The rights of the equitable owner of the various securities for the payment of money, are recognized to a limited extent in courts of law, and these courts will give them every aid consistent with their established modes of procedure. The right

of the equitable assignee to use the name of the person holding the legal title for the collection of the money may be investigated, and if found not to exist, a recovery will be defeated. In such case, however, the legal title is not drawn in question, but only the right of the party claiming the equitable interest to put in issue the legal title of his assignor, is the point in controversy. Hence, it is a good replication to a plea of former recovery interposed to an action in the name of A. for the use of B., that the former suit was in the name of A. for the use of C., and that it was decided against the plaintiff, because B. (the present nsee) and not C. (the usee in the former action) had the equitable interest in it; *Field v. Weir*, 6 C. 56. But if it appear that the assignment from the nominal plaintiff to the usee is void, this is no objection to the action, as in that view the beneficial interest would remain with the plaintiff; and has not been transferred to another not joined in the action as usee; *Lee v. Gardiner*, 4 C. 521. But if the possession of the usee of the instrument sued on be *bona fide*, a court of law will not inquire into the nature and extent of his interest; *Holcomb v. Mason*, 6 G. 698.

II. Uses and Nominal Plaintiffs.

See NOMINAL PLAINTIFFS.

4. *Same: Usee.* An action may be brought on a judgment in the name of the nominal plaintiff who recovered it for the use of the assignee of the person who was usee in the first action, though the assignment were made before the rendition of the judgment; *Lee v. Gardiner*, 4 C. 521.

5. *Same.* An action on a sheriff's bond for a failure to pay over money collected by him on execution, may be maintained in the name of the governor, for the use of the assignee of the creditor, because the bond itself contains a stipulation to pay to the plaintiff or his assignee; but for this stipulation, the plaintiff in the judgment and execution would be the proper usee, since the assignee would not have a legal title; *Matthews v. Baily*, 3 C. 33.

6. *Same: Usee in replevin and detainue.* An usee is not allowable in an action of detainue, and if one be inserted in the declaration, the insertion will be impertinent, and treated as surplage; *Hundly v. Buckner*, 6 S. & M. 70; *Brown v. Thomas*, 4 C. 286; *Lee v. Gardiner*, 4 C. 521; *Pierce v. Twitchell*, 41 M. 344. And so in replevin, the insertion of the usee's name will not be error, but it will make him no party to the action, and if judgment be for defendant, it must be against the plaintiff and not against the usee; *Pearce v. Twitchell*, 41 M. 344.

See TRESPASS, 22. REPLEVIN, 14.

7. *Usee brought in by replication to a plea.* When a suit has been brought in the name of the payee of a note, and it is pleaded that the note has been assigned to another: and to this it is replied, that the suit is brought and prosecuted for such assignee's use, this does not make such assignee a party to the suit, and if judgment be rendered for plaintiff and he die, it cannot be enforced, as, in case of

an action brought and so named in the declaration, for the use of another, without revivor; *Peck v. Ingraham*, 6 C. 246.

8. *Use generally.* The use is the real plaintiff, and all bonds required by law of the plaintiff, including an attachment bond, may be executed by him; *Grand Gulf Railroad and Banking Co. v. Conger*, 9 S. & M. 505. The nominal plaintiff may, however, file a bill of discovery against the defendant at law; *Minor v. Gaw*, 11 S. & M. 322. And a bill of discovery may be filed against him; *Watts v. Smith*, 2 C. 77.

9. *Nominal plaintiff: Powers of.* The nominal plaintiff has no right to settle or compromise the suit; *Emmons v. Myers*, 7 H. 375. The court will not allow him to control the suit; *Eckford v. Hogan*, 44 M. 398.

10. *Same: Death of.* If the nominal plaintiff be dead when the suit is commenced, it will be abated, but abatement may be prevented by amending in the name of the administrator; *Denton v. Stephens*, 3 G. 194. And by statute, if he die pending the action, it may proceed to judgment in the name of the usee; *Humphreys v. Irvine*, 6 S. & M. 205. And this rule applies where a bank is nominal plaintiff, and the corporation be dissolved pending the suit. It will progress to judgment and execution, as in case of death of a nominal plaintiff who is a natural person; *Grand Gulf Bank v. Jeffers*, 12 S. & M. 486.

See ABATEMENT, 6.

11. *Same: As a witness.* The nominal plaintiff if willing to testify, is a competent witness for defendant, but he is not compelled to testify against his will, and hence, a bill of discovery may be filed against him. The defendant is not obliged to wait before filing the bill for him to refuse to testify (*Blundell v. Vaughan*, 12 S. & M. 625; *Coopwood v. Foster*, 1b. 718; *Smith v. Francis*, 7 id. 507, as to his competency; and *Watts v. Smith*, 2 C. 77, as to a bill of discovery); and he may also file a bill of discovery at law; *Minor v. Gaw*, 11 S. & M. 322; and a bill of discovery may be filed against him; *Watts v. Smith*, 2 C. 77. He is competent as a witness in his own favor, to prove his claim against a deceased person's estate; *Hedges v. Aydlott*, 45 M.

III. Joint Actions.

When party is dead.

12. *Joint actions.* A joint action cannot be maintained against a surviving maker of a promissory note, and the executor of a deceased one; *Poole v. McLeod*, 1 S. & M. 391; *contra*, *Steen v. Finley*, 3 C. 535. But in an action against two or more joint obligors in a writing obligatory, if one die pending the suit, it may be revived against the executor of the deceased obligor, and proceed, thus revived, to final judgment against both: and it seems if one be dead when suit is commenced, his legal representative and the survivor may be sued in the same action; *Henderson v. Talbert*, 5 S. & M. 109. But if there be error in bringing a suit against the executor of a de-

ceased joint obligor, and the survivor, it will be cured by the statute of jeofails, if a verdict be rendered without objection; *Bradford v. Curlee*, 41 M. 558.

12a. *Joint action in favor of husband and wife.* A joint action cannot be maintained for a claim due the wife as her separate estate and for a claim due the husband, though these separate rights grow out of the same transaction; *Harvey v. Edington*, 3 C. 22.

13. *Joint action by partners.* Under the statutes of this State making all promissory notes joint and several, a member of a partnership to whom a note is made payable, may be co-plaintiff in an action on a note made by another firm of which he was a member, provided the action be not brought against him, but only against his copartners in the firm which made the note; *Morris & Hiltery*, 7 H. 61.

14. *Same.* And such an action is so far not joint under the statute that if one of the defendants sued as a partner be shown not to be one, judgment may go against the others; *Fairchild v. Grand Gulf Bank*, 5 H. 597.

15. *Actions under the statute requiring makers and endorsers, &c., to be sued jointly.* This statute does not apply to an action on a note, which has never been endorsed, so as to require all the joint makers to be sued in one action, but in such case the holder may sue any one or more of the makers of a joint and several promissory note, and omit the others, even though the omitted party be a principal, and the party sued a surety; *Crumpp v. Wooten*, 41 M. 611; *Thompson v. Planters' Bank*, 2 S. & M. 476.

16. *Same.* This act applies only to the remedy and does not affect the right; and hence is applicable to actions brought after its passage on bills and notes made and endorsed before its passage; *Rappelye v. Hill*, 4 H. 295.

17. *Same: Suit against endorser.* The endorser may be sued alone, if the maker be a non-resident of the State; *Bullitt v. Thatcher*, 5 H. 689.

18. *Same: Dismissal as to one party.* It is error to dismiss the action against the maker and take judgment against the endorser; *Boush v. Smith*, 2 S. & M. 512. And the rule is the same if the maker die: since his personal representative in that event should be made a party defendant. But if process cannot be served on the maker, the rule is different; *Smith v. Crutcher*, 5 C. 455. It is not error to discontinue as to the maker, unless the record show that he is a resident of the State; *Pool v. Hill*, 44 M. 306. But the action may be dismissed as to the endorser and prosecuted to judgment against the maker; *Kirk v. Seawell*, 2 S. & M. 571. And so a suit may be instituted against the maker alone, omitting the endorser, for the joining of the endorser is no benefit to the maker, who is primarily liable, but an injury as it increases costs. The object of the statute being to protect the parties secondarily liable from compulsory payment of the

debt and costs of suit, until the parties liable before them and resident in the State, are prosecuted to insolvency; *McGrath v. Hoopes*, 4 C. 496; overruling *Wells v. Patterson*, 7 H. 32, in which the contrary was held. If, however, the holder sue the maker alone, and get judgment against him; it seems this would release the endorser, for if they were afterwards sued they could plead in abatement that the maker was not sued, and it would be no answer to the plea that judgment was already rendered against him on the note, and he could not be sued; *Agricultural Bank v. Harris*, 2 S. & M. 463; *Rogers v. Hunter*, 8 S. & M. 640. But if the endorser, being resident in the State, when the makers were sued, and were afterwards sued in another State, or if when sued here, the maker against whom the judgment had already been rendered, had become a non-resident, or if judgment were rendered in favor of the maker on a ground of defence existing alone between him and the endorser, would the rule apply?

See ABATEMENT, 4. PLEADING, 46.

19. *Same*: Does not apply to attachments. The statute requiring makers, endorser, &c., to be sued jointly, does not apply to proceedings by attachment; and the creditor may proceed by attachment against one of the parties to the bill or note, who is in the condition which makes him liable to attachment, without proceeding against the others; *Crump v. Wooten*, 41 M. 611.

IV. Money had and received.

20. *Money had and received*. The action for money had and received is founded on all the equitable circumstances between the parties; and consequently in order to recover in this form of action, the plaintiff must show that he has equity and good conscience on his side; and the law will raise a promise by defendant to pay to the plaintiff money which defendant has received, and to which the plaintiff had a clear equitable right. Hence, where plaintiff in a judgment sold for costs, tendered the redemption money within the proper time to the purchaser, and the latter refused it, and afterwards collected the money from the defendant in the judgment, the plaintiff will be entitled to recover the money so collected in this form of action; *Legard v. Gholson*, 2 C. 692.

And it is no answer to this action that the person paying the money had notice of plaintiff's right to it, and therefore paid it in his own wrong; for in such case the plaintiff has his election to sue either the party wrongfully paying, or the party wrongfully receiving the money; *Ib*.

21. *Same*. The action for money had and received will lie in favor of an endorser, who has paid the note against the maker. It is in the nature of a bill in equity, and equal and exact justice between the parties should be done by it; and hence in such an action only what the endorser has actually paid can be recovered by it; *Rawlings v. Poinexter*, 14 S. & M. 66.

See MONEY HAD AND RECEIVED, 1, 2, 3. PLEADING, 30.

V. Actions of Assumpsit, Debt, and Ex delicto.

22. *Assumpsit*. Will not lie on a sealed instrument; *Pierce v. Lacy*, 1 C. 193.

See PLEADING, 44, *et seq*.

23. *Debt*. The action of debt may be maintained when the sum demanded is certain, or is capable of being reduced to a certainty; *Lee v. Gardiner*, 4 C. 521. In this action the plaintiff is not limited in his recovery to the demand in the declaration, but may recover any amount he is legally entitled to, not exceeding the damages laid; *Hudson v. Poinexter*, 42 M. 304.

See PLEADING, 49, 49a.

24. *Same*. In a suit against an administrator on his bond by a creditor, for *devastavit* in not paying his judgment, that judgment is the foundation of the action, notwithstanding by our statute the judgment has no longer the effect of being an admission of assets by the administrator; and being the foundation of the action, debt will lie; *Lee v. Gardiner*, *supra*.

25. *Ex delicto*. Where an action *ex delicto* is founded on a contract, this contract must be proven as alleged; *Tutt v. McLeod*, 3 H. 223.

26. *Same*. The character of an action, as to whether it is in tort or founded on a contract, is to be determined rather from the nature of the grievance complained of, than from the form of the declaration; *Heirn v. McCaughan*, 3 G. 17, S. P.; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 id. 660.

27. *Same*. An action against a common carrier for a failure to stop his vessel at a particular place, and take on board the plaintiff as a passenger, according to previous notice given to the public by advertisement, is founded in tort; *Ib*.

28. *Same*. An action against a Railway Co. for damages occasioned by a failure to stop the train at a station, and put off a passenger there, may be considered as founded in tort, unless a special contract appear very clearly to be the gravamen of the action; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660.

VI. Actions on Statutes.

29. *Same*. Where an action does not lie at common law, but is given by statute, it is necessary to show by averments in the declaration, that it is founded on the statute and comes within its purview; *Scott v. Peebles*, 2 S. & M. 546. But when the action was for slander under the statute, making actionable words "which were in their common acceptance considered as insults, and lead to violence and a breach of the peace," it was held, that the allegation in the declaration, that the defendant spoke the words complained of "contrary to the statute, with a view to insult the plaintiff and to lead him to commit a breach of the peace," brought the case within the statute; *Ib*.

See PLEADING, 41.

30. *Same*: Statutory remedy. A mode

prescribed in the charter of a corporation for a work of internal improvement for assessing damages to the owner of land occasioned by its construction, is, without any express words to that effect in the charter, exclusive of the remedy which would otherwise exist at common law; *Brown v. Beatty*, 5 G. 227.

31. *Same*: The statute which allows a debtor certain property exempt from seizure and sale under execution or attachment, provides, that if any officer shall levy on such exempt property, the debtor shall have an action of trespass, or on the case, for the injury; this remedy is not exclusive, and in case of an illegal levy on personalty, the debtor may maintain replevin for its specific recovery; *Mosely v. Anderson*, 40 M. 49.

32. *Same*: *Qui tam action v. Probate Clerk for issuing marriage licences*. The *qui tam* action given by the statute against the probate clerk for issuing a marriage license for the marriage of a minor, does not lie, where the minor at the time of the issuance was not a resident of the State; *Bates v. Stokes*, 40 M. 56.

VII. Miscellaneous.

33. *Assumpsit, use and occupation*. An action for use and occupation does not lie, except where the relation of landlord and tenant exists either expressly or by implication, being an action *ex contractu*, it cannot be supported where there is no pretence of a contract and certainly not where the land is held adversely to plaintiff by the defendant; *Scales v. Anderson*, 4 C. 94. Yet an action *ex contractu* has sometimes been maintained against a trespasser in cases where the avails of the trespass or occupation, as money had and received to plaintiff's use, and not the trespass or occupation itself, is the gist of the action. In such cases the plaintiff may waive the tort and sue in assumpsit for money had and received; *Ib*.

34. *Two actions or suits for same cause*. A pending action of unlawful detainer is no bar to an action for use and occupation of the same premises, because: 1st. The gist of the action of unlawful detainer is to recover possession of the premises, and the rent is merely incidental, and 2d. The amount of the rent recoverable in the proceeding of unlawful detainer could not, under the statute, exceed \$50; *Scale v. Anderson*, 4 C. 94.

35. *Same*: *Suit in equity in rem no bar to an action at law in personam*. It is no defence to an action against an endorser, that a suit is pending in equity to collect the same debt by enforcing the vendor's lien; nor that the maker is solvent and able to pay the debt; *Speight v. Porter*, 4 C. 286. And the vendor may sue the vendee at law, and proceed in equity against him to enforce the lien for the purchase money. The remedies are separate and distinct, the one being in *personam* and the other in *rem*; *Payne v. Harrell*, 40 M. 498; but if both suits were to enforce a personal responsibility, they could not be maintained; *Ib*.

See ATTACHMENT, 104.

36. *Same*: *Power of chancery to compel election of two suits*. The power of compelling a plaintiff to make an election as to which he will prosecute of two suits brought by him against the same defendant, for the same subject-matter is in a court of equity; *Laurausini v. Carquette*, 2 C. 151.

37. *Statute allowing one year after reversal to bring new action*. If upon the reversal in this court of a judgment for plaintiff, a judgment be entered here on a verdict for defendant, the judgment so entered will be final and conclusive, and the statute which allows one year after reversal, in which to bring a new action, does not apply to such a case; *Wilkes v. Coopwood*, 10 G. 348.

38. *Action on lost note*. An action at law may be maintained on a lost note (not made so as to be regulated by the commercial law) because, under our statute the maker would be protected if the note should turn out to be in the hands of a *bona fide* endorsee; and so if the note be destroyed, for in the last case, it could not get into the hands of an endorsee. In such cases no indemnity is necessary, and actions at law may be maintained; *Wofford v. Board of Police of Holmes Co.*, 44 M. 579; *Clark v. Reed*, 12 S. & M. 554.

Administrator ad Colligendum.

Appointment of, except in cases specially enumerated in the statute, is void.

See PROBATE COURT, 41, 216. EXECUTOR AND ADMINISTRATOR, 22, 23.

Admiralty.

1. *Jurisdiction of State courts*. The State courts have no jurisdiction to enforce a maritime lien by a proceeding *in rem*, and the State Legislatures have no authority to create maritime liens; *Dever v. Steamer Hope*, 42 M. 715.

2. *Same*: *Work and labor on water craft*. Work and labor on a steamboat does not create a maritime lien, and a debt so contracted cannot be enforced by a proceeding *in rem* in a State court, if the vessel exceed ten tons in burden, and be engaged in the commerce between two States. (Citing and commenting on *Allen v. Newberry*, 21 How., S. C. 244; *McGuire v. Card*, Id. 248; *The Moses Taylor*, 4 Wallace, 411; *The Hine v. Trevor*, Id. 555; *The Belfast*, 7 Wallace, 624.)

Admission.

1. *When matter of opinion*. An admission of a party which amounts only to a statement of his opinion that he is legally liable to a certain extent, upon a contract, cannot have the effect to change or alter his liability upon the contract as the law fixes it. Parties are not bound by mistaken opinions expressed by them as to their legal obligations; *Stamps v. Bush*, 7 H. 255. But when a positive and absolute acknowledgment of liability for the acts of his co-administrator is made by one cognizant of all the facts, and entirely competent to form an opinion as to

the extent of his liability (as by a lawyer of eminence). The acknowledgment is conclusive, unless it be shown affirmatively that it was founded on mistake; *Jeffries v. Lawson*, 10 G. 791.

See EVIDENCE, 2 to 33.

Advancement.

See DESCENT AND DISTRIBUTION, 35 to 39.

1. *What is—must come from intestate who must part with all his interest in it.* To constitute an advancement which the statute of distributions requires to be brought into hotch-pot, the provision must proceed from the intestate himself; a gift from the separate estate of the intestate's wife will not do, though that estate were settled on the wife in consideration of marriage; *Callender v. McCreary*, 4 H. 356. And it is essential also that the intestate should have parted in his lifetime, with all his interest in the property or money, to the distributee; a debt due by the distributee to the intestate is not an advancement, but remains a debt still, unless it be shown that the intestate in his lifetime released the debt. Hence, where the proof shows merely that the distributee received from a third person a sum of money for the intestate, which he never paid over, it will not show an advancement; *Crosby v. Covington*, 2 C. 619.

2. *If intended as an absolute gift, no advancement.* And if the father give a sum of money to a trustee for the use of his child and declare it to be an absolute gift, and not an advancement, it cannot, on the father's death, be brought into hotch-pot, but the child, notwithstanding the gift, will be entitled to his full share in his father's estate; *Slack v. Slack*, 4 C. 287.

3. *Hotch-pot—child advanced not compellable to bring his portion into.* Where an advancement is made by the father to his child, the portion advanced becomes the absolute property of the child, subject only to the condition that on the father's dying intestate, the child, if he elects to claim distribution of the father's estate must bring his advancement into hotch-pot; but if the child be satisfied with what he has received, it is not in the power of the administrator, or the other distributees to compel him to refund, and take a new share in the estate; *Phillips v. McLaughlin*, 4 C. 592.

4. *Advancement not chargeable to administrator.* An advancement when brought into hotch-pot is chargeable to the distributee but not to the administrator, so as to increase the assets in his hands for distribution; *French v. Davis*, 9 G. 167.

5. *Widow not affected by* The distributive share of the widow is not affected in any way by advancements made to the children; *Jackson v. Jackson*, 6 C. 674; *Whitley v. Stephenson*, 9 G. 113.

6. *Purchase of land by father in name of child.* The purchase by the father of land in the name of the child is *prima facie* an advancement, and though voluntary is irrevocable;

Lisloff v. Hart, 3 C. 245; *Gee v. Gee*, 3 G. 190.

See PARENT AND CHILD, 2. TRUSTS, 28, 28a.

7. *Purchase in name of wife.* A purchase by the husband in the name of the wife is an advancement to her, and her title is good against him and his voluntary grantees; *Fatheree v. Fletcher*, 2 G. 265.

See TRUSTS, 28, 28a.

Adverse Possession.

See LIMITATION OF ACTIONS.

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1. Whether a Question of Law or Fact.

1. *Rule on this subject.* No precise rule can be laid down as to what is adverse possession; it is a question to be determined by the jury under instructions from the court; *Ford v. Wilson*, 6 G. 490.

2. *Same.* What constitutes adverse possession is a question of law; but the intention of the possessor is a question of fact for the jury; *Magee v. Magee*, 8 G. 138. It is rather of a question of fact than of law; *Grafton v. Grafton*, 8 S. & M. 77. It is peculiarly a matter for the court and jury, and when that question is pending in a court of law, a court of chancery will not withdraw it from determination there; *Huntington v. Allen*, 44 M. 654.

II. What Possession is Adverse.

3. *Notorious occupation.* Visible and notorious occupation with intent to claim against the world, constitutes adverse possession; *Ford v. Wilson*, 6 G. 490.

4. *Notorious acts of ownership.* So will any visible acts of ownership exercised over land, which from their nature indicate notorious claim of property in it, if continued for a long time with the knowledge of the owner, and without interruption from him; *Id.* The possession is presumed to be in subordination to the title; it is hence, incumbent on the possessor to show it is adverse, by proving either that the owner had actual notice of his adverse claim and possession, or that his occupancy and user were so open, notorious and inconsistent with, as well as injurious, to the right of the owner, as from these facts to raise a presumption of such knowledge on the owner's part. This presumption is violent where the whole tract is occupied and enclosed; but where on the boundary between the owner and the possessor, the latter occupies a narrow strip, which may as well be attributed to accident as design, knowledge of the adverse claim will not be presumed; *Alexander v. Polk*, 10 G. 737, S. P.; *Huntington v. Allen*, 44 M. 654.

5. *When actual occupancy not necessary.* Neither actual occupancy, residence nor cultivation, is necessary to constitute adverse possession when the property is so

situated as not to admit of permanent useful improvement; *Magee v. Magee*, 8 G. 138.

6. *Same: Case in judgment.* The *locus in quo* was in defendant's possession twelve years under claim of title, which was known to the owner. The improvements were then destroyed by fire, and there was no actual occupancy for six years, then the buildings were repaired, and actual occupancy again commenced; but during this six years the defendant's claim was open and notorious in the neighborhood; Held, that the possession was adverse during the whole period; *Ib.*

7. *Claim of title may be either avowed or constructive.* A disseisin and adverse holding is an actual, visible and exclusive appropriation of the land, commenced and continued under a claim of right, openly avowed, or under a constructive claim arising from the circumstances attending the appropriation; *Magee v. Magee*, 8 G. 138. A devise of land by the mortgagee is a claim of title; *Kohlheim v. Harrison*, 5 G. 457.

8. *Same: Case in judgment.* Where it appeared that defendant's ancestor had been in undisturbed possession of the land for twenty-five years, and on his death his heirs had continued the possession for seven years before the suit was brought, and that defendant's ancestor had made permanent and valuable improvements and cultivated the soil, it was held that the jury were fully warranted in finding the possession adverse; *Magee v. Magee, supra.*

9. *Same: Case in judgment.* The open and notorious possession of land for twenty-five years, commencing under a parol agreement to purchase, in pursuance of which the purchase money was paid, and the erection of permanent improvements, greatly exceeding in value the unimproved of the land, clearly constitutes an adverse holding, and vests the title in the possessor; *Ib.* And so, where the defendant went into possession two years before the death of the owner from whom he claimed, and then administered on the owner's estate, which was insolvent, without applying the *locus in quo* to the payment of debts, and both the intestate and defendant were members of the same family and it was generally understood in the family and among the neighbors, during the lifetime of the intestate, that he had sold to defendant; this, after the lapse of thirty years, was held to be sufficient evidence that the possession in the lifetime of the intestate was adverse; *Grafton v. Grafton*, 8 S. & M. 77. And so if a guardian return by mistake his own property as belonging to his ward, and so treat it for eight years, he will be barred from setting up a claim; *Magee v. Keegan*, 6 G. 244.

III. What Possession is not Adverse.

10. *Without claim of title.* Possession of land without claim of title is not adverse; *Adams v. Guice*, 1 G. 397; *Snodgrass v. Andrews*, 1 G. 472.

11. *Possession of vendee.* Possession of vendee under a title bond is not adverse till

payment of purchase money; *Ib.* Or the making of a deed; *Benson v. Stewart*, 1 G. 49.

11a. *Possession under a parol sale.* Where the vendee of land, under a parol contract, goes into possession and makes improvements, and when notified of the invalidity of the sale and of the vendor's rights, makes no claim to the land, but only to compensation for the improvements, and always claims to hold under the vendor, his possession is not adverse to the vendor. And, if the land be sold under execution against the vendee, and bought by another who never goes into possession, it is still not adverse. If the purchaser at sheriff's sale, however, go into possession, an adverse possession will then commence; *McClanahan v. Barrow*, 5 C. 664. But if the possession continue for twenty-five years with open and notorious claim of title, and the possessor erect valuable improvements, it is adverse, though under a parol sale; *Magee v. Magee*, 8 G. 138.

11b. *Possession by coparceners.* Where one of the distributees of an estate holds all the personalty, and there is no administrator, the possession will not be adverse to the other distributees; *Wood v. Ford*, 7 C. 57.

12. *When mortgagee's possession becomes adverse.* The possession of the mortgaged premises by the mortgagee, under an agreement to apply the rents and profits to the satisfaction of the mortgage debt, does not become adverse to the mortgagor, until the debt is fully discharged from that source; *Anding v. Davis*, 9 G. 574.

13. *Husband's vendee of wife's land not adverse possessor.* The possession of the wife's realty, in which the husband has a curtesy, by a purchase in fee, from the husband, is not adverse, but in subordination to the wife, and if continued long enough, will bar in favor of the wife an outstanding title in a stranger; *Griffin v. Sheffield*, 9 G. 359, S. P.; *Day v. Cochran*, 2 C. 261.

14. *Same.* And such possession after the husband's death is not adverse to the wife, if she be living, nor to her heirs if she be dead. And the purchaser being a tenant at sufferance to her, cannot purchase in an outstanding title without first surrendering possession; *Ib.*

15. *Claim of title without possession.* A mere claim of title unaccompanied by possession is not adverse possession; there must be occupation with intent to claim against the true owner; *Magee v. Magee*, 8 G. 138.

IV. Color of Title.

16. *Defective deed.* A defective deed is color of title; *Hanna v. Renfro*, 3 G. 125; *Nash v. Fletcher*, 44 M. 609.

17. *Void deed.* A void deed is color of title; *Welborn v. Anderson*, 8 G. 155.

18. *Deed from a party having no title.* A deed from a party who appears never to have had any title is color of title; *Ib.*

V. Extent of Adverse Possession.

19. *Intruder.* The adverse possession of a

mere intruder without color of title, extends only to the boundaries of his actual occupation; *Welborn v. Anderson*, 8 G. 155.

20. *Under color of title.* An adverse possession under color of title extends to all the tract embraced in the deed, though only a part be enclosed; *Ib.* and *Hanna v. Renfro*, 3 G. 125.

V. How acquired and lost.

21. *How acquired.* Possession of land by an entry with intent to hold it; *Harper v. Tupley*, 6 G. 506.

22. *How lost.* It is lost by leaving it with intent to abandon it; *Ib.*

23. *Same.* Possession is not lost by a mere removal, if the party have color of title, and by his acts manifests an intention to claim and use it; *Ib.*

VI. Must be continuous.

24. *Must be continuous and uninterrupted.* An adverse possession must be continuous and uninterrupted for the whole period prescribed by the statute; *Tegarden v. Carpenter*, 7 G. 404; *Nixon v. Porter*, 9 G. 401.

25. *Same.* And where there is no actual occupancy, there must be an exercise of ownership and control over the premises for that period; *Tegarden v. Carpenter*, *supra*.

25a. *Same: Case in judgment.* Hence where it appeared that the defendant's vendor vacated the premises a short time before he sold to defendant, and before the latter took possession, and it did not appear that during this period either of them exercised ownership and control over the land, it was held that the adverse possession was not continuous, and the two possessions could not be added together; *Ib.*

26. *Two adverse possessions added together.* Several adverse possessions of different persons may be added together if they be continuous and uninterrupted; but if there be any period of time between them, in which the possession was not adverse, only the adverse possession occurring after this can be counted; *Benson v. Stewart*, 1 G. 49, S. P.; *Huntington v. Cotton*, 2 G. 253; *Tegarden v. Carpenter*, 7 G. 404. And the rule is the same as to personality; *White v. Graves*, 2 C. 166.

See LIMITATION OF ACTIONS, 35, 36, 38, 39, 40, 40b to 42.

Affidavit.

1. *Form of.* It is not necessary that the affiant should sign his affidavit. It is sufficient if the officer taking it certify that the affiant took the proper oath; *Yeizer v. Burke*, 3 S. & M. 439; *Redus v. Wofford*, 4 id. 579.

2. *Same.* Every affidavit taken in the progress of a suit must bear upon its face, somewhere, the title of the suit, and a reference to the proceedings to which it is intended to apply; and when it is taken before an officer confined in the execution of his duties to a particular district or county, it must appear

that it was made within such district or county; *Saunders v. Erwin*, 2 H. 732.

3. *Who may take and certify.* By art. 222, p. 516 of Rev. Code of 1857, any judge of a Court of Record, a clerk, or his deputy, member of Board of Police, justice of the peace, master or commissioner in chancery, is authorized to administer oaths, and to take and certify affidavits "whenever the same may be necessary or proper, in any proceeding in any court, or under any law of this State;" and the fee is twenty-five cents for each affidavit so taken and certified.

Africans.

See SLAVERY and CONSTITUTIONAL LAW, and *Shaw v. Brown*, 6 G. 246; *Mitchell v. Wells*, 8 G. 235; *Heirn v. Bridault*, 8 G. 209.

Agency.

See PRINCIPAL AND AGENT.

Agricultural Lien.

1. *What it protects from execution: Enrolment.* A contract for an agricultural lien under the Act of 18th February, 1867, can only take effect as against a prior judgment, from the date of the enrolment of the contract. All of the crop which may have matured and been gathered before such enrolment, becomes thereby liable to the judgment lien, and a subsequent enrolment will not defeat it. And the rule is the same though the creditor having the agricultural lien furnished all the supplies by which the crop was raised; *Howard v. Simmons*, 43 M. 75.

Aliens.

See SLAVERY and INTERNATIONAL LAW.

1. *Rights of.* It is only by virtue of the municipal law of each State or nation, or the law of civilized nations, which is a part of the municipal law of each, that aliens have any rights beyond the jurisdiction of the domicile of their birth; *Heirn v. Bridault*, 8 G. 209.

2. *Status of.* All aliens who are not friends are enemies. Alien enemies are 1st, temporary, or such as may become friends again; 2d, specially permitted, or commorant in the enemies country at the time of the suspension of amity; or 3d, perpetual enemies, or all savage and barbarian tribes who have no social, commercial, or diplomatic relations with other nations, and who do not recognize the obligations of international law and comity; *Ib.*

3. *Rights of alien enemies.* Alien enemies (except such as are specially permitted) are incapable of acquiring any right to property, or maintaining any action in this State; *Ib.*

Alimony.

1. *When wife is entitled to.* The wife is entitled to alimony upon a divorce *a vinculo* for the husband's adultery; *Armstrong v. Armstrong*, 3 G. 279.

2. *Extent of.* And in this case, her conduct being unexceptionable, she was allowed one-third of the husband's estate; *Ib.*

3. *When not entitled.* If she be guilty of adultery, she is not entitled to alimony; *Holmes v. Holmes*. W. 474.

See MARRIAGES AND DIVORCE, 26 to 33.

Alteration of Writings.

See BILLS OF EXCHANGE, &c., 225, *et seq.*

1. *Effect of.* If the name of an obligor be erased from a bond by the obligee, it is a material alteration, and makes the bond void, as to a co-obligor not consenting thereto; *Love v. Shoape*, W. 508. And the alteration of a promissory note, without the maker's consent, by inserting therein a place of payment, invalidates the note; *Oakey v. Wilcox*. 3 H. 330. But if the note be delivered in blank, as to the time of payment, the holder may fill it up, and such alteration will not avoid the note; nor will an alteration made by the holder with consent of the maker; *Wilson v. Henderson*, 9 S. & M. 375.

2. *When made by a stranger.* A material alteration made in a deed or other instrument, without the knowledge or privity of the grantee, obligee, payee, or holder, does not change or affect its legal operation; *Croft v. White*, 7 G. 455.

3. *Can have no effect in favor of party making it.* When a party to a contract gets possession of it, and without the consent of the other party, erases his own name, this does not rescind the contract; one party alone cannot thus rescind; *City of Natchez v. Minor*, 9 S. & M. 544.

4. *As to date of alteration; how determined.* Whether an alteration apparent on the face of an instrument was made before or after its execution, is a question to be determined by the jury, from all the evidence; *Coml. & R. R. Bk. of Vicksburg v. Lum*, 7 H. 414; *Wilson v. Henderson*, 9 S. & M. 375.

4a. *Rule as to materiality.* When an alteration makes a writing speak a language different in legal effect from that which it originally spoke, it is material, otherwise it is not. Thus, where a note dated in 1859 was altered, by inserting after the consideration of loaned money, the words "in gold," the alteration is immaterial, as it can have no effect to change the legal obligation of the contract as it was by the law then in existence, payable only in gold, and the alteration only expresses what the law implies; *Bridges v. Winters*, 42 M. 135.

4b. *Difference between alteration and spoliation.* When the change in the writing is done by the owner, it is called alteration; when it is done by a stranger, without the owner's consent, it is a spoliation; *Ib.*

5. *Presumptions as to alterations.* The general presumption indulged in favor of fairness and against fraud in transactions, would ordinarily throw the burden of proof on the party alleging the illegal alteration; *Coml. & R. R. Bk. of Vicksburg v. Lum*,

supra. But this rule does not apply when negotiable paper appears on its face, to have been materially altered. In that case, the holder must show that it was done under circumstances legal and proper; *Coml. & R. R. Bk. v. Lum, supra*; *Ellison v. Mobile & Ohio R. R.*, 7 G. 572; *Croft v. White*, 7 G. 455; *sed aliter* where it is only probable from an inspection of the instrument, that it has been changed materially; *Mobile & Ohio R. R. Co. v. Ellison*, 7 G. 572. If, however, the alteration be against the interest of the holder of negotiable paper, the presumption that it was altered by him after delivery, is very much weakened, if not destroyed, as when the alteration postpones the time of payment; *Wilson v. Henderson*, 9 S. & M. 375; and if there be no other proof, than that the alteration appears to be prejudicial to the holder, this alone will authorize the jury to find that it was done with the maker's consent; *Ib.*

6. *Province of court and jury as to.* The effect of an alteration, when it is established, is for the court and not for the jury to determine; *Hill v. Calvin*, 4 H. 231.

See further on this subject, DEED, subdivision Alteration, 8, 83, 84.

Amendment.

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I. Time for Amendment.

1. *Must be before final judgment.* The record cannot be amended after final judgment; *Spring v. Tidwell*, 2 G. 63.

2. *Allowed after final judgment set aside.* The defendant's plea of the general issue was withdrawn without his consent or authority and judgment finally taken, which was set aside on writ of error, *coram nobis*, because a co-defendant was dead when it was entered; and on the cause being remanded to the docket, the defendant applied for leave to file *non est factum* under oath, and supported his application with an affidavit of merits, and it was allowed; *Held*, the amendment was proper; *Stephens v. Coml. & R. R. Bank of Vicksburg*, 2 G. 438.

3. *After jury has taken the cause.* A motion to amend the pleading after the cause has been submitted to the jury, and another cause called, is too late; nor is it any excuse for not applying earlier, that the cause had escaped the attention of the attorney; *Green v. Robinson*, 3 H. 105; *Newman v. Foster*, *Ib.* 383.

4. *After pleading made up for two years.* After the pleadings had been made up for two years, it was held proper not to allow the defendant to file the plea of *non est factum* under oath; *Henderson v. Hamer*, 5 H. 525. And so when the defendant in attachment pleads to the action, it is a waiver of any objection to the plaintiff's right to sue; and he

will not be permitted two years after filing such a plea, to amend by pleading that the plaintiff is a non-resident, and not entitled to sue in attachment; *Peters v. Finney*, 12 S. & M. 449.

5. *After evidence closed to the jury.* After the evidence is closed, it is too late to apply to the court to amend the pleadings, by striking out the name of the usee, and inserting in lieu thereof, the name of his assignee in bankruptcy; *Burrus v. Fisher*, 5 C. 418.

6. *Four years after suit commenced.* Four years after the commencement of the suit is not too late to apply for an amendment of the declaration, so as to make it conform to the proof made in the deposition of a witness, if the application be made at the next term after the deposition is taken, and it do not appear that the plaintiff had knowledge of the facts stated in the deposition before it was taken; *Miller v. Northern Bank of Miss.*, 5 G. 412.

6a. *At any time before final judgment.* Under the statute of 1840, an application to amend is allowable at any time before final judgment; *Shields v. Taylor*, 13 S. & M. 127.

See PRACTICE, 1.

And under the Rev. Code of 1857, amendments may be allowed at any time before verdict; *Barker v. Justice*, 41 M. 240. Thus where there were three counts in the declaration, and the defendant filed special pleas to two, and omitted to plead to the third, after the evidence was closed and the argument to the jury completed, there having been no evidence introduced in support of the undefended count, the defendant applied for leave to plead the general issue to that count, and the court granted it, giving, however, to the plaintiff the right to re-open the evidence, and to re-argue the case: It was held that the allowance of the amendment was right; *Ib.*

Under the Act of 1840, amendments may be made in the pleading after the imparlance term; *Peyton v. Minor*, 11 S. & M. 148.

II. Amendments under the Pleading Act of 1850.

7. *At appearance term.* Under the Pleading Act of 1850, the defendant on any day of the appearance term, may plead, without leave of court, any proper matter, though he may have already pleaded; and at that term he may amend his pleadings in any particular of his own motion; *Rowland v. Dalton*, 7 G. 702.

8. *After issue term.* Neither party has the right to amend after the issue term without leave of court; and if one do so, the amended pleading may be stricken out, provided, the pleadings regularly on file be sufficient to try the merits and right of the case; *Lewis v. Black*, 5 C. 425.

9. *New parties.* Under this act, new parties may be made by way of amendment; *Stratton v. Taylor*, 3 G. 201; Thus, the declaration may be amended by substituting the name of one nominal plaintiff for the one originally inserted; *Denton v. Stephens*, 3

G. 194; as where the suit is brought in the name of a nominal plaintiff who is dead, his administrator may be substituted; *Ib.* And so, if the suit be brought in the name of the holder of a note who has not the legal title, the declaration may be amended by inserting the name of the holder of the legal title as nominal plaintiff; and this is the rule under the Rev. Code, p. 508, art. 180; *Montague v. King*, 8 G. 441. And so, if the plaintiff be an endorsee, and strike out after the suit is commenced the name of the payee as endorser, he may afterwards amend by substituting the payee as nominal plaintiff; *Ib.* And the name of the usee may be stricken out; S. P. under Act of 1840; *Archer v. Stamps*, 4 S. & M. 352; *Anderson v. Robertson*, 3 G. 241. But the new party substituted as plaintiff must have a legal interest in the suit; *Shaw v. Alexander*, 3 G. 229; S. P. *Newell v. Fisher*, 2 C. 392.

10. *Repleader.* Where a demurrer has been sustained to a plea in abatement, the filing of a plea to the merits is not an amendment of the pleadings within the meaning of the Pleading Act of 1850, which allows amendments to be made as a matter of course at the issue term. And in such a case, when the demurrer is sustained at the appearance term, the defendant may then, without leave, file a plea in bar, but he has no right to demand that he shall have until the next term to file such a plea; *Morrison v. Gaillard*, 3 C. 194.

III. Effects of.

11. *Change in character of plaintiff.* F. brought an action as administrator of A. He was also receiver by appointment of the chancellor of the estate of A. & Co., and he amended his declaration so as to make it a suit in his name as receiver, in which character he had the beneficial interest in the suit; but he held the legal title as administrator of A.; *Held*, that this amendment was improper, and amounted in effect to a discontinuance of the action, as it could only be maintained by him in his character as administrator, in which alone he held the legal title; *Newell v. Fisher*, 2 C. 392.

12. *Striking out the usee's name.* If in an amended declaration the name of the usee be omitted, this is an abandonment of the original declaration, and all proceedings under it cease; new pleas must be filed to the amended declaration, and for want of a plea, judgment by default may be taken, notwithstanding the pleas to the original declaration; *Anderson v. Robertson*, 3 G. 241. See *post*, 16a.

13. *Dismissal as to one of several defendants.* The dismissal of an action *ex contractu* as to one of two joint defendants, does not change the nature of the action, so as to make it a suit against the other alone; it is still a joint action, to the extent at least that the plaintiff cannot, after the dismissal, amend by adding a count against the defendant on a cause of action, which is a separate demand against him alone; *Miller v. Northern Bank*, 5 G. 412.

14. *In respect to proof.* A deposition does not become incompetent evidence by a subsequent amendment in the declaration, correcting a misdescription of the subject matter of the suit; *Cooper v. Granberry*, 4 G. 117.

15. *In respect to a demurrer to evidence.* If after joinder by the plaintiff in defendant's demurrer to his evidence, the plaintiff amend his declaration so as to make it correspond with the evidence, the demurrer is discharged, and the defendant is entitled to plead; *Ib.*

16. *Amendment after judgment by default.* When judgment by default is rendered on a defective declaration, and the plaintiff gets leave to amend, this gives the defendant a right to plead as in the first instance; *Summers v. Foote*, 6 C. 671.

16a. *Amendment of declaration.* An amended declaration becomes to all intents and purposes a new declaration, and the defendant, though he has already pleaded to the merits on the original declaration, may plead either in abatement or bar, or may demur; *Shaw v. Brown*, 42 M. 309. See *ante*, 12.

IV. Principles for allowing—and Examples.

17. *Amendments liberally allowed.* Under our statutes, amendments are very liberally allowed, and they cannot be assigned as error unless manifest injury has been done; *Miller v. Northern Bank*, 5 G. 412; *S. P. Bloom v. Price*, 44 M. 73. But whilst it is the duty of the court to allow amendments on liberal terms, for the purpose of reaching the merits of the controversy, the parties desiring amendments are not to be excused from exercising proper diligence in bringing and preparing their suits for trial; *Burrus v. Fisher*, 5 C. 418. The court will allow them even when not asked for, if the interests of justice demand it; *Price v. Bloom*, *supra*.

18. *Variance.* The court will generally allow amendments to obviate objections on the ground of variance; *Fulcord v. Hamberlin*, 4 S. & M. 649.

19. *When damages are laid too low.* If the damages in an action of assumpsit be laid for a less amount than the sum due, the court should allow the plaintiff to amend by putting the damages high enough to cover the debt; *Green v. Wright*, 8 S. & M. 360.

19a. *Other instances for allowing amendments.* A plea setting up duress in avoidance of a note given to procure a release of a fraudulent levy on the defendant's goods, even when bad as a plea of duress, should be allowed to be amended so as to set up the fraud in procuring the note; *Bingham v. Sessions*, 6 S. & M. 13.

20. *Matter of discretion.* The allowance or disallowance of amendments is a matter of discretion, and not assignable as error. This is the rule at common law, and under our statutes prior to 1840; *Green v. Robinson*, 3 H. 105; *Newman v. Foster*, 3 H. 383; *Shropshire v. Probate Judge*, 4 H. 142; *Henderson v. Hamer*, 5 H. 525; *Vicksburgh*

Water Works and Banking Co. v. Washington, 1 S. & M. 536; *Planters' Bank v. Walker*, 3 S. & M. 409; *Archer v. Stamps*, 4 S. & M. 352. Except perhaps in a case of manifest abuse, as where one party has been allowed to amend and the other refused permission to amend; *Henderson v. Hamer*, 5 H. 525. Under the Act of 1857, amendments are to some extent discretionary, but the High Court will revise the action of the court below in allowing or refusing them; *Bloom v. Price*, 44 M. 73.

21. *Not discretionary under Act of 1840.* The statute of 1840 (Session Laws, p. 133), makes it the duty of the judge to allow amendments to be made to the pleadings if desired, and if an application to amend be refused, it will be error—it is no longer matter of discretion; *Wharton v. Porter*, 10 S. & M. 305.

22. *Under Act of 1840 the court may order, of his own motion, amendments.* To an action of assumpsit the defendant pleaded two defective pleas, to which plaintiff replied, and defendant filed a demurrer to one of the replications, which was overruled. The court then ordered all the pleas and replications to be stricken out, and the general issue to be filed, to which neither party objected, and the cause was tried, and there was a verdict and judgment for plaintiff. On writ of error by the defendant, it was held that the action of the court was justified by the Act of 1840, which made it the duty of the judge to amend and perfect the pleadings, so that the merits of the controversy might be fairly put to the jury, and if it were not, the failure of defendant to object at the time, precluded him from making the objection in the High Court; *Aldridge v. Grider*, 13 S. & M. 281.

See PRACTICE, 3.

23. *Immaterial amendments.* The allowance of an immaterial amendment after the cause has been submitted to a jury, and a part of the evidence introduced, is no ground of error; *Whitehead v. Miss. Cent. Railroad Co.*, 41 M. 225.

24. *Amendment of judgment.* A judgment is extinguished by a forthcoming bond taken and forfeited, and it cannot afterwards be amended; *Burns v. Stanton*, 2 S. & M. 457; *Dowd v. Hunt*, 10 S. & M. 414.

25. *Judgments only amendable by matter in the record.* Courts may amend errors and mistakes of their clerks, if there be anything in the record to amend by; but at a term subsequent to the rendition of a judgment, it cannot be amended except in the mode pointed out in the statute. And in no case can an amendment be made, unless there be something in the record to show what amendment is proper. The judge's notes on the docket, and his memoranda made on the papers, are no part of the record, and can furnish no ground by which a judgment can be amended; *Russell v. McDougall*, 3 S. & M. 234; *S. P. Boon v. Boon*, 8 S. & M. 318; *Poole v. McLeod*, 1 S. & M. 391; *Dickson v. Hoff*, 3 H. 165. Nor is a written memorandum of an attorney in the cause sufficient to amend by; *Moody v. Grant*, 41 M. 565. A judgment

by default final in blank as to the amount, by mistake of the clerk, cannot be amended at a subsequent term, without notice to defendant. The remedy is by petition under the statute; *Poole v. McLeod*, 1 S. & M. 391. The amendment cannot be made without reasonable notice to the other party; *Shirley v. Conway*, 44 M. 434.

See JUDGMENT, 67, *et seq.*

26. *Amendment of verdict.* The court, as a general rule, may correct its proceedings at the term at which they take place, and if there be anything to amend by, it may amend a verdict as to matter of form, but not as to matter of substance, after the discharge of the jury, or at least without their consent given after being recalled. Hence, if in an action of detinue for several specific articles, the verdict assess the value of the whole in gross, the court cannot amend the verdict, assessing a separate value to each article, without the consent of the jury, though the aggregate be less than the amount assessed in the verdict; *Walker v. Com'rs of Sinking Fund*, 1 S. & M. 372.

See VERDICT, 8, 9.

27. *Amendment after demurrer.* Under the Act of 1840, where the defendant's demurrer to the declaration is overruled, and judgment final in form is entered against the demurrant, if the latter ask leave to plead before the term expires, the judgment should be set aside and leave granted; *Shields v. Taylor*, 13 S. & M. 127, and so if plaintiff's demurrer to a plea be overruled, he should have leave to reply; *Whitfield v. Wooldridge*, 1 C. 183.

28. *How objections made.* An objection to the allowance of an amendment substituting as plaintiff the administrator of the nominal plaintiff, who was dead when the suit was commenced, must be made on writ of error. It cannot be made by a motion to dismiss at a term subsequent to the one at which the amendment was made; *Denton v. Stephens*, 3 G. 194.

29. *Ejectment—Description of land.* A declaration in ejectment may be amended so as to correct a misdescription of the land sued for; *Cooper v. Granberry*, 4 G. 117.

V. Amendment of Process.

See PROCESS, 26, *et seq.*

30. *Return on.* The court may allow the sheriff to amend his return on a *fi. fa.* at the return term, notwithstanding a motion may then be pending against him in relation to the return; *Trotter v. Parker*, 9 G. 473. Generally, the court may allow the sheriff to amend his return on final process at any time subsequent to the return term; *aliter* as to mesne process; *Planters' Bank v. Walker*, 3 S. & M. 409. As to mesne process, the return cannot be amended after the term expires at which final judgment was rendered; *Hughes v. Lapice*, 5 S. & M. 451; *Dorsey v. Pierce*, 5 H. 173. Nor can mesne process be amended after the return term without notice; *Williams v. Doe ex dem. Oppelt*, 1 S. & M. 559.

31. *Amendment of return on trial of right of property.* On the trial of the right of property levied on under an execution, it was proposed to allow the sheriff to amend his return by correcting the statement that two hundred bales of cotton were levied on, showing that the levy was made on cotton in the seed, and unpacked, and when packed the cotton only amounted to one hundred and seventy-one bales. This application was refused by the court below; but the refusal was held to be wrong, yet, being a matter of discretion, it was no ground for error; *Planters' Bank v. Walker*, 3 S. & M. 409.

31a. *Of return on process after expiration of the sheriff's term of office.* The sheriff, after his term of office has expired, will not be permitted to amend his return on process. His returns while in office are under his official oath, and they would lose that sanction when made after his office expires; *Cole v. Dugger*, 41 M. 557.

32. *As to rights of other parties.* Whether by order of court and during the term of his office, he can be allowed to amend his return, so as to affect the rights of persons not parties to the suit acquired before the amendment? *Id.*

33. *When notice required.* An amendment to a sheriff's return on a *fi. fa.*, which could have the effect of restoring the defendant's liability on it, must be on notice to him, if made for the sheriff's benefit; *Coopwood v. Morgan*, 5 G. 368.

33a. *Amendment of attachment.* An attachment must be sued out in the name of all the parties in interest, and the parties in the declaration must conform to those in the writ and affidavit. If there be an omission in this respect in the affidavit and writ, the court will allow an amendment; *Shaw v. Brown*, 42 M. 309.

VI. What is an Amendment.

34. *Filing of additional pleas.* The filing of an additional plea after the pleadings are made up, is an amendment; *Shropshire v. Probate Judge, &c.*, 4 H. 142.

35. *Objection as to identity.* In an amended declaration in trover, the plaintiff changed his demand from a general right to the property sued for, as administrator of B., to a claim for it specially acquired by his intestate in the State after his marriage with H., and during the coverture. Held, that the amended declaration was not objectionable on the ground that it was identical with the original; *Carmichael v. Browder*, 4 H. 431.

36. *Plea filed after issue term must appear by leave of court.* When a plea is filed subsequent to the issue term, though it profess on its face to be done by leave of court, it may be disregarded, unless the record shows that leave was given to file it; *Wright v. Alexander*, 11 S. & M. 411; *S. P. Peters v. Finney*, 12 S. & M. 449 (Citing *Price v. Sinclair*, 5 S. & M. 254, and distinguishing it from this because the plea there was filed at the issue term; Citing also *O'Conly v. Natchez*, 1 S. & M. 31).

Ancestor and Heir.

See DESCENT AND DISTRIBUTION. EXECUTOR AND ADMINISTRATOR, sub-division Sales of Real Estate.

1. *Seisin perfected by heir.* If the imperfect and constructive seisin of the ancestor, under an equitable title, be afterwards perfected by the heir, this perfect seisin will relate back to the inception of the title so as to make the estate liable to be sold for the ancestor's debt, under a decree directing a sale of the lands of which he died seized; *Doe ex dem. Starke v. Gildart*, 5 H. 606.

2. *En ventre sa mere.* An infant from the time of conception, is in *esse* for the purpose of taking any estate which is for its benefit; whether by descent, devise, or under the statutes of distributions, provided that the infant be subsequently born alive, and after such a period of foetal existence, that its continuance in life may reasonably be expected. But the right is inchoate at conception, and will not be completed by a premature birth, and subsequent death of the infant; *Harper v. Archer*, 4 S. & M. 99.

3. *Same.* In this case, the infant was born eight months and twenty-one days after the death of his sister, who left no issue or husband, and it was held he was entitled as her heir; the court deciding that the commencement of nine months previous to birth is the proper period to fix for conception; *Ib.*

4. *Land descended, rent of, before insolvency.* The rent of land descended may be applied by garnishment to the debts of the heir, notwithstanding the ancestor's estate is involved in debt by it. Such application will not prevent the creditors of the ancestor from afterwards proceeding to condemn the land to pay their debts, when the estate is ascertained to be insolvent; *Baynton v. Fennell*, 4 S. & M. 193.

Ancient Documents.

See EVIDENCE, 58, 59, 60. DEED, 92, 92a.

Appeal.

See CHANCERY, sub-division Appeal.

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I. Generally.

1. *Origin of.* An appeal is a process of civil law origin, and removes a cause entirely to the Appellate Court, subjecting the facts and the law to re-trial and review; a writ of error is of common law origin, and removes nothing for examination but the law; *Lyles v. Barnes*, 49 M. 608. Nevertheless appeals and writs of error will have such effect only under our system as given by law, and the facts and law will be reviewed and re-tried in either proceeding, as may be pre-

scribed by statute, allowing the appeal or writ of error, or regulating such proceedings; and in this case an appeal from the County Court was held to bring no more before the Circuit Court than would be brought by a writ of error; *Ib.*

2. *Right of appeal—How exercised—Bonds.* Appeals are given by statute, they are not allowed as a matter of constitutional right. They are allowable only in cases authorized by statute, and in such cases, the appeal must be taken and prosecuted in strict conformity to the statute, and if not in conformity to the statute, the appeal will be void. Thus where the statute requires an appeal bond, the execution of the bond in strict conformity to the statute is a condition of the appeal, and necessary to the jurisdiction of the Appellate Court; *Hardaway v. Biles*, 1 S. & M. 657; *Porter v. Grisham*, 3 H. 75. Hence the bond and security must both be approved by the court. The court cannot approve the surety and give appellant till after adjournment of the term to execute the bond; *Porter v. Grisham, supra.* But if, notwithstanding the time allowed to execute the bond, it be actually executed in proper time and approved by the court, it will be good; *Carmichael v. Trustees of School Lands*, 3 H. 84. Nor can the court delegate its power of approval of the appeal bond to the clerk; *Picket v. Picket*, 1 H. 267; *Par-ker v. Willis*, 5 C. 766.

II. Appeal Bond.

3. *Same: Bond must be conditioned according to the statute.* Where the statute requires the appeal bond to be conditioned "to pay the amount of the recovery and all costs and damages awarded in case the judgment be affirmed," and a bond was taken with the condition to pay "all such damages and costs, as the appellee may sustain in defending the appeal, and to perform such judgment as the High Court of Errors and Appeals may adjudge," &c., it was held that the condition was not in conformity to the statute, because it did not contain a covenant to pay the recovery, and without that there was no stipulation in the bond which would cover the costs recovered in the court below; *Bowie v. Hagan*, 5 H. 13.

4. *Same: Bond must be made by Appellant.* And so where the statute required the appeal bond to be executed by the appellant, if it be executed in the name of his agent it will not do, and the appeal is void; *Hardaway v. Biles*, 1 S. & M. 657.

5. *Same: Bond must be made payable to proper party.* And where the statute required appeal bonds, in appeals from the Probate Court, to be made payable to the probate judge, if it be made payable to the appellees it will be void, and dismissed for want of jurisdiction; *Harper v. Archer*, 4 S. & M. 99; *S. P. Alexander v. Smith*, 1b. 258.

6. *Executor and administrator not bound to give bond.* An executor, or administrator, or guardian, is exempt from the duty of giving bond when he appeals on behalf of

the estate or his ward, but when the appeal is to assert a right individually against the estate or ward, the bond must be given; *Hunter v. Thurman*, 3 C. 463.

III. When Grantable.

7. *Grantable only to parties.* An appeal cannot be granted to an *amicus curiæ*, but only to a party; hence where in a contest for letters of administration, one applicant withdrew his petition, and he was neither a distributee nor a creditor, it was held that he could not appeal from the order appointing the other applicant, as by his withdrawal of his petition his connection as a party to the proceeding ceased; *Miller v. Keith*, 4 C. 166.

8. *In criminal cases.* An appeal from the Circuit Court in criminal cases does not lie; the remedy is by writ of error; *Tuomey's Case*, 5 H. 50; and a recognizance taken to secure the attendance of the prisoner in High Court, to abide its judgment on an appeal taken in a criminal case is void; *Loftins Case*, 11 S. & M. 358.

9. *Void appeal: Effect of.* A void appeal will be dismissed, and will not have the effect to bar the appellant from his right to a writ of error; *Bull v. Harrell*, 7 H. 9; *S. P. Harper v. Archer*, 4 S. & M. 99; *Alexander v. Smith*, *Ib.* 258. But if the appeal were dismissed for the negligence of the appellant in filing the record, it would be a bar; *Smith v. Union Bank of Tennessee*, 13 S. & M. 240.

10. *Waiver of Appeal.* A waiver of the right to appeal can only be insisted on in the court granting it; it cannot be relied on in the Appellate Court; *Morris v. Palmer*, 3 G. 278.

IV. From Board of Police.

11. *Who may appeal from.* Any person, whether a party to the record or not, who is aggrieved by the judgment of the Board of Police, may appeal therefrom by *certiorari*, and show by extrinsic evidence his right, and the injury done to it by the judgment; *Deberry v. Holly Springs*, 6 G. 385.

12. *Same.* The corporate authorities of a town who are authorized by law to grant license for the retail of vinous and spirituous liquors within the town, may appeal from an order of the Board of Police of the county in which the town is located, by which order the board usurps the privilege of granting license for retailing in the town by the actual exercise of it in granting a license; *Ib.*

13. *Same: Effect of bad bond.* And in such a case the judgment rendered in favor of the appellant will not be disturbed, because he gave an insufficient bond to procure a supersedeas of the judgment appealed from; *Ib.*

14. *Appeals to Circuit Court.* The statutes allowing appeals from the Board of Police to the Circuit Court is not unconstitutional; because it allows an ultimate appeal to the High Court, in which court all appellate jurisdiction is vested; *Yallabusha Co. v. Carbry*, 3 S. & M. 529. But the reason here given

for sustaining this appeal, to wit: that an ultimate appeal is also granted to the High Court, was said to be erroneous and mere *obiter dictum*; and that the statute in the Rev. Code, art. 33, p. 419, which makes the judgment of the Circuit Court on appeals from the Board of Police final, was constitutional; *Dismukes v. Stokes*, 41 M. 429.

15. *What judgment can be appealed from.* When a party alleging himself to be a creditor of the county, presents his claim to the Board of Police for allowance, and the board refuse it, such refusal is a judgment of the board, from which an appeal (under the statute (H. & H. p. 453) by bill of exceptions or *certiorari*) will lie to the Circuit Court of that county; *Yallabusha Co. v. Carbry*, 3 S. & M. 529. See *post*, 20.

16. *Practice in.* Whether on such an appeal the appellant is entitled to have the cause tried *de novo*, *quære*? But if he have not, the agreement of the Board of Police and the appellant, at the time the appeal is taken, that the cause shall be tried in the Circuit Court upon such evidence as either party may introduce, is equivalent to an agreement for a trial by jury in the Circuit Court, and is valid as such; *Ib.*

17. *Agreement to appeal without bill of exceptions.* The board and appellant may agree to an appeal without bill of exceptions; *Ib.*

18. *Venue of appeal.* But the statute requires the appeal to be made to the Circuit Court of that county; and it does not provide for a change of venue in appellate cases in the Circuit Court, but only in cases originating in that court; and if, after an appeal is taken, the venue be changed by agreement to another county, the order making the change is void, as consent cannot give jurisdiction; *Ib.*

19. *Same: Provisions of Rev. Code of 1857.* By art. 33, p. 419, of the Rev. Code, an appeal to the Circuit Court is allowed; and it must be by bill of exceptions, embodying the evidence; and the trial in the Circuit Court is to be on the record, and not *de novo*, and the judgment of the Circuit Court is final.

20. *Same.* And by art. 34 of the Rev. Code, p. 419, if a creditor's claim is rejected by the Board of Police, he need not appeal, but may sue the board in any court having competent jurisdiction; and it is made the duty of the board to pay out of the county funds the judgment, &c.

V. From Circuit Court.

21. *When applied for.* An appeal from the Circuit Court must be prayed for at the term at which the judgment appealed from was rendered, and the appeal bond must also be then executed; *Coffman v. Devany*, 2 H. 854.

22. *Must be in name of all defendants.* An appeal from the Circuit Court must be in the name of all the parties against whom judgment was rendered. If some will not

join, then those desiring it may prosecute the appeal in the name of all, and have a summons against the others, and if they refuse to join, then an order of severance; *Green v. Planters' Bank*, 3 H. 43. See also *Whitworth v. Carter*, 41 M. 639; and *Hoggatt v. Ferrell*, lb. 642, in which the same rule is applied to writs of error; and S. P., *Henderson v. Wilson* 4 S. & M. 732; *Flournoy v. Burke*, 4 H. 337; *Preira v. Silva*, 4 S. & M. 735; *Thomas v. Wyatt*, 9 S. & M. 308; see High Court 23 and 23a.

23. *Same: Bond.* But if the appeal be in the name of all, the appeal bond may be executed by one appellant only; *Barker v. Wanzer*, 5 H. 290. The bond must be approved by the court, and not by the clerk; *Picket v. Picket*, 1 H. 267; *Porter v. Grisham*, 3 H. 75; *Carmichael v. Trustees, &c.*, 3 H. 84; *Parker v. Willis*, 5 C. 766.

24. *From final judgement only.* An appeal (and writ of error) will lie only to a final judgment in a court of law; *Porter v. Deterly*, 1 S. & M. 163.

25. *Not allowable now in any case.* There is now (under Rev. Code of 1857) no provision for appeals from the Circuit Court, and the only remedy is by writ of error; *Lyles v. Barnes*, 40 M. 608

VI. From Probate Court.

26. *From interlocutory decree.* An appeal lies from an interlocutory decree of the Probate Court, if it involve the merits of the case, or may prove a grievance to the appellant; *Green v. Tunstall*, 5 H. 638; *sed contra*, *Regan v. Stone*, 4 S. & M. 691; where an appeal was refused from an order referring a claim against an insolvent estate to referees, it having been rejected by the commissioners, because the order was both interlocutory and discretionary; under the Act of 1844 an appeal lies, only from a final decree; *Prewell v. Crump*, 1 C. 574. And a decree refusing a new trial on an issue *devisavit vel non* was held to be interlocutory so that an appeal would not lie from it; *Cowden v. Dobyns*, 2 C. 486. And so of a decree of the court after hearing testimony in support of a will continuing the cause for further proof, but neither establishing nor rejecting the will; *Morris v. Morris*, 5 C. 847. The rule is the same under the Rev. Code of 1857; *Ricard v. Smith*, 7 G. 644; *Wiggle v. Orven*, 43 M. 158.

27. *Appeal by one of several parties* Where the decree is against several, the appeal should be in the name of all, or steps be taken for a severance; *Duwall v. Cox*, 5 H. 12; *sed contra*, *Porter's Heirs v. Porter*, 7 H. 106. Where it is held that any one of the parties aggrieved may appeal alone.

28. *Bond.* The appeal bond must be made payable to the probate judge, and not to the appellee, otherwise the appeal will be dismissed; *Harper v. Archer*, 4 S. & M. 99; S. P., *Alexander v. Smith*, 4 S. & M. 258. Under the Rev. Code, 431, art. 28, an appeal may be granted without bond; but it will not stay proceeding unless bond be given;

and then it is to be payable to the probate judge, or adverse party as the judge may direct. A bond, however, was essential under the Act of 1821, when the appeal was taken in term time, and the bond must have been then executed; *Hunter v. Thurman*, 3 C. 463; *Am. Col. Society v. Wade*, 4 S. & M. 670.

29. *Effect of.* An appeal from an order of the Probate Court removing an administrator, suspends the order, and the removed administrator may continue to act as such where no person has been appointed by the court to take charge of the estate pending the appeal; *Muirhead v. Muirhead*, 8 S. & M. 211.

29a. *Appeal granted by clerk only.* Appeals can now be granted only by the clerk; the court has no power to grant them; *Ricard v. Smith*, 8 G. 640.

VII. From a Justice of the Peace.

30. *Issue in Circuit Court.* On an appeal from the judgment of a justice of the peace, where the matter in controversy exceeds \$20, a formal issue must be made up for trial in the Circuit Court (changed by legislation); *Lindsey v. Herd*, W. 18; *Horn v. Gillock*, lb. 107. Such appeals are now triable *de novo* without the formality of pleading; *Wright v. Simmons*, 1 S. & M. 389; *Hairston v. Francher*, 7 S. & M. 249.

31. *Sureties on appeal bond to a jury.* The execution of an appeal bond by sureties, when the appeal is taken to a jury, makes them parties to the suit, so that if the case be afterwards taken to the Circuit Court by *certiorari*, the sureties will be parties in that court, and judgment may be rendered against them as such; *Wright v. Simmons*, 1 S. & M. 657.

32. *Appeal from a city magistrate.* The constitution and laws of this State secure the right of appeal in civil cases from the judgments of justices of the peace to the Circuit Court; where, therefore, a judgment is rendered by the magistrate of a city for a violation of the city ordinances, and the magistrate certifies to the record as city magistrate and justice of the peace, an appeal will lie to the Circuit Court; *Agnew v. Natchez*, 9 S. & M. 104; and if it be claimed that such magistrate has a special and exclusive jurisdiction to enforce the by-laws of the corporation, from which no appeal will lie, that jurisdiction must be clearly pointed out, or it will not be allowed; *Ib.*

33. *Practice: Where bond is defective.* It is too late after the term of the Circuit Court, to which the appeal is taken from a justice of the peace, to move to dismiss the appeal for any defect in the bond, which makes it voidable only and not void; *Battle v. Woolf*, 1 C. 318.

34. *Bond no part of the record.* An appeal bond, executed to take an appeal from a justice of the peace to a Circuit Court, is no part of the record of the cause in the Circuit Court, and hence, when the cause is taken from that court to the High Court, that bond will not be noticed in the High

Court, unless certified in a bill of exceptions; *Battle v. Woolf*, 1 C. 318.

35. *Appeal to a jury of five men abolished.* The Act of 1842, allowing appeals from a justice of the peace to the Circuit Court, abolished the former statute allowing appeals to a jury of five men; *Pollard v. Parish*, 1 C. 573; and the rule is the same by the Rev. Code, p. 409.

See JUSTICE OF THE PEACE, sub-division Certiorari.

36. *In unlawful detainer cases.* The statute allows appeals from the judgment of the special court of two justices of the peace in cases of unlawful detainer and forcible entry, within five days from its rendition. Such appeal, therefore, is grantable after the dissolution of the special court and the completion of its record, and in such case no order of appeal can be entered, and it is therefore sufficient to sustain the appeal if it appear that the appeal bond was executed and approved within the five days; *Busby v. Graham*, 4 C. 210.

For appeal from the special Justices' Court organized under the Act of 1863, to try replevin cases, see *Bloom v. Price*, 44 M. 73.

36a. *Appeals from special court to try replevin.* The provisions of the Rev. Code of 1857, in relation to appeals from justices of the peace, do not apply to appeals from the special court composed of justices of the peace, and organized under the Act of December 3d, 1863, to try actions of replevin; *Bloom v. Price*, 44 M. 73.

VIII. From County Court.

37. *How tried.* An appeal from the County Court to the Circuit Court, is triable only on the record, and not *de novo*; *Lyles v. Barnard*, 40 M. 608.

Agreement to try de novo. And if the appeal, by consent of parties, be tried *de novo*, the trial and judgment are void, as the Circuit Court, by law, has no jurisdiction to try the cause *de novo*; *Lester v. Harris*, 41 M. 668. See *ante*, 16.

38a. *No appeal after verdict in criminal cases*; *Dunkin's Case*, 42 M. 631.

See JUSTICE OF THE PEACE.

IX. From Circuit Judge.

39. *Habeas corpus.* No appeal lies from the judgment of a circuit judge rendered in vacation, on the trial of a writ of *habeas corpus* for the recovery of slaves. The remedy is by writ of error; *Steele v. Shirley*, 9 S. & M. 382.

See WRIT OF ERROR, 11.

Appearance.

1. *What is: Recital in the record.* A recital in the record that "this day came the parties by their attorneys, and the defendants withdrew their plea," &c., is no evidence of appearance by a defendant not served with process; *Pitman v. Planters' Bank*, 1 H. 527; *Copeland v. Pate*, 6 H. 275; *Hender-*

son v. Hamer, 5 H. 525; *Dean v. McKinstry*, 2 S. & M. 213; *Edwards v. Toomer*, 14 S. & M. 75; *Schirling v. Scites*, 41 M. 644, and so where the recital is, that the defendant appeared and withdrew his plea; *Barker v. Sheppard*, 42 M. 277. See *post*, 4.

But an appearance is an essential step in the progress of the cause, and should be entered of record; and such an entry, where it appears to be not merely the act of the clerk in making another entry, but a statement made by the court, is evidence of the appearance. Hence a statement in the record in an action of ejectment that "A. Gwinn, on his motion, was admitted as defendant in the room of Richard Roe, and therefore by his attorney comes and defends," &c., and pleads the general issue, is a sufficient appearance; *Gwin v. Williams*, 5 C. 324. And so a statement, "that the parties interested (naming them) being present in court and waiving formal notice," is conclusive evidence of appearance, and not to be controverted except on writ of error; *Frisby v. Harrison*, 1 G. 452; *Hardy v. Gholson*, 4 C. 70.

See PROBATE COURT, 195, 47. JUDGMENT, 8. ATTACHMENT, 72, 73.

2. *By plea.* The words in a plea, "and the said defendant comes and defends," &c., is an appearance, though the balance of the plea be a nullity; *Young v. Rankin*, 4 H. 27. And if there be several defendants, and the plea state, "and the said defendants by their attorneys come and defend," &c., without specifying any particular defendants, or omitting any; it will be an appearance for all, including those not served with process; *Jones v. Hunter*, 4 H. 342; *Harris v. Gwin*, 10 S. & M. 563; *Henderson v. Hamer*, 5 H. 525; *Miller v. Ewing*, 8 S. & M. 421; *Schirling v. Scites*, 41 M. 644. And this is so whether the attorney filing the plea, had authority or not to plead for those not served with process; *Jones v. Hunter*, *supra*; *Harris v. Gwin*, *supra*; unless it appears that the attorney acted in collusion with the other party, or is not responsible in damages; *Harris v. Gwin*; *Miller v. Ewing*, *supra*. As to what is sufficient evidence of the authority of an attorney in such a case, See ATTORNEY AT LAW, 9, 29, 54, and *Keirn v. Carson*, 12 S. & M. 431.

3. *By answer.* And where an answer in chancery is signed by counsel, and also by all the defendants, though there is no service of process, this is an appearance, and will justify a decree, though there be no proof on the record that the signature is genuine, or that the attorney had authority to act; *Lester v. Watkins*, 41 M. 647.

4. *By motion.* If the defendants who have been served with process, move to quash it, this is an appearance for them, but not an appearance for those not served, though the record recite "the defendants came and moved," &c., without specifying which of them appeared; *Harrison v. Agricultural Bank*, 2 S. & M. 307.

5. *Same.* So a motion to quash the return

on a *sci. fa.* is an appearance; *Fisher v. Battaille*, 2 G. 471.

6. *Other modes.* The taking a bill of exceptions is an appearance; and in England the taking of the declaration out of the office, or the replevin by defendant, or his allowing of a copy of it, is a good appearance; *Young v. Rankin*, 4 H. 27. See *post*, 8.

7. *Effect of.* An appearance cures all defects in the service of process; *Stevens v. Riche*, 1 H. 523; *Young v. Rankin*, 4 H. 27; *Henderson v. Hamer*, 5 H. 525. And this applies to a proceeding before a judge in vacation, to correct a judgment; *Graves v. Fulton*, 7 H. 592.

See *PROCESS*, 25. *ATTACHMENT*, 74, 75.

8. *Waiver of notice.* A voluntary waiver of service of notice of a suit is good, and dispenses with legal service; *Friby v. Harrison*, 1 G. 452; and this may be made by an entry on the declaration, without the actual presence in court of the defendant. Thus, where the plaintiff filed his declaration in the clerk's office, five days before the commencement of the term, and the defendant on the same day endorsed on the declaration a waiver of summons, an entry of his appearance, and his consent that the court might at the ensuing term render a judgment for a specified sum, it was held on proof of these facts, the plaintiff was entitled to judgment according to the agreement (overruling *Hemphill v. Hemphill*, 5 G. 68); *Byrne, Vance & Co. v. Jeffries*, 9 G. 533.

And a written acknowledgment of service of process, endorsed on the writ, and signed by the party, will be sufficient only when the signature of the party is proven; *Bacon v. Bevan*, 44 M. 293.

9. *Appearance when term fails.* Parties cited to appear at a term of the Probate Court, which fails, are bound to appear at the next term; *Hanks v. Neal*, 44 M. 212.

Appropriation of Payments.

See *PAYMENT*.

1. *Debtor has first right to appropriate.* The debtor has the right at the time he makes a payment to appropriate it to whichever of several demands held against him by the creditor, he pleases; if he fail to exercise this right, then the creditor can appropriate the payment; *Crisler v. McCoy*, 4 G. 445.

2. *When credit rejected.* If there be no other evidence of the payment of a sum credited on an open account to the payment of an item barred by the statute of limitations, then the credit itself, if the item be rejected as barred, the credit will also be rejected; *Ib.*

3. *Payments on a debt due by instalments.* Where several promissory notes being for the several instalments of one debt are given on the same day, but falling due at different times, partial payments thereon, unappropriated by the parties, will be applied exclusively to the note first falling due, until it is satisfied, and then to the next, &c.; *Miller v. Leftore*, 3 G. 634.

4. *On open accounts.* Partial payments on an open account, if unappropriated by the parties, will be applied to the items drawing interest in the order in which they fall due; *Scott v. Cleveland*, 4 G. 447.

5. *Applied to debt overdue.* Partial payments are applied to a debt overdue in preference to one not due when they are made; *Effinger v. Henderson*, 4 G. 449.

6. *Enrolment law.* The enrolment law has no reference to voluntary payments made by judgment debtors, and they may apply such payments in the manner they see proper; *Miss. Cen. R. R. Co. v. Harkness*, 3 G. 203.

7. *Payments by administrator of insolvent estate.* B. endorsed two notes on C to S., who sued both B. and C., on one of the notes, and obtained judgment against C.'s administrator alone, being non-suited as to B., the endorser, C.'s estate was insolvent and S., the holder, presented the judgment and the note, and was allowed his *pro rata* dividend on both: *Held*, that S. could not credit this dividend alone on the judgment, but must apply it to the judgment and the other note, so as to exonerate B. *pro rata* from his liability on the note; *Stamps v. Brown*, 2 W. 526.

8. *On several notes secured by mortgage.* Where several notes are secured by a mortgage, the proceeds of the sale of the mortgaged estate must be applied to all equally, notwithstanding there may be an accommodation endorser on one of them; *Parker v. Mercer*, 6 H. 320. And the rule is the same when the sale is by a trustee under a deed in trust; *Cage v. Iler*, 5 S. & M. 410. And if the trustee apply the proceeds differently, the sureties on the notes, secured by the mortgage, as also the sureties on an injunction bond given by mortgagor to restrain the collection of a judgment based on one of the notes secured by the mortgage, have a right to have the proceeds applied ratably; *Ib.*

9. *Mortgage and simple contract debts.* If a party be indebted by mortgage and also by simple contract debts to the same creditor, and make a payment and omit to apply it specifically to one of the debts, the law will make the application in the way most beneficial to the debtor, viz.: to the mortgage. And so if the mortgagor sell the mortgaged property, and the purchaser pay the purchase money to the mortgagee, who has another debt against the mortgagor, the law will apply the payments made by the purchaser in exoneration of the mortgaged property; *Poindexter v. La Roche*, 7 S. & M. 699.

10. *Appropriation of money attached.* A debtor owing several demands may, when he makes a partial payment, apply it to that demand which he sees proper. If he do not make an appropriation of the payment, then the creditor may; and if neither make it, the law will make the appropriation. And this right of the debtor to make the appropriation is not lost when the creditor obtains possession of his money without his consent, otherwise than by a judicial proceeding which is binding on the debtor. And it was recognized fully in a case where the creditor attached

the debtor's money in the hands of his agent, and forced the agent, in order to obtain a release of his own private funds from the same attachment, to agree that the money should be applied as the creditor desired; *Dennis v. McLaurin & Co.*, 2 G. 606.

11. *Appropriation of payments on judgment.* When a judgment for money has been affirmed in the High Court with damages, partial payments thereafter made are to be applied first, to the interest on the original judgment; second, to the principal of that judgment, and lastly, to the judgment for damages. The latter judgment bearing no interest, the payments will be applied in this way, because that application will be most beneficial to the debtor (citing *Poindexter v. La Roche*; see *ante*, 9); *Hamer v. Kirkwood*, 3 C. 95.

11a. *As to appropriation of payments to several notes secured by mortgage, when they have been assigned to different parties.*

See MORTGAGE, 52 to 60.

Appropriation of Private Property to Public Use.

See CONSTITUTIONAL LAW, 20 to 31.

Arbitration and Award.

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I. Submission.

1. *Attorney may submit.* The general doctrine is, that an attorney at law, who is employed in a suit, may submit the matter in dispute to arbitration, because by the implied assent of his client arising from his employment, he may do anything in the progress of the cause which the court may approve; but there must be a suit pending which the attorney is employed to manage; he has no power to submit to an arbitration where there is no suit, much less to change the terms of a submission agreed to by his client. Hence, if the client agree to submit to the award of seven men, and the attorney agree that five may decide it, the award will not be binding on the client. *Jenkins v. Gillespie*, 10 S. & M. 31.

2. *Husband has no power: Power of wife.* The husband has no power to submit to arbitration the rights of his wife, without her consent; *Fort v. Battle*, 13 S. & M. 133. Nor has the wife power without the consent of her husband, to submit to arbitration her title to lands which may be involved in a suit; and if she do, and a decree be entered on the award, it will not be binding on her; *Handy v. Cobb*, 44 M. 699.

3. *Guardian ad litem.* A guardian ad litem has no power to bind his ward by a submission to arbitration; *Fort v. Battle*, *supra*.

4. *Adult and minor distributees.* The distributees of an estate may submit to arbitration the settlement of the accounts of the administrator; and if some of them be minors, the adults will nevertheless be bound by the award; *Ib.*

5. *Guardian's power.* A submission by a guardian to arbitration of his ward's interests, is binding on the guardian personally, and being so binding on him, it is binding on the other party; *Coleman v. Turner*, 14 S. & M. 118; *McComb v. Turner*, *Ib.* 119.

6. *Power of a church.* The courts will not enforce an award made by a church settling a dispute between two of its members; but if arbitrators be appointed by the church or its pastor, and the parties voluntarily agree to abide by their decision, which is made in due form, it is binding; *Jones v. Binns*, 5 C. 373.

7. *Power of a mayor of a city.* The Mayor of the City of Columbus has no power to submit a claim of the city to arbitration, without the consent of the selectmen; whether their consent can be proven by their private conversations at the time. *Quære? Hand v. City of Columbus*, 4 S. & M. 203.

8. *Both parties must agree to submit.* An award will not be binding, unless both parties agree to the submission; and an agreement to the award after it is made, by the plaintiff, evidenced by his bringing an action to enforce it, will not dispense with proof that the other party agreed to it; *Hand v. City of Columbus*, *supra*. But it need not be proven that the defendant in an action on the award, agreed to the submission before the award was made, if it be shown that afterwards he recognized it as binding, and promised to pay the amount awarded against him; *Williams v. Williams*, 11 S. & M. 393.

9. *Proof of submission by parol.* The submission may be by parol, and its nature and extent may be proven by parol evidence; *Tucker v. Gordon*, 7 H. 306. And when the submission recites, "that there had been a suit pending between the parties, and they desired an end of the litigation, and for that purpose had referred the matter in dispute, to their attorneys," without specifying the matters in dispute; it was held that parol proof was admissible to show what was in dispute; and thereby determine whether or not the award embraced matters not submitted; *Hill v. Hill*, 11 S. & M. 616.

10. *Judgment on: Without previous rule of court.* If the parties to a suit without any previous rule of court, agree to refer the matter in controversy to arbitrators, and that their award shall be the judgment of the court; and thereupon an award is made and returned into court, judgment may be entered on it; *Wear v. Ragan*, 1 G. 83; *S. P.*, *Handy v. Cobb*, 44 M. 699.

II. The Award.

11. *Arbitrators must consider all matters submitted.* There is an obligation on the arbitrators to consider all the matters embraced in the submission, and if they refuse to do so, their award is not binding; *Tucker v. Gordon*, 7 H. 306.

12. *Award must follow submission: And be certain and mutual.* An award must always be in strict accordance with the submission, and not extend to subjects nor

to strangers not embraced in the submission; and it must also be certain in its terms, and mutually binding on both parties. otherwise it will be void; *Gibson v. Powell*, 5 S. & M. 712; *Williams v. Williams*, 11 S. & M. 393; *Hill v. Hill*, 11 S. & M. 616.

13. *Same: Certainty in: Instance.* It is no objection to an award, that it directs a particular debt to be paid by one of the parties to the other, in the event it cannot be collected from a third party; since, if at the time of the trial of an action on the award, it be ascertained that the debt cannot be collected, it will be a good set-off in favor of the party to whom it was to be paid; and if not then known that it cannot be collected, its payment may be enforced by suit, whenever that fact is ascertained; *Williams v. Williams, supra*. Nor is it an objection to the certainty of the award that it gives the right to one party to pay a debt awarded against him, in the notes of good solvent banks of the state, for if void as to the kind of funds in which payment is to be made, then it would be payable in specie; *Hill v. Hill, supra*.

14. *Same.* An award is not bad because, having directed the payment of a certain amount by one party to the other, it also directs that the parties shall execute mutual receipts to each other, in respect to the matters in controversy; *Hill v. Hill, supra*.

15. *Effect and extent of award.* There is a conflict in the decisions of courts in reference to the extent to which an award is binding. In Maine, Massachusetts, New Hampshire, and Kentucky, the award is conclusive only as to the matters actually laid before the arbitrators, and considered by them, and does not bind as to matters, though within the terms of the submission, which were not decided by the arbitrators. In England and New York, the award is conclusive of all demands embraced in the submission, and evidence to show that any particular demand so embraced was not before the arbitrators, nor passed on by them, is inadmissible; and this latter rule is approved by this court, and hence evidence to show that a particular part of the partnership property was not embraced in the award, when the submission was of all demands and accounts arising out of the partnership business, and the disposition of the partnership property, is inadmissible; *Gardner v. Oden* 2 C. 382.

16. *When good in part and bad in part.* An award containing matter not legally binding on the parties, will yet be upheld as to the matter which is legal and proper, if the part which is good can be separated from and exist independently of that which is bad. But the good cannot be enforced, if the performance of the void part be a consideration of the performance of the good; *Gibson v. Powell*, 5 S. & M. 712.

17. *Same: Case on judgment.* Gibson held the notes of Harmon, *Henry & Bennett*, subject to certain credits, and a dispute arising about the matter, it was agreed to submit it to arbitration. The award found the amount of the indebtedness due to Gibson,

and directed that a large portion of it should be extinguished by a conveyance of certain land to be made by one Powell, who was a stranger to the submission. It was also awarded, that the balance should be paid—a specified part by Harmon, and the remainder by Bennett—and that certain lumber and logs were to be divided between Harmon and Bennett, and that they should confess a judgment to Gibson, with stay of execution, for the amount awarded against them: *Held*, the award was wholly void; *Ib*.

18. *Public officers appointed to adjust claim against the State.* By private statute, the governor, auditor of public accounts, and State treasurer were directed to examine into the accounts of a creditor of the State, and it was provided that whatever they should allow should be paid to the creditor in full of his demand: *Held*, that if the creditor appeared before these officers and submitted his claim to their adjustment, he was bound by their award: otherwise, not; *Jack v. State*, 6 S. & M. 494.

19. *When a party may appoint both arbitrators.* When an agreement is made that the owner of land shall pay for improvements thereon, to be *thereafter* made, "what two disinterested men shall value them to be worth," it is the true meaning of the contract that each party shall select one of the referees; but if, after the improvements are made in pursuance of the agreement, the owner refuse to appoint a referee, upon reasonable request, the other party may select both, and their award will be binding; *Orne v. Sullivan*, 3 H. 161.

20. *Notice of meeting of arbitrators.* Whether an award made on a voluntary submission, and under a rule of court, without notice to the parties, of the time and place of meeting of the arbitrators, is good? *Quære?* But the award is *prima facie* good, and in pleading it an averment of notice is unnecessary; *Upshaw v. Hargrove*, 6 S. & M. 286. S. P., in *Hill v. Hill*, 11 S. & M. 616, where it is also held that notice to the attorneys of the parties is sufficient, and where the attorneys are the arbitrators, no further notice is necessary.

21. *Power of arbitrators to appoint umpire.* When, by the terms of the submission, the arbitrators were authorized to select an umpire in case they disagreed, and the selection was made in the beginning of the trial, before any disagreement, and all of them, including the umpire, heard the case, and made and signed the award, it was held that this did not vitiate it: 1st. because no objection was made at the time of the trial before the arbitrators, both parties being present. 2d. because, if the umpire were an unauthorized person, his signing the award, with the other arbitrators, was immaterial; *Estill v. Cockerell*, 4 C. 127.

22. *Mistake in award.* When the arbitrators have made a clear mistake in a calculation, by which they ascertained the amount due by one of the parties to the other, it may be corrected in a suit to enforce the award.

Hence, where it was conceded that the plaintiff only worked for defendant from January to May, of the same year, and the arbitrators awarded plaintiff \$19 per month, but by mistake calculated the time at six months instead of four, it was held the mistake could be corrected; *Robertson v. Wells*, 6 C. 90.

23. *Action on: Pleading and proof.* Where an action was brought on a bond given to secure the performance of an award to be made by arbitrators named in the bond, and the plaintiff set out in his replication to defendant's plea, the award and the names of the persons who made it, and the defendant made an issue by averring performance: it was held he could not object on that issue to the award thus pleaded, upon the ground that it was not made by the arbitrators named in the bond, but by others; *Gardner v. Oden*, 2 C. 382.

24. *Same.* If an award be fatally defective on its face, and it so appear in the pleading setting it up, the defect may be taken advantage of by demurrer; *Hill v. Hill*, 11 S. & M. 616.

III. Statutes on Arbitration.

25. *Act of 1857.* Rev. Code of 1857, ch. 61, p. 371, art. 1, provides that pending suits and actions may, by rule of court, be referred to arbitrators mutually chosen by the parties, and the award, when made and returned and approved by the court, shall be entered as the judgment of the court.

Art 2 provides, that all persons may refer matters in controversy between them to arbitration, and that they may provide in the submission that the award shall, by rule of court, be entered as the judgment of the court agreed on, and on filing such submission and award, and proving the same by the affidavit of one or more of the witnesses, a rule shall be made that the parties submit thereto, and a judgment shall be entered.

Art 3 provides, that the court shall not invalidate any award made in pursuance of the act, unless it be made to appear that the award was procured by corruption or undue means, or that there was partiality or misbehavior in some of the arbitrators; provided, complaint be made before the end of the term of the court next succeeding that at which the return of the award was made.

Art 4 reserves to the Chancery Court its jurisdiction over awards, &c.

Assault and Battery.

1. *Civil and criminal proceedings at same time.* The prosecutor may proceed by civil action for damages, and also by indictment at the same time; *State v. Blennerhassett*, W. 7.

See CRIMINAL LAW, sub-division, Assault and Battery.

See TRESPASS, 4.

Assessor of Taxes.

1. *Penalty for failure of duty.* In 1839 the revenue law required the assessor of taxes

to return the assessment roll for his county to the auditor of public accounts before the 1st day of July in each year, and for a failure to do so a penalty of \$500 was imposed, to be recovered by action of debt. In 1841 the law increased the penalty to \$1000; and held that for a default under the law of 1839, an action might be maintained after the Act of 1841 went into operation, and that the sureties on the bond executed in 1839 were liable for the damages the State might sustain by the default, the repeal of the law having no effect on the contract; *Tucker v. Stokes*, 3 S. & M. 124.

2. *Compensation.* By the revenue Act of 1841, the assessor of taxes was allowed five per cent. commission on his assessment roll for the State, and "the same compensation for his assessment of the county tax." By the Act of 1846, his compensation for assessing the State taxes was reduced to three per cent., and nothing was said about his compensation for assessing the county tax: *Held*, that his compensation of five per cent. for the county tax, fixed by the Act of 1841, was unchanged, and was still five per cent.; *Board of Police of Holmes Co. v. Morton*, 2 C. 240.

3. *Cannot appoint a deputy.* The duties of assessor of taxes cannot be discharged by his private agent; nor is he authorized by law to appoint a deputy (now changed by statute). Hence, a list of persons liable to serve as jurors made out and returned by one acting as agent for the assessor is illegal, though afterwards ratified by him; and a grand jury drawn from such list is illegal; *Stokes' Case*, 2 C. 621. This is now changed by statute.

4. *Appointment of, by Board of Police.* The statute (H. C., p. 189, § 23), which provides, "that if any assessor of taxes shall fail from any cause to perform the duties required of him by law, it shall be the duty of the Board of Police to appoint another assessor," embraces a case of resignation by the assessor, as well as a failure to perform the duties of his office from any other cause; *Morgan v. Harrell*, 4 C. 468.

Assignment.

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I. Statutes.

1. *Act of 1822.* The Act of June 25th, 1822, (Hutch. Code §40, §9. H. & H. 373, §12), provides that "all bonds, obligations, bills single, promissory notes and all other writings for the payment of money or any other things shall and may be assigned by endorsement, whether the same be made payable to the order or assigns of the obligee or payee or not; and the assignee or endorsee shall and may sue in his own name, and maintain any action which the obligee or payee might or could have sued or maintained thereon pre-

vions to assignment; and in all actions commenced and sued on any such assigned bond, obligation, &c., the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-offs, made, had or possessed against the same previous to notice of the assignment, &c., in the same manner as if the same had been sued and prosecuted by the payee or obligee, and the assignee or endorsee may sue the endorsee as in case of the inland bills of exchange. This is re-enacted in Rev. Code of 1857, p. 355, art. 4.

2. *Act of 1857.* The assignee of any chose in action may sue in his own name to recover the same if the assignment be in writing; Rev. Code of 1857, p. 485, art. 42.

II. What is Assignable.

3. *Conditional contract.* A contract for the payment of money upon a condition, is assignable after the condition is performed; *Bryars' Garnishee v. Griffin*, 2 G. 603. And it is assignable without reference to whether the condition is performed or not; *Shields v. Taylor*, 3 C. 13; where it was held that an order by a client on his attorney, directing him to pay a certain sum of money to the payee, when the amount was collected by the attorney, from paper in his hands for collection was assignable. And an injunction bond conditioned to pay the judgment enjoined in case the injunction be dissolved, is assignable under the statute; *Alexander v. Pringle*, 5 C. 56. But a bond conditioned for the performance of an act or service, and not for the payment of money, or other things, is not assignable; *Shackelford v. Franks*, 3 C. 49.

4. *Judgments.* The assignment of a chose in action did not at common law vest in the assignee the legal right to it, so as to enable him to sue on it in his own name at law. The Act of 1822, *supra*, removed this common law inhibition only in the cases therein specified, leaving it in full force as to all others. Judgments are not embraced in that act, and hence the assignee of a judgment cannot maintain an action at law in his own name, to recover damages against third persons, for obstructing him, in the execution of the judgment, by preventing him from levying a *fi. fa.* The action should have been brought in the name of the judgment creditor; *Wilson v. McElroy*, 2 S. & M. 241. And it makes no differences in such case that the plaintiff in the judgment is a bankrupt, and the assignment was made by the assignee, for then the action should have been brought in the name of the bankrupt, or at farthest by the assignee in bankruptcy; *Ib.* And it is doubtful whether a court of law would so far recognize the equitable rights of the assignee of a judgment as to allow him to make it the foundation of an action against an administrator on his bond for a *devastavit*, when the action is in the name of the State, the obligee, as plaintiff for the use of the assignee; *Ruff v. Smith*, 2 G. 59. But a judgment may be assigned so as to vest in the assignee an equitable right to it, and the

power to use the name of the plaintiff in enforcing it; *Vanhouten v. Reily*, 6 S. & M. 440. But whilst a valid, operative judgment may be assigned, yet if the assignee first pay it, it cannot afterwards be assigned to him in consideration of the payment; the judgment is then extinguished; *Rollins v. Thompson*, 13 S. & M. 522. A judgment is, however, a record and incapable of such possession by the owner, as to be assignable by delivery; *Parker v. Bacon*, 4 C. 425. A judgment may, however, be assigned by parol; *Pass v. McRae*, 7 G. 143. And it may also be assigned by the assignee taking an order from the plaintiff on his attorney, directing him to pay the proceeds of the judgment to the assignee, when collected, and the right of such assignee will be recognized in a court of law and protected; *Tombigbee Railroad Company v. Bell*, 7 H. 216.

5. *Title bond.* The assignment of a bond conditioned to make title to land on payment of the purchase money, conveys an equitable interest in the land, and is a good consideration for a contract; *Montgomery v. Dillingham*, 3 S. & M. 647.

6. *Open account.* An open account is assignable by delivery, or in writing; *Ashby v. Carr*, 40 M. 64. It is also assignable by contract (not in writing), based on a valuable consideration, without delivery; *Pass v. McRae*, 7 G. 143. And the assignee may sue on it, in the name of the assignor for his use, and his interest will not be affected by the subsequent insolvency of the assignor; *De France v. Davis*, W. 69.

III. What is and is not a good Assignment.

7. *By delivery.* An assignment by delivery of a contract, not payable to bearer, is valid to convey an equitable interest; *Byars' Garnishee v. Griffin*, 2 G. 603. So of an open account; *Ashby v. Carr*, 40 M. 64. But a judgment cannot be assigned by delivery, since it is incapable of manual possession; *Parker v. Bacon*, 4 C. 425. A promissory note not payable to bearer, is assignable by delivery, so as to vest an equitable title in the assignee, who may sue on it at law in the name of payee for his use; or he may maintain a suit in equity in his own name as equitable owner; *Taylor v. Reese*, 44 M. 89.

8. *In a power of attorney to agent.* A power of attorney authorizing an agent to sell property and apply the proceeds to the payment of a debt due him, is a valid assignment of the proceeds of the sale, to the amount of the agent's debt; *Cobb v. Champlin*, 4 G. 406.

9. *By order: Without consent of drawee.* An order drawn for a valuable consideration by a client on his attorney, directing the payment of a part of the money, when collected from a claim in the attorney's hands, is an equitable assignment of that much of the fund, whether the drawee assent to it or not; *Fitch v. Stamps*, 6 H. 487; *S. P., Moody v. Kyle*, 5 G. 506. But the drawing of such an order payable to the drawee's own order, is

not *per se* an assignment, without delivery of the order to another; *Shields v. Taylor*, 3 C. 13.

10. *Attorney's receipt.* The assignment of an attorney's receipt, given for a claim intrusted to him for collection, is an equitable assignment of the claim, and if the debtor afterwards, with notice of the assignment, pay the claim to a subsequent assignee, the payment will be void, and courts of law will so far recognize the assignee's claim, though merely equitable, as to compel the assignor to allow the use of his name to collect the claim, and will not recognize any payment subsequent to notice; *Anderson v. Miller*, 7 S. & M. 586. And the assignment of the attorney's receipt for a claim then in suit, does not convey the legal title, though the claim be a note payable to bearer; it is a mere equitable assignment, giving the assignee the right to the proceeds of the note when collected; *Dease v. Reid*, 2 C. 239. See *post*, 17a.

11. *By debtors agreeing to pay another.* If by agreement between a debtor and creditor the former is to pay the debt, which is due by open account, to another, who afterwards assents to it, this is a valid assignment of the debt to the substituted creditor; *Swisher v. Fitch*, 1 S. & M. 541.

12. *Payment by stranger, when an assignment.* If a stranger to a judgment pay the amount thereof to the plaintiff, and take an order from him to the attorney who recovered the judgment, directing payment of the proceeds to him, this will be an assignment of the judgment to the stranger, if it be the intent of all the parties that the transaction shall operate as an assignment, and not as a payment. And it makes no difference that the creditor enter on his books to the credit of the judgment the amount so received, and that the assignment was made at the instance of the principal debtor, without consulting his sureties; *Tombigbee Railroad Co. v. Bell*, 7 H. 216. But where payment was made by a stranger at the request of a maker, and nothing was said about a sale, but a simple receipt endorsed on the note, stating that payment was made by the stranger, it was held to be no assignment, but a payment; *Blundel v. Vaughan*, 12 S. & M. 625.

13. *Intention of the parties governs.* The intention of the parties at the time the transaction takes place is to govern as to whether it be an assignment or not, or a payment or assignment; *Vanhouten v. Reily*, 6 S. & M. 440; *Pass v. McRae*, 7 G. 143. Where, therefore, a distributee of an estate purchased a judgment against the estate, which was a lien on all the property, including that which had been distributed to him, and took an assignment of the judgment; and it was insisted that the transaction was a payment, as the judgment was a lien on property which he held, and it could not, therefore, be an assignment, it was held that there was nothing in his character of distributee which prevented him from being an assignee of the judgment, and that the transaction should be

carried out according to the intention of the parties; *Vanhouten v. Reily*, *supra*.

14. *When made by performance of condition in original contract.* A party may become the equitable owner of a contract without a formal assignment. He is such when, by the terms of the contract, it is to enure to his benefit on a condition which has been performed; *Field v. Weir*, 6 C. 56.

15. *Oral assignment without delivery.* A chose in action may be assigned by oral agreement without delivery, if based on valid consideration, so as to vest an equitable title in the assignee; *Pass v. McRae*, 7 G. 143.

16. *Illegal consideration for.* An assignment made on an illegal consideration is void, and confers no title on the assignee; and this defence may be made by the debtor; *Holman v. Ringo*, 7 G. 690. But if the consideration be legal, the debtor has no right to object that it was inadequate; *Turner v. Brown*, 3 S. & M. 425.

17. *Assignment of bonds and notes.* To confer a legal title on assignee of a bond, it is not necessary under the statute that the endorsement should be under seal; *Montgomery v. Dillingham*, 3 S. & M. 647. And an assignment by the payee of a note of "the money due upon it," if not made by endorsement, does not convey the legal title. The assignor in such case holds the legal title in trust for the assignee, and to collect the money for him; *Scott v. Metcalf*, 13 S. & M. 563. And an assignment by deed of bills and notes and other choses in action, does not confer the legal title; *Grand Gulf Bank, v. Wood*, 12 S. & M. 482. But this is changed by statute. See Rev. Code of 1857, p. 485, art. 42 *supra*.

17a. *Assignment of a suit pending.* The assignment of the beneficial interest in a suit, so as to make the assignee entitled to the proceeds of it, is an equitable assignment of the suit, and after judgment will entitle the assignee, if another suit on the judgment be necessary, to bring the action in the name of the plaintiff for his use; *Lee v. Gardner*, 4 C. 521, citing 2 S. & M. 250; 6 S. & M. 440; 7 H. 216. See also *ante*, 10.

IV. Rights of Assignee where there are several Assignments.

17b. *Equitable assignment.* The rule that an assignee takes subject only to the equities existing in favor of the obligor or payer, and not subject to latent equities in favor of strangers, does not apply when the assignee gets only an equitable title; for in such case he gets only the rights which the assignor had power to convey, and he is subject to the equitable rule *qui prior est in tempore potior est in jure*; hence, where the original payee in a note, having assigned it, was intrusted by the assignee with the note, to be given to an attorney for collection, which he did, but took the attorney's receipt in his own name, and instead of delivering that receipt to the assignee's agent, left another with him, which, however, the assignee refused to receive; and afterwards the payee transferred the receipt

for the assignee's note to another, who had no notice of the first assignment; it was held, that as the second assignee got only an equity by the assignment of the attorney's receipt, the first assignee, who was prior in time, had the right to the money; *Roberts v. Bean*, 5 S. & M. 590; S. P. *Raily v. Bacon*, 4 C. 455. But where the holder of the fund has become bound to pay it to a junior assignee, without notice of a prior assignment, this will defeat the claim of the prior assignee, as against him; *Matthews v. Hamblin*, 6 C. 611. See *post*, 22.

V. Rights of Debtor against Assignee.

18. *As to equities against payee.* The assignee of a bond is bound by all the equities between the obligor and the obligee accruing before notice of assignment; where, therefore, the obligee in a bond who had assigned it to a third person, contracted with the obligor in consideration of a sale to him by the obligor of a tract of land, to deliver up to him the bond, the assignee was held to be bound by this contract, if the obligor had at the time no notice of the assignment. But it was also held that if the obligee made an executory contract to deliver the bond, but did not actually deliver it, this was evidence conducing to show notice of the assignment to the obligor; *City of Natchez, v. Minor*, 9 S. & M. 544.

19. *Same: Where the contract is rescinded.* Where the contract which is the consideration of the note is rescinded by the payee and maker, without notice to the latter that the note has been assigned, this is a release and discharge to him of his liability on the note; it is otherwise if he had notice. And if it be a part of the agreement of rescission that the payee shall take up the note from the assignee, this is notice of the assignment, and also a recognition by the maker of its validity; *Wiggins v. McGimpsey*, 13 S. & M. 532.

20. *Partial failure of consideration of several assigned notes.* When there is a partial failure of consideration of several notes, which are a part of the same transaction, and which have all been assigned by the payee, the loss ought to fall ratably on all the notes; *Kilpatrick v. Dye's Heirs*, 4 S. & M. 289.

21. *Payment without notice: Case in judgment.* When a client drew an order on his attorney, but payable to his own order, by which he directed a sum of money to be paid out of collections to be made by the attorney, and at the same time informed the attorney that the order was drawn for the purpose of being assigned to one of his creditors, and the attorney afterwards paid the money to the client without having received any notice of an actual transfer of the order, the payment will be good. The transaction itself did not amount to notice to the attorney of a transfer, and subsequent notice before payment was necessary to defeat the attorney's right to pay to the client; *Shields v. Taylor*, 3 C. 13. But the debtor can acquire no off-

set against assignor after notice of assignment; *Pass v. McRae*, 7 G. 143.

22. *Equitable assignment.* In cases of assignment, where the assignee gets only an equitable title, though not embraced in the terms of the statute allowing equities between the original parties to be set up against the assignee, these equities are allowed; and if the assignee come into a court of chancery for relief, equity will enforce the contract as it was made between the original parties, and give the defendant the benefit of all defences he was entitled to as against the assignor. Hence, where a note was made payable to a bank since the act of 1840, prohibiting banks to assign notes due them, and requiring them to take in payment of their debts their own bank issues, the equitable assignee of a bank, coming into a court of equity to collect the assigned note, can recover only the paper of the bank, or in default of the maker paying in that, then the highest market value of the bank notes from the time the assigned note fell due till the trial. In such case, the law requiring the bank to take its own issues in payment of its debts, will be considered as part of the contract between the bank and the maker of a note payable to it; whether this would be the rule at law where the note was made payable to the bank or order, and endorsed by it so as to convey the legal title. *Quære?* *Raily v. Bacon*, 4 C. 455. See *ante*, 17b.

22a. *Maker's right of defence unaffected by his assignment of his interest in the contract.* The right of a maker of a note to make a defence of partial failure of consideration, even against the assignee of the note, is not affected by his (the maker's) assignment of his interest in the consideration; hence, where vendee bought land, with a stipulation in the deed that he was to have a remission of the price at a stated sum per acre for all the land the vendor could not show a clear title to when the purchase money became due; and vendee afterwards assigned the deed and all his interest in the land to another, it was held that this did not deprive him of his right to claim the remission, and this right existed against the assignee of the note; *Chaplain v. Briscoe*, 11 S. & M. 372.

See *ante*, 17b, and MORTGAGES, 58.

VI. Assignment where there is Garnishee process.

See SET-OFF, 19.

23. *Garnishment: Notice when good.* The assignee of a note is entitled to it against a subsequent attachment by a creditor of the assignor, though the maker have no notice of the assignment until after the service of the writ of garnishment on him. And notice after judgment against the garnishee is good and sufficient, for by the assignment the absolute property vested in the assignee, the maker became his debtor, and the assignee's right can be affected in no way, except by his failure to give notice to the maker, before he has made payment or

satisfaction to the payee or his attaching creditor. Where notice is given after judgment against the garnishee, his remedy is by injunction bill in equity; *Oldham v. Ledbetter*, 1 H. 43.

24. *Equitable assignment good against garnishee process.* Either a legal or equitable assignment before the service of garnishee process, will defeat the rights of the garnishing creditor; *Byars' Garnishee v. Griffin*, 2 G. 603; S. P., *Black v. McMurtry*, W. 389.

25. *Assignment under foreign insolvent laws.* An assignment under the insolvent laws of a sister State, will generally be recognized here so far as the right to the thing assigned is concerned; but when the debtor whose debt is thus assigned, resides in this State, the assignment will not be recognized, so as to defeat the claim of a creditor who has served the debtor with garnishee process before payment; *Beer v. Hooper*, 2 G. 246. A foreign assignment, so far as concerns the legal title, will be governed by our laws; *Kirkland v. Lowe*, 4 G. 423; *Tully v. Herrin*, 44 M. 626.

See CONFLICT OF LAWS, 35, 36, 37, and post, 33.

VII. Miscellaneous.

26. *Mortgage.* When a bond secured by mortgage has been assigned as collateral security for the payment of drafts to be drawn by assignor on assignee, the latter upon paying the drafts will be an equitable assignee of the mortgage, and entitled to foreclose it in equity; *City of Natchez v. Minor*, 9 S. & M. 544.

See MORTGAGES, 52, et seq.

27. *Assignee of bankrupt.* The assignee of a bankrupt, succeeds only to the bankrupt's rights; and so of a purchaser from the assignee; *Anderson v. Miller*, 7 S. & M. 526.

28. *Admission of Assignor when evidence against assignee.* The admissions of the assignor of a chose in action made before assignment and whilst he was the holder, are evidence against his assignee and all others claiming under him; and this rule is universal, since under the statute makers of notes, bills, &c., may set up against innocent assignees any infirmity in the contract between the original parties. Hence, in an action against the maker and endorser of a note, the former may prove that the latter while holding the note, admitted it was given for a gaming consideration; *Brown v. McGraw*, 12 S. & M. 267.

See EVIDENCE, 28, et seq.

29. *Warranty by assignor.* The assignor of a judgment implies warrants that there is such a judgment, valid and operative, against the defendant, and hence if the judgment has been paid before assignment, the warranty is broken; and so of all other assignments of instruments, whether negotiable or not; *Lile v. Hopkins*, 12 S. & M. 209. And the assignee of an unfounded claim may recover from the assignor, the costs he has ex-

pended in attempting to recover it; *Cartwright v. Carpenter*, 7 H. 328.

30. *Assignment by judicial action.* Where a judgment is rendered condemning to the payment of a creditor's judgment, a sum of money in the hands of the sheriff belonging to the judgment debtor, this is an appropriation of the fund in the sheriff's hands, and all control over it, to the creditor, and is *pro tanto*, a satisfaction of the judgment, whether the creditor gets the money or not, unless immediately after the condemnation, the creditor reverts the title and control over the fund in the debtor; *Skinner v. Jayne*, 2 C. 567.

See SET-OFF, 19.

31. *Is irrevocable.* An assignment once made, cannot be revoked by the action of the assignee alone; *Sevier v. McWhorter*, 5 C. 442.

32. *Pleading.* Where a pleading avers an assignment to have been made, it will be understood as a valid assignment, and in writing if necessary, unless the contrary appears; *Andrews v. Carr*, 4 C. 577.

33. *Assignment under foreign insolvent laws.* Foreign assignments are recognized in this State, so far as the right to the thing is concerned; but whether the assignment conveys to the assignee a legal title or only an equitable interest, is regulated in a suit brought in this State, by the laws here; *Kirkland v. Lowe*, 4 G. 423; S. P., *Tully v. Herrin*, 44 M. 626; but such foreign assignment of a chose in action, under the insolvent laws of a sister State, where the debtor resides in the State, will not defeat an attaching creditor of the insolvent, where it is served before payment to the syndic or assignee; *Beer v. Hooper*, 3 G. 246. See ante, 25.

34. *As to assignment under foreign attachment.*

See SET-OFF, 19.

Assignment for the Benefit of Creditors.

See FRAUDULENT ASSIGNMENT.

Assignment of Errors.

See HIGH COURT.

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See CONTRACT AND PLEADING.

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I. Nature of.

1. *A proceeding in rem.* An attachment against a non-resident is a proceeding *in rem.* and if the defendant do not appear and defend, the judgment binds only the property levied on under the attachment writ; *Ridley v. Ridley*, 2 C. 648. And it is so essentially of that character, that the attachment must be levied on property, in order to give the court jurisdiction in a case, where there is no service of the summons and no appearance; and if on publication of notice only, the judgment be *in personam*, and not *in rem.* and it be not shown in a proceeding in equity by defendant to annul the sale, that there was an actual levy, the judgment will not authorize a sale; *Bias v. Vanre*, 3 G. 198.

2. *Replevy makes it in personam.* But if the defendant replevy the property attached it then becomes a proceeding *in personam*, the replevy bond itself being a sufficient personal notice to defendant; *Philips Hines*, 4 G. 163. Yet, after replevy, it still retains its character as a proceeding *in rem.* as to the property attached, and the lien created by the levy of the attachment still continues; *Montague v. Gaddis*, 8 G. 453. But appearance alone, without replevy, under the Act of 1843, H. C. 819, §20, does not change its character from a proceeding *in rem.*; *Philips v. Hines*, 4 G. 163.

3. *Extraordinary remedy.* The remedy by attachment is out of the ordinary course of proceeding, and was designed to be applied only in cases of emergency embraced in the statute. Hence every requisite of the statute must be complied with, or the proceeding will be irregular and void; *Hopkins v. Griscom*, 4 C. 143; *Rankin v. Dulaney*, 43 M. 197.

II. Where it Lies.

4. *Statute of 1822.* The statute of 1822, Hutch Code, p. 801, gave the remedy of attachment against non-resident debtors, and those absconding, concealing or removing, so that the ordinary process of law could not be served, but the remedy against non-resident debtors was allowed only to resident creditors. The object of that statute was to secure the appearance of the defendant.

5. *Act of 1844.* The Act of 1844, H. C. 820, extended it to cases where the debtor was removing or concealing, or about to remove himself or his effects out of the State, so that plaintiff's debt would be defeated, and the object of that statute was to give the remedy to secure the plaintiff's debt.

6. *Statute of 1857, Rev. Code, p. 372.* This act gives the remedy in seven cases, as follows: 1st. Non-residence of the debtor. 2d.

Actual or impending removal of the debtor or his property from the State. 3d. The absconding or concealment of debtor, so that process can not be served on him. 4th. The possession by the debtor of property which he conceals and unjustly refuses to apply to the payment of his debts. 5th. The actual or impending assignment or disposal by the debtor of his property, or any part of it, with intent to defraud his creditors, or give an unfair preference to some of them. 6th. The actual or impending conversion by the debtor of his property, with intent to place it beyond the reach of his creditors. 7th. When the debtor fraudulently contracted the debt sued on.

6a. *Who is a non-resident.* Domicile and residence are not convertible terms—the domicile may be in one place and the residence in another. The statute gives the remedy against persons who are non-residents of the State, although they may have a domicile here. It is intended to give the remedy against persons who are actually non-residents, so that process cannot be served on them here. Mere absence of a debtor domiciled here, if it be temporary, whether on business or pleasure does not make him a non-resident within the meaning of the statute; to do this, he must have a fixed residence elsewhere, with the intention to remain permanently, at least for a time; *Alston v. Newcomer*, 42 M. 186.

See DOMICILE.

6b. *Fraudulent assignment as a cause.* The attachment law of 1857, is purely remedial; and so much of it as gives the remedy by attachment against a debtor who has made a fraudulent assignment of his property, applies as well to such assignments made before the passage of the act as to those made afterwards; *Green v. Anderson*, 10 G. 359.

7. *Cause of action.* An attachment lies to recover damages arising from a breach of covenant; *Woolfolk v. Cage*, W. 300. But if the damages be unliquidated, and the declaration be in trover, after final judgment without objection, the defect will be cured by the statute of jeofails; *Redus v. Woolfow*, 4 S. & M. 579. By Revised Code, p. 372, art. 1, an attachment will lie in proper cases for any debt or demand for damages arising from the breach of any contract, express or implied, or for a penalty given by statute; but the remedy does not extend to actions *ex delicto*; *Fellows v. Brown*, 9 G. 541.

8. *Parties: Non-resident plaintiff.* The statute relating to attachments confers an extraordinary remedy, and is to be confined to cases embraced in its express terms; *Hopkins v. Griscom*, 4 C. 143; *Rankin v. Dulaney*, 43 M. 197. And a non-resident plaintiff, though entitled to an attachment against his absconding debtor, cannot maintain it against a non-resident debtor, as the statute (of 1822) giving the remedy against non-resident debtors, confines it to resident plaintiffs; *Hosey v. Ferriere*, 1 S. & M. 663. But under the Revised Code of 1857, non-resident

creditors may attach non-resident debtors. So under the Act of 1848; *Barrow v. Burbridge*, 41 M. 622. Where, however, the defendant, in an attachment prior to the Act of 1848, appeared and pleaded to the action without objecting to the non-residence of the plaintiff, it was a waiver of the objection, which could not afterwards be raised; *Peters v. Finny*, 12 S. & M. 449.

9. *Against endorsers and sureties.* Where one of several persons liable on a bill or note as makers, endorsers, drawers, &c., is in that condition in which the statutes gives the remedy by attachment against a debtor, he may be proceeded against by attachment without joining the others, though he be a party only secondarily liable, or a mere surety or endorser; *Crump v. Wooten*, 41 M. 611.

10. *Plaintiff must be a creditor and not a mere surety.* An accommodation acceptor of a bill of exchange is not a creditor of the drawer until after the payment of the bill, and is not till payment entitled to sue out an attachment against the drawer on account of the bill. And if he do, and recover judgment, another creditor may come into equity and set aside the attachment, if such course be necessary to enable him to obtain payment of his debt; *Henderson v. Thornton*, 8 G. 448.

11. *Use.* When an attachment is sued out in the name of A. for the use of B., the attachment bond must be given by B., the usee, who is the real plaintiff; *Grand Gulf Railroad & Banking Co. v. Conger*, 9 S. & M. 505.

12. *Where suit has been dismissed.* Whether under the statute prohibiting a plaintiff from renewing a dismissed suit to the term next succeeding the dismissal, a plaintiff who dismisses a suit *in personam* is prohibited from suing out an attachment to the next term on the same cause of action. *Quære?* But if he were, and the first suit were for an amount different from the last, and there be no other proof of identity in the cause of action, the objection cannot prevail; *Baldwin v. Conger*, 9 S. & M. 516.

III. Affidavit.

1. What it should contain.

13. *Affidavit.* A substantial, not a literal compliance, with the statute, in the affidavit, is all that is required. Hence, where the statute gives an attachment against a debtor "who absconds, so that the ordinary process of law cannot be served on him," it is sufficient if the affidavit aver that the debtor "hath absconded, so that the ordinary process of law cannot be served on him;" *Wallis v. Wallace*, 6 H. 254.

And so if the affidavit states that the affiant has good grounds to believe, and does believe, "that the defendant has absconded," &c., it is sufficiently positive and certain; *Id.*

And so if the affidavit be that the debtor "is about removing," when the statute re-

quires "that he is about to remove," the sense and meaning of both phrases being the same; *Lee v. Peters*, 1 S. & M. 503.

14. *Same: Surplusage: Statement of grounds of affidavit.* Surplusage in an affidavit for an attachment will not vitiate it. Hence if the affiant state the grounds upon which the charge of concealing his goods by the debtor is made, it will still be good, though not required by the statute. Thus where the affiant stated that "said King (the debtor) has conveyed to his brother most of his tangible effects, and is greatly embarrassed for goods purchased as a merchant, and these debts are now pressing him; that these goods he has conveyed to his brother, who is a man of little property or responsibility, but lately come to the State, and has no permanent residence in it, and is expected soon to leave; that some of the goods had been boxed up, and that King and his brother contemplated moving themselves out of the State in some short time, and by this means King was concealing his effects, so that the claim of affiant will be defeated in ordinary course of law;" *Held*, that the affidavit was good under the act of 1844, giving an attachment when the debtor was concealing his effects, so that plaintiff's claim will be defeated; *Spear v. King*, 6 S. & M. 276. See *post*, 23.

15. *Same: Same.* Nor will such affidavit be bad when the attachment is for the debtor's concealing his goods, because it states as a consequence of the concealment "that the ordinary process of law cannot be served on the defendant;" *Lovelady v. Harkins*, 6 S. & M. 412.

But such averment, though unnecessary in the above instance, is essential where the attachment is sued out on the ground that the debtor is absconding; *Page v. Ford*, 2 S. & M. 266.

16. *Same: Under the Act of 1844.* The Act of 1844, Session Laws, ch. 15, H. C. 820, extending the remedy by attachment, reaches further in its effects than the Act of 1822. The object of the latter act was to compel the appearance of the defendant; the object of the former is to secure the debt under certain circumstances, and under it the lien of the attachment is not removed by the appearance of the defendant, as was the result under the Act of 1822; it is, therefore, unnecessary, in an affidavit for an attachment under the Act of 1844, to add the words, "so that the ordinary process of law cannot be served on the defendant;" *Wharton v. Conger*, 9 S. & M. 510.

17. *Same: Under the Act of 1844.* It is sufficient if the plaintiff swear to the indebtedness in a sum certain, "and that the defendant is concealing his property so as to defeat the plaintiff's claim," and it is not necessary to add that these facts are within the affiant's personal knowledge, or that he is informed and believes them to be true. Such addition is necessary only when there is in the affidavit a narrative in detail of the facts and circumstances on which it is based; *Jones v. Leake*, 11 S. & M. 591.

17a *Same*: Under Act of 1857. An affidavit for an attachment was made as follows: "C. L. King, duly sworn, says on oath that B. C. is justly indebted to him, the said C. L., in the sum of \$100, on a note endorsed to C. L., and one other note payable to N. A., and by him endorsed to said C. L., and that he is a non-resident of the State, he therefore prays," &c.: Held, that it was fatally defective, because it averred that the plaintiff himself, not the defendant, was a non-resident; *Cantrell v. Letninger*, 44 M. 437. See post, 48.

2. Variance in Affidavit and Statute.

18. *Same*. If the affidavit contain the material averment that the plaintiff's claim will be defeated if plaintiff should await the ordinary process of law, the attachment will not be quashed on account of the residue of the affidavit slightly varying from the precise language of the statute; therefore, when instead of the words "is about to remove himself and his effects, so that affiant's claim cannot be made in due course of law," the affidavit used the words "will remove himself and his effects beyond the limits of the State before his claim can be collected by due course of law;" it was held sufficient; *Dandridge v. Stevens*, 12 S. & M. 723.

19. *Same*: Alternative statement in. An affidavit which states that the defendant "hath removed, or is removing out of the State, or so absconds, or privately conceals himself, that the ordinary process of law cannot be served on him," is not bad for stating these matters alternatively. The material fact to be sworn to is that the ordinary process of law cannot be served on the defendant, and that is stated positively; and plaintiff might be unable to state from which of the causes stated alternatively, this inability to serve process arose, but might swear it was from some one of them; *Jones v. Leake*, 11 S. & M. 591.

3. Affidavit where Defendant is non-resident.

20. Though until the Act of 1848, an attachment did not lie in favor of a non-resident creditor against a non-resident debtor, yet in the affidavit for an attachment against a non-resident, it was unnecessary to show that the plaintiff was a resident of the State; if he were in fact a non-resident the objection must be made by plea; *Amos v. Allnutt*, 2 S. & M. 215; S. P., *Linder v. Aaron*, 5 H. 581. Nor is it necessary that the affidavit should state the residence of the defendant, it being sufficient if it aver that he is a non-resident, so that the ordinary process of law cannot be served on him; *James v. Dowell*, 7 S. & M. 333. But it is essential that it contain the statement that "the ordinary process of law cannot be served on him," for, notwithstanding his non-residence, the defendant may have been within the limits of the State, and subject to be served with process; *Thompson v. Chambers*, 12 S. & M. 488. This averment is, however, unnecessary under the Rev. Code of 1857. See p. 372, art. 2.

4. Without Affidavit or Bond.

21. An attachment issued without bond and affidavit is void, and a judgment rendered on it against a garnishee on his answer is erroneous, and will be set aside; *Ford v. Woodward*, 2 S. & M. 260; S. P., *Ford v. Hurd*, 4 S. & M. 683. See post, 31.

23. *Two affidavits*. That there are two affidavits for an attachment is no ground for quashing it, as one may be treated as surplusage; *Wharton v. Conger*, 9 S. & M. 510. See ante, 14.

5. Failure of the officer granting the Writ to return the Affidavit and Bond.

24. *Same*. By express provision in the statute allowing attachments, it is to be construed in the most liberal manner, for the advancement of justice, the suppression of fraud, and the benefit of creditors. Hence, though that statute requires the affidavit and bond of the attaching creditor to be returned into court, or the attachment to be dismissed; yet it will not be held to embrace a case of accidental destruction of these papers whilst in possession of the officer who issued the attachment, whereby it is impossible to return them. In such case their contents may be proven by parol, and the lost bond will be as good indemnity to the defendant as if it were not destroyed; *Wheeler v. Slaven*, 13 S. & M. 623. And so if the officer granting the attachment negligently fail to return the affidavit and bond at the return term of the writ, and they be in fact filed at the next term, before any motion is made to quash on that ground, whereby the failure causes no injury to defendant, a motion made after their return to quash on that ground will be overruled; *Bank of Augusta v. Convey*, 6 C. 667.

6. Miscellaneous as to Affidavits.

25. *Affidavit by one officer, and attachment granted by another*. The law does not require the affidavit for an attachment to be made before the officer granting the writ; and hence, if the affidavit be made before a commissioner of affidavits of the State, residing in another State, it will be sufficient to authorize the granting of an attachment by the proper officer here; *Griffing v. Mills*, 40 M. 611.

26. *When affidavit made before unauthorized officer*. And if the affidavit were made before an officer not authorized to administer it, it would be such a defect as could be amended under the statute of 1857, by the making of a new affidavit in the court to which the attachment is returnable; *Ib.*

27. *Signature to affidavit*. It is not necessary that the affidavit should be signed by the affiant; the certificate of the officer that he was sworn to it is sufficient; *Redus v. Wofford*, 4 S. & M. 579.

28. *Misrecital in*. A misrecital of the defendant's Christian name in one part of the affidavit is no ground for quashing the writ; *Davidson v. Martin*, 4 G. 530.

29. For affidavits by partners and agents see sub-division "By Partners," and "By Agents."

IV. Bond.

30. *Form of, under Act of 1822.* The 14th section of the Act of 1822, H. & C. p. 801, prescribes a form for the attachment bond in so many words; the 8th section directs also what shall be in the condition of the bond, and specifically includes a stipulation to pay the costs, which is omitted in the form set out in the 14th section: *Held*, that if the form prescribed in the 14th section be followed, it will be sufficient; *McIndygre v. White*, 5 H. 298; *Amos v. Allnutt*, 2 S. & M. 215; *Prosky v. West*, 8 id. 711.

31. *Without bond or security: Affidavit.* An attachment issued without bond or affidavit is void, and a judgment in such case against the garnishee on his answer will be set aside; *Ford v. Woodward*, 2 S. & M. 260. And if the bond be not given by the plaintiff or his agent, it is void; and a bond without security, signed by a third party, not shown to be an agent, is void; *Ford v. Hurd*, 4 S. & M. 683. See *ante*, 21.

32. *Bond is security for costs.* The bond is security for costs in that suit, and no other security for costs can be required until that is shown to be insufficient; *House v. Bierne*, 5 S. & M. 622.

33. *Where surety is sufficient.* Under the statute of 1822, it is the duty of the officer issuing an attachment to take bond with good security. The law presumes he does his duty, and there being no statutory provision for testing the solvency of the surety, if the officer take bad security, or the surety afterwards becomes bad, the defendant cannot object thereto and require new security to be given. The action of the officer granting the attachment is final; *Prosky v. West*, 8 S. & M. 711. Under the Rev. Code of 1857, p. 377, art. 15, provision is made for the trial of exceptions to the sufficiency of the security, and if found insufficient by the court, new surety is to be given, or the attachment will be dismissed.

34. *Use must give bond.* If an attachment be brought in the name of one for the use of another, the latter is the real plaintiff and must give the bond; *Grand Gulf Railroad & Banking Co. v. Conger*, 9 S. & M. 505.

35. *Signature to bond.* It is not necessary that an attachment bond be signed with the full Christian names of the obligors, their initials, with the surnames in full, will do; *Baldwin v. Conger*, 9 S. & M. 516.

35a. *Bond by a corporation as plaintiff.* The plaintiff in attachment was a corporation. The obligors in the bond are stated to be the corporation, J. B. and A. H., and it is stated in the bond that it was sealed with their seals. This means the corporate seal of the corporation, as it has no other. G., as secretary of the company, countersigned the bond, to which was attached a scroll indicating the *locus sigilli*. A. H. signed his name twice, once opposite the *locus sigilli*,

and then after J. B., and opposite a scroll as a private seal: *Held*, that it sufficiently appeared from these facts, that A. H. had signed as president of the corporation, and that the bond was duly executed by it; *Saunders v. Columbus Life Insurance Co.*, 43 M. 583.

See CORPORATION, 41.

36. *Penalty of.* If the penalty of the bond be in double the amount of the debt mentioned in the affidavit, it will be no ground for quashing the attachment, that the writ states the debt to be larger; the averment in the affidavit will control; *Laurence v. Featherstone*, 10 S. & M. 345.

37. *Defective bond not amendable.* Under the Act of 1822, and its amendments as late as 1846, when the bond originally taken was defective, there could be no amendment; the statute requiring the bond to be given before the issuance of the attachment; *Houston v. Belcher*, 12 S. & M. 514. The Rev. Code of 1857, art. 15, p. 378, allows defective bonds and affidavits in all cases to be amended by the filing of new ones.

38. *Misrecital in bond.* A bond which recites that the attachment was returnable to the September term, when in fact it was returnable to the March term, is not defective. The affidavit and attachment control the recital in the bond in this respect; *Houston v. Belcher*, 12 S. & M. 514. See *ante*, 36.

39. *Failure of bond to recite who issued the writ.* The bond is good, though it omit to state that the writ was issued by a justice of the peace of this State, if it can be gathered from the whole record, that it was issued by a proper officer; *Steamer General Worth v. Hopkins*, 1 G. 703.

V. By Partners.

40. *Affidavit.* An affidavit for an attachment in behalf of a partnership made by one of the members of the firm, will not be defective on account of its failing to state the interest of the affiant in the suit, if the other parts of the record show that he is one of the partners; *Bosbyshell v. Emanuel*, 12 S. & M. 63.

41. *Bond.* When one member of a firm sues out an attachment in the name of the firm, the bond need not be executed by the firm; its execution by the partner suing it out with proper sureties, is all that is necessary, *Wallis v. Wallace*, 6 H. 254.

VI. By Agents

42. *When agents may act.* Under the Act of 1822, H. C. 802, § 7, when the creditor was absent from the State, the affidavit is authorized to be made by an agent, but this absence need not appear in the record; *Linder v. Aaron*, 5 H. 581. But now an agent may act in all cases, and make both the affidavit and bond; *Parker v. Stovall*, 2 G. 446; *Beer v. Hooper*, 3 G. 246; Rev. Code of 1867, p. 372, art. 2, and p. 373, art. 6.

43. *Affidavit by agent.* It is not necessary

for an agent who sues out an attachment, to swear to his agency; it is sufficient if that fact appear by the certificate of the justice of the peace, who grants it; *Linder v. Aaron*, 5 H. 581; S. P., *Frost v. Cook*, 7 H. 357.

44. *Bond: Authority presumed.* Where an attachment bond was signed in the name of the plaintiff by an agent, it is unnecessary that the power of attorney of the agent to act for the principal should accompany the record; the presumption will be that the officer granting the attachment required proof of the legal authority of the agent to act. On failure of the defendant to appear and contest the proceedings, the utmost the court would do, would be to make a rule requiring the production of the agent's authority. The bond being good on its face, the court would not at the instance of an *amicus curiae*, make up an issue to try its validity; *Linder v. Aaron*, 5 H. 581. And so upon a motion to quash the attachment for defects in the bond, the court will not inquire into the authority of the agent to execute it; *Spear v. King*, 6 S. & M. 276.

45. *Same: Prosecution of the suit an estoppel as to the agents authority.* A motion to quash will not be sustained where the bond is executed by an agent of the plaintiff, because the agent does not show authority from the plaintiff to execute the bond. For the prosecution of the suit by the plaintiff is an estoppel to deny that the agent had authority to execute the bond; *Bank of Augusta v. Conrey*, 6 C. 667. And in such case if the defendant plead in abatement, that the attachment bond was not executed by the plaintiff, or his lawful agent, and that the plaintiff had not ratified the act of the agent in making the bond, the plea will be bad; for though it is competent for the defendant to show that the suit was prosecuted by an agent, without the authority of the plaintiff, yet the facts set out in the plea did not show this; on the contrary, the matter pleaded was shown to be false by the record itself, as the prosecution of the suit by the plaintiff was an adoption by him of the act of the agent in giving the bond; and there was no averment in the plea, that the prosecution of the suit was without the plaintiff's consent; *Dove v. Martin*, 1 C. 588.

46. *Bond in agent's name good.* An attachment bond given by an agent in his own name is good; *Frost v. Cook*, 7 H. 357; S. P., *Page v. Ford*, 2 S. & M. 266. But the writ must be in the name of the principal; *Parker v. Stovall*, 2 G. 44; *Beer v. Hooper*, 3 G. 246; *Ford v. Hurd*, 4 S. & M. 683.

47. *Bond by one of several trustees.* One of several trustees of a town, suing out an attachment for himself and his associates, may execute the bond in his own name, binding himself personally and giving security, and he is presumed on the face of the papers to be agent for the others; and a bond by an agent is good; *Clanton v. Laird*, 12 S. & M. 568.

VII. The Writ.

48. *Clerical error in.* If the writ of attachment by mistake of the officer issuing it, recites that the *plaintiff* (instead of the defendant), is concealing his effects, it is a mere clerical error, and will not, on that account be bad, if the affidavit and bond be correct. The court will look to the whole record and give it such a construction as will not defeat its own end; *Lovelady v. Harkins*, 6 S. & M. 412. See *ante*, 17a.

49. *Same: Omission of a word.* The omission of the word "circuit" before the word "court" in a writ of attachment issued by a justice of the peace, will not vitiate the attachment if from the amount of the debt sued for (being above \$50), the time and place of holding the court, as specified in the writ, it can be reasonably inferred that it was the intention to make it returnable to the Circuit Court, and especially, where the bond recites the proper court; *Byrd v. Hopkins*, 8 S. & M. 441. And so where the attachment is for \$500, and is returnable to a court to be held at Port Gibson (the county seat), for the county of Claiborne, at the time fixed by law for holding the Circuit Court there, it will be understood as returnable to the Circuit, as no other court has jurisdiction of such a case; *Wharton v. Conger*, 9 S. & M. 510.

49a. *Duplicate writs.* It is not necessary that duplicate writs of attachment should be endorsed that they are duplicates; *Sanders v. Columbus Life Insurance Co.*, 43 M. 583.

50. *Mistake in.* A writ of attachment was issued on 22d March, 1847, returnable "to the 6th Monday after the 4th Monday in March next," the time fixed by law for holding the next term of the court. At that term (May, 1847) the defendant appeared and moved to quash: *Held*, that although the phraseology was awkward, yet as the defendant appeared at the proper time, it showed he had not been deceived in that respect, and that the attachment would not be quashed; *Dandridge v. Stevens*, 12 S. & M. 723.

51. *Variance between affidavit and writ.* It is an immaterial variance between the affidavit and the writ, that in the one the plaintiffs are described as A., B. and C., trustees of a named town, and in the other that they are described as A. and B. surviving trustees; *Clanton v. Laird*, 12 S. & M. 568. And so when the plaintiffs are described in one as Ulman & H. Houseman, and in the other as Henry Ulman & William H. Houseman; *Com'l Bank of Manchester v. Uiman*, 10 S. & M. 411.

51a. *Variance between writ and declaration.* A variance as to the names, number, and identity of the parties plaintiff, in the writ and in the declaration will be fatal on demurrer, but may be cured by averment; *Lyon v. Bishop*, 43 M. 527.

52. *Variance between bond and writ as to amount of the debt.* If the bond be for the correct amount, as described in the affidavit, it will be no cause for quashing the attach-

ment, that the writ is for a larger amount, as the statement in the affidavit will control; *Lawrence v. Featherstone*, 10 S. & M. 345.

53. *Sealing of the writ.* If a writ of attachment issued by a justice of the peace be sealed with a scroll with word "seal" in it and appended to the justice's name, the sealing will be sufficient; *Com'l Bank of Manchester v. Ullman*, 10 S. & M. 411; S. P., *Whittington v. Clark*, 8 S. & M. 480.

54. *How served.* Where the writ is served on the defendant, the service and return must be in the same mode as is required for the service and return of other original process; *Crizer v. Gorren*, 41 M. 563; *Ezelle v. Simpson*, 42 M. 515. See post, 69a.

VIII. Levy and its effects—Lien, &c.

55. *Return: And form.* Under the Act of 1822, which provided that a levy of an attachment on land, should be made "on the premises, and in the presence of at least one credible person," a general return on the writ of "levied on" land, describing it, will do, without specifying the particular mode of the levy. The law, in such case, presumes it was correctly done; *Redus v. Wofford*, 4 S. & M. 569; S. P., *Smith v. Cohea*, 3 H. 35; *Drake v. Collins*, 5 id. 253.

55a. *Form of return of levy under Act of 1857.* It is not necessary that the return should state that the land levied on was the property of the defendant. This will be presumed until the contrary is shown; *Sanders v. Columbus Life Ins. Co.*, 43 M. 583.

55b. *Return as to levy on land.* The statute (Rev. Code of 1857, p. 374, art. 7) provides that the levy of an attachment on land shall be as follows: "The officer shall go to the house of the defendant, or to the person, or house of the person in whose possession the same may be, and then and there shall declare, that he attaches the same, at the suit of the plaintiff. But in the event the land is wild and uncultivated, a return upon the writ by the proper officer, that he has attached the land, giving a description thereof, by numbers, metes, and bounds, or otherwise, shall be a sufficient levy, without going upon the land."

Under this statute, the following returns were held good: "Levied this attachment on the following land (describing it), this 1st November, 1866."

"I have this day executed this writ by attaching the following described lands (describing them), November 2d, 1866." They are good as to wild lands, and the lands are so to be considered under the presumption in favor of the levy, until the contrary is shown.

The following was held good: "Executed by levying the within attachment on the following lands (describing them), notifying the defendant's agent, I. S., now living on and having possession and control of said land, of the said levy—the defendant not found."

This return, though not in strict accordance with the language of the statute, is a substantial compliance with it, as to occupied lands; *Id.*

55c. *Same.* But the following return was held bad: "Levied the within attachment on the following lands, as the property of defendant (describing the lands); *Gustavus v. Marx*, 44 M. 446.

56. *Who may levy—constable.* A constable can only execute attachments returnable to the Circuit Court, when the defendant is absconding. The statute which authorizes him to execute attachments, is enabling, and confers no authority, except in the cases specified in it; hence he cannot execute an attachment against a non-resident debtor, and if he do, and take a replevy bond from the defendant, the bond will be void; *Lawrence v. Featherstone*, 10 S. & M. 345. But an attachment against a steamboat, under the statute authorizing proceedings in rem, against water-craft, is within the reason of the rule allowing attachments against absconding debtors to be executed by a constable, and may therefore be properly executed by that officer; *Wallace v. Seales*, 7 G. 53.

57. *Same: As to personalty.* The term "levy," when used by a sheriff in his return on process, means, so far as personalty is concerned, the taking possession of it by the officer, and that fact need not otherwise be shown, to constitute a valid levy on personalty; *Wharton v. Conger*, 9 S. & M. 510. If possession be not taken, the levy is void, and the judgment also void as to that property; *Gates v. Flint*, 10 G. 365.

58. *Same: As to garnishee.* The sheriff need not return how he executed an attachment; it is sufficient if he return it "executed," or "summoned," as to the garnishee; *Bryan v. Lashley*, 13 S. & M. 284; S. P., *Redus v. Wofford*, 4 S. & M. 579. But the rule is different under the Rev. Code of 1857; for as to the garnishee the writ is original process, and the return must show the mode of its execution, and that it was served according to law, as in other cases of original process; *Jeffries v. Harvie*, 9 G. 97; and a general return of "executed," is no evidence of service upon which the court can act, and imposes no duty or liability on the garnishee; and if, under such a return, the garnishee appear and answer, it will be sufficient if he deny indebtedness at the time he answers, and he need not deny indebtedness "at the time of service of the garnishment." In such case the lien of the attaching creditor would commence from the time of the answer, and not from the date of the illegal service; *Roy v. Heard*, 9 G. 544; S. P., *Merritt v. White*, 8 G. 438.

See GARNISHMENT, 45.

59. *Levy essential.* The actual levy of an attachment on land, is necessary to give the court jurisdiction to render a judgment condemning it to be sold; *Bias v. Vance*, 3 G. 198. And the rule is the same as to personalty; and in the latter case the property must be actually taken into the possession of the officer, or his agent, and if a pretended levy be made without taking such possession, the judgment will be void as to that property; *Gates v. Flint*, 10 G. 365. But it

seems that if the defendant give a replevy bond, that is a waiver of any technical objection to the mode of making the levy; *Wharton v. Conger*, 9 S. & M. 510.

60. *Lien created by levy.* A sale of the attached property is not for the purpose of divesting title, but to ascertain its value. The title is transferred by the levy of the attachment; *Oldham v. Ledbetter*, 1 H. 43; but a judgment is necessary to give effect to and consummate this lien and title; *Mandell v. McClure*, 14 S. & M. 11; *Edwards v. Toomer*, Ib. 75. Hence, in a controversy between several attaching creditors, as to the appropriation of the proceeds of the property attached, no part of the fund can go to that creditor, whose judgment is void for want of notice, though it was the first levied; *Edwards v. Toomer*, *supra*. Yet, if after levy, the parties to the attachment agree that the property attached shall go to the plaintiff, in satisfaction of his debt, the title of the plaintiff thus acquired, as against adverse claimants under a sale from the defendant, will relate back to, and commence with, the levy of the attachment; *Peck v. Webber*, 7 H. 658. And the levy creates a lien from the date of the levy, which will have priority over a judgment rendered against the defendant, between the date of the levy and the judgment rendered on the attachment; the effect of the latter judgment being not to create a lien, but to condemn the attached property, and it relates back to the date of the levy; *Redus v. Wofford*, 4 S. & M. 579; *S. P., Gray v. Perkins*, 12 S. & M. 622; *Saunders v. Columbus Life Ins. Co.*, 43 M. 583.

61. *Same: Destruction of lien.* The lien created by the levy of an attachment, is not destroyed by the subsequent bankruptcy of the defendant, under the Act of Congress of 1841; *Wells v. Brander*, 10 S. & M. 348.

62. *Same: Effect of replevy on lien.* The execution by the defendant of a replevy bond, under the 1st section of the Act of 1843, and which bond is conditioned to have the attached property forthcoming, to abide the order or decree of the court, does not destroy the lien created by the levy of the attachment; *Gray v. Perkins*, 12 S. & M. 622. See *post*, 87.

63. *Effect of levy as payment.* To an action in this State on a promissory note, the defendant pleaded payment and former recovery; and to support the issues, introduced, a transcript from the records of a court in another State, which showed an attachment against defendant, based on the note, a levy of the same on slaves, an execution, and a return of *nulla bona*: *Held*, that the levy of the attachment, and the judgment in that proceeding condemning the property, created a presumption which was not rebutted by the return on the execution, and that it was the plaintiff's duty to rebut this presumption, by showing a legal motion of the levy, or a legal disposition of the property; *Benson v. Benson*, 2 C. 625.

IX. The notice.

64. *To non-resident under Act of 1822.*

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The defendant, if a non-resident, is entitled, under the Act of 1822, to six months at least from the return day of the attachment, in which to appear and defend the suit, and judgment before that time expires is erroneous; and it makes no difference in this respect that the court ordered notice to be given to appear at the next term, which was six months distant, and the Legislature afterwards changed the next term, so that only four months intervened between it and the term at which notice was ordered; the time for his appearance may be enlarged, and cannot be shortened below six months; *Saffaracus v. Bennett*, 6 H. 277.

65. *Same.* But under that act, the publication of notice to a non-resident, in a newspaper printed in the State of his residence, is a matter in the discretion of the court, to order or not, as the court may see proper; and if not ordered, the ordinary publication, as in case of absconding debtors, will do; *Ridley v. Ridley*, 2 C. 648. And the rule is the same under the Act of 1857; *Moore v. Williams*, 44 M. 61. But whether the notice be published in the State of defendant's residence or not, there must in all cases, under the Act of 1822, be six months between the return day of the attachment and the judgment; *Saffaracus v. Bennett*, *supra*. And even the notice necessary for absconding debtors is not essential, and the judgment is good without any notice whatever, except what arises from a seizure of the thing attached; *Calhoun v. Ware*, 5 G. 146; *vide post*, 66. 67.

66. *Necessity of notice.* In proceedings *in rem*, the seizure of the thing itself is deemed in most instances sufficient notice to all parties interested in it to come forward and assert their rights, and the seizure is substituted in lieu of actual notice; but if the statute require other notice, it must be given, or the judgment will be erroneous if not void; *Ridley v. Ridley*, 2 C. 648; and it seems that the judgment would be void; *Edwards v. Toomer*, 14 S. & M. 75; *sed vide Calhoun v. Ware*, *ante*, 65.

67. *How published.* Under the Act of 1857 the publication of the notice must be after the levy of the attachment, but it need not be after the sheriff's return of "not found" on the summons; and under that act requiring publication of notice for four successive weeks, it is sufficient if the publication be made in four successive numbers of a weekly newspaper, if the first insertion be four weeks before the return term, though only three weeks intervene between the dates of the first and last publication; *Griffing v. Mills*, 40 M. 611. Publication for four successive weeks in a newspaper, and the mailing of notice to the defendant, if he be a non-resident, is essential when the defendant has not been summoned. Posting notices in a public place in the county, including the court house door, will not do; *Moore v. Williams*, 44 S. & M. 61; *Patrick v. Dillard*, Ib. 384.

68. *Proof of: Recital in judgment.* A judgment in attachment is not bad, because

the record does not contain proof of publication, if the judgment itself recite, that proof of publication was made; this recital in judgments of courts of general jurisdiction is *prima facie* evidence; the rule is otherwise in courts of special and limited jurisdiction; *Saffarans v. Terry*, 12 S. & M. 690. See *post*, 72.

69. *Same: Mistake in affidavit.* An affidavit proving publication of notice, which recites that the publication was made "four weeks successively, once every week, commencing 24th April and ending 5th May," of the same year, is good, to show publication for four successive weeks,—the latter part stating the dates is surplusage, and will be treated as a mistake; *Swayze v. McCrossin*, 13 S. & M. 317.

69a. *Notice by personal service.* The affidavit showed that the defendant lived in the county; the return was "executed personally upon defendant 22d September, 1865." Held, that it was insufficient to authorize a judgment by default; *Gustarus v. Marx*, 44 M. 446; *Rankin v. Dulaney*, 43 M. 197. See *ante*, 54.

69b. That execution of replevy bond is equivalent to notice. See *post*, 73, 89.

X. Appearance of Defendant.

70. *Defendant's right to appear.* Under the Act of 1822, the defendant in an attachment, when the debt was not due, had no right to appear and plead until he had given bond to pay the debt; *Rowly v. Cummings*, 1 S. & M. 340; *Garrett v. Tiernin*, 7 H. 465. Nor under that act could he, where the debt was due, appear and plead, without giving special bail; but after the Act of 1840, abolishing imprisonment for debt, and also the giving of special bail bond, the defendant might plead without giving bond when the debt was due, but even then he could not plead, when the debt was not due, until bond to pay the debt was given; *Rowly v. Cummings*, 1 S. & M. 340.

71. *What is.* If the defendant move to quash the attachment, this is an appearance, and the court may proceed to judgment *in personam*; *Lawrence v. Featherstone*, 10 S. & M. 345.

72. *Recital in judgment.* Whilst it is true that the recital of the existence of jurisdictional facts in a judgment is *prima facie* evidence that the facts exist, yet when the recital is general, as "this day came the parties by their attorneys," &c., it will be held to refer to such parties as the record in other parts show were served with process; and such recital in an attachment case, when there is no proof of publication (or service of process) in the record, is not sufficient to show the appearance of the defendant; *Edwards v. Toomer*, 14 S. & M. 75; S. P., *Givinn v. McCarroll*, 1 S. & M. 351; *Miller v. Ewing*, 8 id. 421; *Winston v. Miller*, 12 id. 550; *Saffarans v. Terry*, 12 id. 690. See *ante*, 68.

See APPEARANCE, 1. PROBATE COURT, 47, 195. JUDGMENT, 8

73. *Replevy.* The execution of a replevy bond under the act of 1843 is notice to the defendant, but is not technically an appearance; it, however, authorizes the court to enter a judgment *in personam*; *Philips v. Hines*, 4 G. 163. The rule is the same under the Act of 1857; *Richard v. Moony*, 10 G. 357. See *post*, 89.

74. *Effect of appearance.* Under the Act of 1843, H. C. 819, art. 14, the appearance of the defendant simply, without executing a replevy bond, does not change the suit into a proceeding *in personam*; *Philips v. Hines*, *supra*.

75. *Same.* The appearance of the defendant is a waiver of all irregularity in the notice and in the proof of notice, and under the Act of 1857, authorizes a judgment to be rendered against him *in personam*, as well as *in rem*; *Barrow v. Burbridge*, 41 M. 622.

As to effect of appearance to an ancillary attachment on the original suit, see 141.

XI. Judgment and Execution.

76. *When in rem.* If there be no service of summons on defendant, and no appearance or replevy by him, and only publication of notice, the judgment will be *in rem*, only, condemning the property attached; *Chew v. Relf*, W. 1; *Swayze v. McCrossin*, 13 S. & M. 317; *Barrow v. Burbridge*, 41 M. 622; *Bias v. Vance*, 3 G. 198. But if the judgment be *in rem*, and the execution be general against all the estate of defendant, and the attached property (real and personal) be sold under it, the irregularity will not vitiate the sale to a purchaser having no notice of it; *Swayze v. McCrossin*, 13 S. & M. 317.

77. *When in personam.* If defendant be served with process, or appear (*Barrow v. Burbridge*, *supra*; *Lawrence v. Featherstone*, 10 S. & M. 345); or replevy the property attached (*Philips v. Hines*, 4 G. 163). The judgment will be *in personam* as well as *in rem*.

78. *Effect of judgment in rem.* When the judgment is *in rem*, it binds only the property attached, and does not merge the original cause of action, and it is no evidence of debt by defendant to plaintiff; *Chew v. Relf*, W. 1.

See SET-OFF, 19.

79. *Judgment essential.* A judgment in an attachment proceeding is essential to give effect to the lien created by the levy; *Edward v. Toomer*, 15 S. & M. 75. See *ante*, 60.

80. *Must be on notice.* A judgment, without the publication of notice required by law, or the appearance of defendant, is void. The seizure of the property under the writ initiates a lien which can be consummated by proper judgment, but it does not confer jurisdiction over the person. *Ib.* See *ante*, 65, 66.

81. *Recital in judgment.* As to recital in judgment of proof of notice, see *ante*, 68; and as to recital of appearance, see *ante*, 72.

82. *Onus in proof of judgment.* Whoever claims a right under a judgment in attachment, must show that the judgment is valid

according to law, and that the court has jurisdiction; *Edwards v. Toomer, supra*.

83. *Judgment where debt is not due.* A judgment in attachment on a debt not due will be irregular, without an order staying execution until the debt becomes due; *Berry v. Anderson*, 2 H. 649.

84. *Effect of, as to lien.* A judgment in attachment does not create a lien on the property attached, but consummates and perfects a lien initiated by the levy; *Redus v. Wofford*, 4 S. & M. 579.

85. *Judgment at return term.* In attachment cases, it is now regular to take judgment on proper publication, or other legal notice, at the return term; *Crizer v. Gorren*, 41 M. 563.

XII. Replevy by Defendant and Strangers.

86. *Under Act of 1822.* Under the Act of 1822, where the attachment was for a debt not due, the defendant might replevy either by giving special bail, or by giving bond and security to pay the debt when due. The Act of 1840, abolishing imprisonment for debt, also abolished special bail; and after the last act, the defendant (where the debt was not due) could only replevy by giving security to pay the debt; *Garrett v. Timmin* 7 H. 455; and when the debt was due, the defendant, after the Act of 1840, could plead without bond or security of any sort; *Rowly v. Cumming*, 1 S. & M. 340.

87. *Replevy does not destroy lien.* The execution by defendant of a replevy bond, under the Act of 1843, H. C., p. 819, art. 14, which bond is conditioned to have the property forthcoming to abide the order or decree of the court, does not destroy the lien created by the levy of the attachment, which lien, if consummated by a judgment, dates from the levy, and is superior to all other liens created subsequent to that time; *Gray v. Perkins*, 12 S. & M. 622; *Montague v. Gaddis*, 8 G. 453.

88. *Cures defect in levy.* It seems that when the defendant replevys the property attached, this is a waiver to any technical objections to the mode of the levy; *Wharton v. Conger*, 9 S. & M. 510; but this effect will not follow, where a constable, in a case in which he has no authority in law, levies the attachment, and takes from the defendant a replevy bond, for in such case both the levy and bond are void; *Lawrence v. Featherstone*, 10 S. & M. 345.

89. *Replevy is notice.* The replevy by the defendant of the property attached, is its sufficient notice to the defendant of the suit, and authorizes the court to proceed against him personally; *Philips v. Hines*, 4 G. 163; *Richard v. Mooney*, 10 G. 357. See *ante*, 73.

90. *Replevy by a stranger.* An attachment was sued out and levied. A stranger to the attachment gave bond and security payable to plaintiff, reciting that the property levied on was claimed by him, and conditioned that the defendant in attachment would appear and answer the complaint, and abide by and pay and satisfy any judgment which

might be rendered against him: *Held*, that the bond was not a bail bond, nor a claimant's bond, as authorized by the statute. That it was a contract between the parties, which, if founded on a valid consideration, was binding; and hence not being a bail bond, a plea to an action on it, that the plaintiff had not sued out against the defendant *ca. sa.*, was no answer to it; *Emanuel v. Laughlin*, 3 S. & M. 342.

91. *Under Act of 1857.* By art. 8, p. 375, of Rev. Code of 1857, it is provided, that the defendant at any time before final judgment may replevy the personal property seized under an attachment, by giving to the officer levying the attachment, a bond with sufficient security, payable to the plaintiff, in double the value of the property, conditioned to have the said property forthcoming to answer and abide the judgment of the court in the attachment suit; or in default thereof, to pay and satisfy the judgment to the extent of the value of the said property; and "such replevin shall not affect the lien of the attachment, or the proceeding thereon, as to any rights, credits, or choses in action of the defendant." And by art. 9 (same page), it is provided, that the jury trying the issue between plaintiff and defendant in the attachment, shall, if they find for the plaintiff, assess the value of the property replevied, and if it be equal to the debt, then judgment shall be entered against defendant and his sureties on the replevin bond, for the amount of the debt, and if less, then for the value of the property. And the same right of replevin is given to a garnishee who has personal property in his hands, and the same proceedings had on his bond.

And if the jury fail to assess the value of the property attached, it is decided that another jury may be called instantly to assess it; *Merrill v. Melchior*, 1 G. 516.

92. *Same.* By art. 11, page 376 of Rev. Code of 1857, it is provided, that the defendant may at any time before the return of the attachment, execute to the officer serving it, a bond with two or more sufficient sureties, payable to plaintiff, in a penalty double the debt claimed by the plaintiff, conditioned to pay, and satisfy any judgment which the plaintiff may recover in such suit, and all costs, and thereupon the attachment shall be discharged and all the property levied on "released and restored to the defendant." And the bond is to be returned with the attachment, and judgment entered on it for the debt recovered.

92a. *Replevin by stranger.* A third person who claims the property attached, may take it out of possession of the officer by writ of replevin; *Hopkins v. Drake*, 44 M. 619; *Ford v. Dyer*, 4 C. 243.

92b. *Liability of sureties on replevy bond.* It is expressly provided, that the sureties on the replevy bond shall only be liable for the assessed value of the property; and it will hence be error to enter judgment against them for the whole amount of the plaintiff's demand, when the jury have omitted to assess

the value of the property attached and relieved; *Richard v. Mooney*, 10 G. 357.

XIII. Plea in Abatement and trial of same.

[*Note*.—Under this is included all cases in which was litigated the grounds on which the attachment was sued out.

See ABATEMENT, 12.]

93. *Under Act of 1822*. In this case, Sharkey, C. J., was strongly inclined to the opinion that a plea in abatement denying the grounds on which an attachment was sued out, was not allowable, and Judge Turner was decidedly of that opinion. Judge Clayton expressed no opinion on the subject; *Garrett v. Tinnin*, 7 H. 465.

But even if not allowable, it cannot, after it is demurred to by plaintiff, be treated as a nullity, and it is therefore error in such a case to take judgment by default, as for want of a plea, if the demurrer be undisposed of; *Rowley v. Cummings*, 1 S. & M. 340.

The remedy of the defendant for the wrongful suing out the attachment was by action on the bond: *Smith v. Herring*, 10 S. & M. 518. And in this last case it was said by the court that *James v. Dowell*, 7 S. & M. 333 (for which see *post*, 104), did not decide that pleas in abatement to attachments denying the grounds on which they were sued out were allowable, but only that where pleas in abatement were proper, that several of such pleas could be pleaded.

94. *Act of 1850*. By the 16th section of the Pleading Act of 1850 (Session Laws, p. 63), it was provided, that on motion of the defendant, an issue shall be made up to try whether the attachment was wrongfully sued out or not, and if found for defendant, the attachment was to be dismissed, with costs and such damages as the jury trying that issue should assess. This was the first statute allowing the grounds on which an attachment was sued out to be contested in the attachment suit.

95. *Acts of 1854 and 1857*. By the Act of 1854 (Session Laws, ch. 10, p. 88), the defendant was required to deny under oath the existence of the grounds on which the attachment was based, before he could have an issue made up to try whether the attachment was wrongfully sued out. And by the Rev. Code of 1857, art. 14, p. 377, the defendant was allowed to traverse the truth of the causes for the attachment alleged in the affidavit, by plea in abatement under oath, and the jury trying the issue "whether the attachment was wrongfully sued out," if they found for defendant, were also to assess the damages the defendant had sustained thereby, and the suit was to be dismissed, with costs, and judgment rendered for the damages so assessed.

95a. *What traverse should be*. A traverse of the grounds upon which an attachment is sued out, should be a simple traverse of the cause for the attachment as stated in the affidavit. A plea setting up the traverse is not

demurrable for objections to the notice of the special matter appended to it. *Ross v. Fowler*, 42 M. 293.

96. *Plea in abatement: Where defendant was removing: Instance*. Where the affidavit charged, as the ground for the attachment, that the debtor "is removing from the State, so that the ordinary process of law cannot be served on him," and issue by plea in abatement was taken thereon; it was held, that the plaintiff would fail, if it were shown that, at the time the writ was issued and levied on the defendant's property, the debtor himself was openly in this State, and that process could have been served on him, notwithstanding the debtor was about removing from the State; *Funk v. McCullough*, 2 C. 481.

97. *Same: Where debtor has concealed his effects*. Proof that the debtor had advertised in a public newspaper, that he had sold out his property preparatory to removing from the State, and notifying his debtors to come forward and pay, is sufficient to sustain an attachment against him on the ground that he had concealed his effects, so that plaintiff's claim could not be made by the ordinary course of law; *Groves v. Bailey*, 2 C. 588.

98. *Same: Where fraud is charged: Evidence*. An attachment was sued out on the ground that the defendant was about to dispose of his property, with intent to defraud his creditors, upon which he took issue; and on the trial the defendant offered in evidence a deed from a third party to his wife, conveying to her, as her separate estate, the property he was charged with being about to sell; *Held*, that the deed was competent, although it was shown that he had paid the purchase money for the property. 1st. Because it tended to show that the property he was about to dispose of was his wife's separate estate, and not his, as charged in the affidavit for the attachment, and if the jury believed that the deed to the wife was *bona fide* and not fraudulent, it was directly relevant to the issue. 2d. Because it was competent, as tending to show that the defendant was not then attempting to dispose of his property with intent to defraud his creditors, inasmuch as the property was already conveyed to the wife, and that was to some extent an impediment to its being subjected to his debts, and, therefore, that the intent to place it beyond the reach of his creditors, was not the motive for his then attempting to sell it; *Barney v. Scherling*, 40 M. 320.

99. *Same: Question for jury in such case*. On the trial of the issue made by the traverse of the grounds on which the attachment was sued out, the question is *not* whether the plaintiff has probable cause for suing out the attachment, but whether it was in fact wrongfully sued out; *Barney v. Scherling*, *supra*. Nor is the question whether the facts stated in the affidavit for the attachment be true or not, but whether, as above, the attachment was wrongfully sued out; and hence, though the facts stated in the affidavit be false, yet if the plaintiff was led to believe

that they were true, by the conduct and declarations of the defendant, the attachment should be sustained, the defendant being estopped to avail himself of his own wrong, in making false statements to the plaintiff; *Coke v. Kuykendall*, 41 M. 65.

100. *When debtor removes part of his property.* Where a debtor resident in this State has in his open possession, property of a permanent character, subject to execution, and which he does not intend to remove, and of value sufficient to pay all his debts in this State, he is not liable to be attached upon the ground that he has removed, or is about to remove the greater part of his property to another State; *Montague v. Gaddis*, 8 G. 453.

101. *Damages. Practice.* If on the trial of an issue on the plea in abatement the verdict be for defendant, the jury may assess damages to defendant for the wrongful suing out the attachment; *Barney v. Scherling*, 40 M. 320.

101a. *Measure of damages.*

See DAMAGES, 30.

102. *Verdict on plea in abatement: Instance.* An attachment was taken out on the ground "that the defendant had concealed his effects, so that plaintiff's claim could not be made by ordinary process of law." The defendant's plea denied this, and plaintiff replied, "that at the time of the suing out the attachment, the defendant had concealed his effects, so that plaintiff's claim could not be made by the ordinary process of law." On this issue the verdict was that the defendant "was not concealing his effects at the time of suing out the attachment, so that the claim of plaintiff would be defeated, and that there was not good cause to sue out the attachment;" *Held*, that the verdict was not responsive to the issue, as it negatived a concealing taking place when the attachment was sued out, and the issue was upon a concealment already accomplished before that period; *Groves v. Bailey*, 2 C. 588.

103. *Same.* On the trial of an issue made by a plea in abatement, traversing the grounds on which the attachment was sued out, the verdict was, "We the jury find for the defendant, and assess his damages at the sum of \$1400;" *Held*, that it was informal and unsatisfactory, and left it doubtful whether the jury understood the issue they were to try; *Coke v. Kuykendall*, 41 M. 65.

104. *Plea in abatement denying non-residence.* In *James v. Dowell*, 7 S. & M. 333, it was held that a plea in abatement, to an attachment taken out on the ground that the defendant was a non-resident, which denied the non-residence, and averred citizenship in this State, was bad, for not further averring that he was a citizen of the county in which the attachment was brought. But this case is overruled by *Smith v. Herring*, 10 S. & M. 518; see *ante*, 93; and this certainly is not the rule under the Rev. Code of 1857; where simple non-residence, without reference to whether process can be

served on the defendant, is a sufficient ground for an attachment.

105. *Pendency of another attachment.* The pendency of another attachment between the same parties, on the same cause of action, is good grounds for abating the last attachment; *James v. Dowell*, 7 S. & M. 333.

See ACTION, 34, 35.

But whether the statute forbidding the renewal of a dismissed suit to the term next after the dismissal, prohibits the plaintiff from dismissing an ordinary suit, and commencing a new action by attachment. *Quære?* *Wharton v. Conger*, 9 S. & M. 510. Now this question is immaterial as ancillary attachments are allowed.

XIV. Trial of the right to property attached.

See TRIAL OF THE RIGHT OF PROPERTY.

106. *Trial only after judgment against defendant.* There can be no trial of the right to property levied on under attachment, and claimed by a third party, nor judgment against a garnishee until after judgment against the defendant in attachment; *Mandel v. McClure*, 14 S. & M. 11; S. P., *Berry v. Anderson*, 2 H. 649; *Whitehead v. Henderson*, 4 S. & M. 704; *Ford v. Hurd*, Ib. 683; *Maury v. Roberts*, 5 C. 225.

But under the provisions of the Rev. Code, p. 381, art. 38, it is held that such trial is entirely collateral to the attachment suit, and may be had before judgment rendered in that suit against the defendant, and that if on such trial the property is adjudged liable, it will return to the officer levying the attachment, or its value be paid to him, and the property kept in the custody of the law until the determination of the attachment suit, and if judgment be rendered in that suit for plaintiff, it will go to him, and if not, be returned to defendant; *Melius v. Houston*, 41 M. 59.

See 90, for instance, of a bond given by a stranger who was a claimant, and which was adjudged bad.

107. *Burden of proof.* And in such a trial the burden of proof, as in similar trials of the right to property levied on under execution, is on the plaintiff, who must show (under the Act of 1822), a right first as against the defendant in the attachment, and second that the property levied on is subject to that right; *Mandel v. McClure*, *supra*.

XV. The sale.

108. *Office of.* A sale of attached property is not for the purpose of divesting the title of defendant, but to ascertain its value; the title is transferred by the levy of the attachment; *Oldham v. Ledbetter*, 1 H. 43.

109. *Bond necessary.* The statute requiring the plaintiff to give a bond of indemnity to the defendant after execution issued, and before a sale of the attached property, applies in all cases as well to payments by garnishees as to sales of chattels and land, and unless it be given, satisfaction by a garnishee

of a judgment against him, is in his own wrong (and a sale would be void); *Oldham v. Ledbetter*, 1 H. 43; *Berry v. Anderson*, 2 H. 649. But the bond is not required to be given until after the execution is awarded; *Berry v. Anderson*, *supra*. But by statute now, the bond is required only where the judgment is rendered by default against non-resident or absent defendants, on publication of notice merely; it is, however, to be given and approved by the court "before any sale be made, or execution issued against a garnishee," and the bond is to be filed with the papers in the case, "and any sale made without such bond being given shall be utterly void;" Rev. Code of 1857, p. 379, art. 23.

110. *Sale under erroneous execution*. When there has been no appearance or service of process, but only notice by publication, the judgment should be *in rem*, condemning the property attached, and the execution should follow the judgment; if, however, the judgment be proper, and the execution be general against the defendant's property, a sale under it of the property attached will be good, the purchaser having no notice of the irregularity; *Swayze v. McCrossin*, 13 S. & M. 317.

111. *Effect of sale: Impeachment of it*. The rights of a purchaser at a sale made by the sheriff under an execution on a judgment in attachment, cannot be affected by any invalidity in the contract upon which the judgment is founded; *Saffarans v. Terry*, 12 S. & M. 690.

XVI. Quashal of Attachments.

112. *Presumption in favor of action of court*. If an attachment, regular on its face, be quashed by the Circuit Court, it will be presumed rightly done, unless the grounds on which the court acted be set out on the record and show the contrary; *Cobb v. O'Neal*, 1 H. 581.

113. *Mistake in writ*. If the bond be for double the amount of the debt, as stated in the affidavit, it will be no ground for quashing the attachment that the writ states the debt to be larger, as the recital in the affidavit must prevail; *Lawrence v. Featherstone*, 10 S. & M. 345.

114. *When writ executed by improper officer*. If a constable, in a case where he has no authority (as in case of a non-resident defendant), levy an attachment writ, and take from the defendant a replevy bond, the writ and bond will be quashed; but this is no ground for quashing the attachment; *Lawrence v. Featherstone*, *supra*.

115. *On plea in abatement*. If the issue on the defendant's plea traversing the grounds on which the attachment is based, be found for defendant, the attachment will be quashed, even though the defendant had previously replevied the property attached; *Montague v. Gaddis*, 8 G. 453.

XVII. Garnishment.

As to garnishment generally, see that title.

116. *Garnishee's duty*. The garnishee is a trustee for his debtor, and it is his duty to see that the attachment proceedings are regular, for if they are not, a judgment against him will be no protection; *Ford v. Hurd*, 4 S. & M. 683.

116a. *Judgment against validity of*. An attachment issued without bond and affidavit is void, and a judgment in such a case against the garnishee in his answer is erroneous and will be set aside; *Ford v. Woodward*, 2 S. & M. 260.

117. *Same: Form of*. An attachment was issued for \$70, and B. summoned as garnishee, who acknowledged an indebtedness to the amount of \$98, and on this answer the judgment was, "ordered that judgment final by default be entered against B. for the amount of his answer, or so much thereof as will satisfy plaintiff's debt and costs;" *Held*, to be irregular for want of certainty; *Berry v. Anderson*, 2 H. 649.

118. *When maintainable*. An attachment is maintainable against the rights and credits of the debtor attached in the hands of a garnishee, though there be no levy on real or personal property; *Bryan v. Lashly*, 13 S. & M. 284.

119. *Return of service*. A return on the attachment, "Garnished M. in presence of L., March 2d, 1849," is equivalent to a return that M. had been summoned to answer as garnishee, and sufficient to uphold the attachment; *Id*. The rule under the Rev. Code of 1857 is different. See *ante*, 55, *et seq*.

120. No judgment against garnishee till judgment against defendant. As to this see *ante*, 106.

121. *Garnishment of bank debtor*. As to effect of foreign attachments and garnishment thereunder, on right of a debtor of a bank, to set off the notes of the bank, see *Ser-off* 36, and *Riggs v. Dyche*, 2 S. & M. 606.

XVIII. Construction of Attachment Law.

122. *Confined to cases in the act*. The statutes in relation to attachments confer extraordinary remedies, and are to be confined to cases embraced in their express terms; and hence a non-resident, though he may take out an attachment against his absconding debtor, cannot sue out one against a non-resident, as the statute providing the remedy against non-residents gives it only to resident creditors; *Hosey v. Ferriere*, 1 S. & M. 663. But under the Rev. Code of 1857, non-residents may attach non-residents.

123. *Same*. And being an extraordinary remedy, and designed to be applied only in cases of emergency specified in the statute, every requisite of the statute must be complied with, or the proceeding will be irregular and void. Hence under the statute H. C. § 13, p. 803, allowing an attachment before a justice of the peace, when the debt is within his jurisdiction, in cases where the debtor is about to remove, or has removed from the county where the debt was contracted, the affidavit for the attachment must state not only that the debtor has removed, or is about

to remove from the county, but must state that the county is the one where the debt was contracted; a removal from any other county will not authorize an attachment; *Hopkins v. Grissom*, 4 C. 143.

124. *Must be construed liberally.* By express provision of the statutes on attachments, they are to be construed liberally for the benefit of creditors, the suppression of fraud, and the advancement of justice; *Houston v. Belcher*, 12 S. & M. 514; *Dandridge v. Stevens*, 12 S. & M. 723; *Wheeler v. Stevens*, 13 S. & M. 623; *Bank of Augusta v. Courcy*, 6 C. 667.

XIX. Attachment against water-craft.

125. *Affidavit for.* The affidavit for an attachment against a steamboat or other water-craft, need not state that the master, owner, &c., is indebted to the plaintiff; it is sufficient if it state that the boat is indebted; *Steamer Genl. Worth v. Hopkins*, 1 G. 703.

126. *Same.* And such affidavit will not be bad because it states the indebtedness of the boat to be "for and on account of the owners;" *Edwards v. The Blacksmith*, 4 G. 190; *Auter v. The Jacobs*, 5 G. 269.

127. *Statute for, remedial.* The statute authorizing attachments against water-craft is remedial, and should receive a liberal construction to advance the remedy given by it; *Auter v. The Jacobs*, *supra*.

128. *Statute, how construed.* The act in relation to attachments against water-craft and the general attachment law, are in *pari materia* and must be construed together; *Wallace v. Seales*, 7 G. 53.

129. *May be served by a constable.* An attachment against a steamboat for a greater sum than fifty dollars, may be served by a constable; *Ib.*

129a. *Affidavit for.* Under the Act of 1840 (H. C. 290, art. 8), allowing attachments against steamboats and other water-craft, against whom the plaintiff has a right of action, an affidavit by the plaintiff, that "the steamer Buckeye, now lying in the navigable waters of Mississippi, is indebted to him in the sum of \$139. for and on account of said steamboat, is sufficient; *Lum v. Steamboat Buckeye*, 2 C. 564.

129b. *Attachment lies for damages ex delicto.* Under that act, attachments against water-craft are granted, both when the right of action arises *ex delicto* and *ex contractu*; *Ib.*

XX. Miscellaneous.

130. *Court of law has jurisdiction.* A court of law has jurisdiction of an attachment when the plaintiff is a resident and the defendant a non-resident, and in such case equity has none; *Echols v. Hammond*, 1 G. 177.

131. *Action for damages.* A joint action against the principal and sureties on an attachment bond, taken under the Act of 1822. (H. C. 804), cannot be maintained until the liability of the principal has been first fixed

in a separate action against him; *Holcomb v. Foxworth*, 5 G. 265. The rule is otherwise under the Rev. Code of 1857.

132. *Two attachments cannot be tried together.* Two attachments by the same plaintiff, against the same defendant, cannot be tried together, without an order of consolidation; *Buckhalter v. Miss. & Tenn. Railroad Co.*, 3 G. 119.

133. *Jeofails: Where attachment is for unliquidated damages.* After final judgment in an attachment case, it cannot be objected that the sale thereunder was invalid, on the ground that the attachment was partly for unliquidated damages, and the declaration was in trover; *Redus v. Wofford*, 4 S. & M. 579.

134. *Taking new bond to make surety a witness.* It is a common practice, when the plaintiff in an attachment desires to examine one of his sureties on the attachment bond, as a witness, for the court to allow him to give new bond and security, and to discharge the old one; *House v. Bierne*, 5 S. & M. 622.

135. *Variance.* The affidavit recited that Ullman & Houseman were the debtors, and the bond described them as Ullman & H. Houseman, and they were declared against as Henry Ullman & William H. Houseman; *Held*, that the variance was immaterial; *Com'l Bk of Manchester v. Ullman*, 10 S. & M. 411.

136. *Same.* It is an immaterial variance between the affidavit and the writ, that in the one the plaintiffs are described as A., B., and C., trustees of a named town, and in the other as A. and B., surviving trustees of the town; *Clanton v. Laird*, 12 S. & M. 568.

137. *Attachment before a justice of the Peace.* Under the Rev. Code of 1857, an attachment returnable before a justice of the peace, cannot be levied on land; *Plummer v. West*, 41 M. 69. See *ante*, 106.

138. *Justice of the peace: Power.* A justice of the peace before whom an attachment is pending, has no power to order the property levied on to be delivered to the plaintiff, and such order is no defence to an action of trover by defendant to recover its value; *Welsh v. Jamison*, 1 H. 160.

139. *Presumption of power of bank to make bond.* On a motion to quash an attachment sued out by a bank, it is incompetent for the defendant to show that the bank had no power to execute a bond under its charter, it will be presumed it had such power as an incident to its right to sue; *Bank of Augusta v. Conrey*, 6 C. 667.

140. *Death of plaintiff.* By the Rev. Code, p. 382, art. 39, the death of the plaintiff does not abate the attachment suit, but the same may proceed to judgment and execution, and sale, as if the death had not taken place; *Melius v. Houston*, 41 M. 59.

141. *Ancillary attachment.* An ancillary attachment, taken out in aid of a pending suit *in personam*, becomes a part of the record of the last named suit, and an appearance and traverse of the affidavit on which

the attachment is founded, will be an appearance to the original suit. But if no writ were issued in the ancillary proceeding, the attachment will be void, and an appearance and traverse of the affidavit will be no appearance to the original suit, and will not, therefore, cure any defect in the service of the original summons; *Sawyer v. Smith*, 41 M. 554.

142. *Amendment of declaration: Attachment by equitable assignee.* When an attachment is sued out by the equitable owner of a chose in action, the affidavit may state an indebtedness to him, for he is a creditor, and the bond may be given by him; but the declaration should be in the name of the legal owner for his use, and if it be not brought in that way, it may be amended, so as to make the holder of the legal title the nominal plaintiff; *Tully v. Herrin*, 44 M. 626.

143. *Alias writs: Ancillary attachment: New attachment.* In 1860 an attachment was sued out against the defendant, on the ground that she was about removing her property from the State, and it was levied on her slaves. In 1868, the attachment being still pending, the plaintiff made a new affidavit, stating the original, and stating also, that since then the defendant had become a non-resident, and prayed for an *alias writ*, which was issued and levied on land. Publication was made after this, but no notice was mailed, and judgment by default entered: *Held*, 1. That if this were regarded as an ancillary attachment under art 13, p. 377 of the Rev. Code of 1857, it was void for want of a bond. 2. That an *alias* attachment can only issue, 1st. When the original has not been executed; 2d. When no property has been found; 3d. When the property seized was insufficient. 4th. When plaintiff desires to garnishee other persons. And that in this case the plaintiff did not proceed on any of these grounds; but for a different cause, viz., the non-residence of the defendant, and had taken judgment on the *alias*, and not on the original attachment, and for this cause the judgment was erroneous. And regarding it as an original, it was bad for want of a bond; *Jeffries v. Dancey*, 44 M. 693.

144. *County Court.* This court has jurisdiction of attachments to the amount of \$250 on debts created after the court was organized, and for causes stated in the general attachment law; *Wragg v. Kelly*, 42 M. 231.

145. *Same: Attachment for removing from the county.* The County Court has jurisdiction of an attachment against a defendant removing from the county, when the debt was created after the court was organized; but not for debts created before, nor where the debt exceeds \$250, and its jurisdiction in such cases is exclusive; *Wragg v. Kelly*, *supra*.

In no other case, and in no other court will an attachment lie, because the defendant has removed from the county in which the debt was contracted; *Meek v. Fox*, 42 M. 513.

Attorney at Law.

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I. Statutes.

1. *Who admitted, and how.* Any citizen of the United States may be admitted to practice law, upon being found qualified on examination in open court, in the High Court or Circuit Court, and proof of good moral character, or upon receiving a diploma as Bachelor of Laws from the State University; and he is required to take in each court where he intends to practice, the following oath: "I solemnly swear (or affirm), that I will demean myself as an attorney and counsellor of this court according to the best of my learning and ability, and with all good fidelity to the court as well as to the client; that I will use no falsehood, nor delay any person's cause for lucre or malice, and that I will support the constitution of the State of Mississippi so long as I continue a citizen thereof, so help me God." And the names of those admitted are required to be entered on a roll or book to be kept in each court for that purpose; *Rev. Code of 1857*, p. 151, arts. 1, 2.

2. *Penalty for practising without license.* Persons practising as attorneys, without getting license and taking the oath, are liable to a penalty of \$200 for each case,—recoverable in a *qui tam* action,—one-half to the informer and the other to the State.

3. *Certain officers prohibited from practising.* Judges of the Circuit and High Courts, sheriffs, coroners, clerks of Courts of Record, are prohibited from practising as attorneys and from preparing papers in any case, under a penalty of \$200; *Ib.* art. 4.

4. *Attorneys of other States.* Attorneys residing in coterminous States are allowed to practice in the courts of this State generally, without taking the oath to support the constitution of the State; and attorneys of any State, in good standing, may appear and plead in any special cause; *Ib.* art. 6.

5. *Striking from the roll.* Any attorney "found in default of record," or being "otherwise guilty of any deceit, malpractice, or misdemeanor, shall be put out of the roll, and his license revoked, by any court in which he may practice, and shall never afterwards be received to act as an attorney and counsellor in any court of this State; *Ib.* art. 7.

6. *Allowed to examine papers and records.* Attorneys are allowed to examine and inspect papers and records in which they are interested as such, and take the papers from the office under such regulations as the court shall prescribe.

7. *Motion against.* Every attorney receiving money for his client and failing to pay it over, when demanded, may be proceeded against summarily by motion in the Circuit

Court of the county where he resides, in the same manner as sheriffs are proceeded against on failing to pay over money collected on execution, and in addition to interest and principal, damages at ten per cent. are recoverable. And if the failure to pay over is wilful, and without reasonable excuse the attorney is to be fined and imprisoned as for a contempt of court, and stricken from the roll and his license revoked; *Ib.* art. 10.

II. What Constitutes the Relation of Attorney and Client.

8. *Employment of attorney.* The employment of an attorney at law by a third person, to assert his claim to property levied on under an attachment, is not an employment to defend the attachment suit; the two cases are entirely distinct; *Whitehead v. Ducker*, 11 S. & M. 98.

9. *What is an employment: Case in judgment.* The complainant Carson, applied for a new trial upon the ground that there was no service of process on him, and that the appearance entered for him by an attorney was done without his authority: and the case was, that suit was brought against *Carson & Griffin* as partners, and process was served on the latter, who employed an attorney to defend the suit: soon afterwards he informed the complainant Carson, who lived in Kentucky, of the institution of the suit, and Carson assisted Griffin in taking depositions in the suit, and paid part of the expenses. and before the trial Carson wrote to the attorney who had been employed, and in the letter referred to the suit in these words: "The other business we wrote you about, we have not heard from, that is, the suit of *Keirn v. Carson & Griffin*, that Griffin employed you in." The attorney testified that when Griffin employed him, he understood he was employed to defend both, and that he did defend both: *Held*, that the proof showed the attorney was properly authorized to appear for both Carson and Griffin; *Keirn v. Carson*, 12 S. & M. 431 See *post*, 29, 54.

10. *Proof of employment: Case in judgment.* An attorney was sued for negligence in not defending a suit. The clerk of the court in which the suit was brought, which it was alleged he was employed to defend, testified that the attorney's name was marked in the case for the defence in his, the clerk's hand writing, and that he never so marked the names of counsel without authority: *Held*, that this was very questionable proof of the employment of the attorney; *Grayson v. Wilkinson*, 5 S. & M. 268.

11. *Who is a client.* A client is one who applies to a lawyer for advice and direction on a question of law, or commits his cause to the management of a lawyer, either to prosecute a claim or defend a suit in a court of justice. The employment of an attorney to do an act, not within this definition, does not constitute the relationship of attorney and client. Hence, where an attorney had been employed by the plaintiff, and recovered a judgment for him, under which the property

of defendant was levied on and sold, and the defendant in the execution asked the attorney to receive from the sheriff the surplus remaining of the proceeds of the sale, after satisfying the judgment, this does not constitute, the defendant in the judgment, the client of the attorney as to that surplus; *McCreary v. Hoopes*, 3 C. 428.

12. *Same.* An administrator placed a note belonging to the estate, in the hands of an attorney for collection, and after the attorney collected it, the administrator was removed, and an administrator *de bonis non* appointed: *Held*, that the latter was not as to the money collected by the attorney, his client, and was not therefore entitled to proceed against the attorney, by motion, for a refusal to pay over the money; *Sloan v. Johnson*, 14 S. & M. 47.

13. *When the relation ceases.* The relation of attorney and client ceases on the dismissal of the suit to defend which the relation was created, and he has no longer any power to bind his client; *Dennis v. McLauren*, 2 G. 606. Still on the dismissal of a bill of interpleader, the complainant's solicitor has the right to demand and receive from the clerk the fund in litigation, which was deposited with him; *Hillar v. Ivy*, 8 G. 431.

III. Duties of Attorneys, and responsibility for Neglect of.

14. *Can't assume inconsistent duties.* It is the duty of an attorney intrusted with the collection of a debt, to enforce such collection if it can be done by legal means. On the other hand, it is the duty of an administrator to resist by all legal means the collection of a claim asserted against his intestate. The two characters therefore impose inconsistent obligations with reference to the same claim, and hence a contract by which an attorney takes a claim against an intestate, for collection, and to that end agrees to administer on the estate, is void as against public policy, and no action can be maintained against him on such contract for his failure to collect the debt; *Spink v. Davis*, 3 G. 122.

15. *Should sue on claim at first term.* It is the duty of an attorney to bring suit on a claim left with him for collection, to the first term of the court, after he receives it, and if he fail to do so, and the debt is thereby lost by the subsequent insolvency of the debtor, he will be responsible for it, for this is gross negligence; *Fitch v. Scott*, 3 H. 314. To hold him responsible, however, for not collecting a note, it is necessary to show that the makers of the note were able to pay all or some part of it, and the failure to collect resulted from gross negligence on the part of the attorney; *Hoover v. Shackelford*, 1 C. 520.

16. *Where one of several joint debtors are not sued.* If a claim be placed in the hands of an attorney for suit, against all of several joint debtors, and he neglect to sue one, he will not be liable for his neglect if it appear that he recovered judgment against one who was solvent, and he was prevented from making the money on the judgment by the act of his client; *Ransom v. Colthran*, 6 S. & M. 167.

17. *Negligence in defending suit.* If an attorney accept a retainer to defend a suit, and fail entirely to do so, he will be liable to his client to the extent of the damages actually sustained by reason of the failure; but if the attorney can show that the defence he was employed to make was not a good one in law, he would be liable at most, only for nominal damages; *Grayson v. Wilkinson*, 5 S. & M. 268. In such case it is necessary, in order to hold the attorney responsible, to show that the client communicated his defence to the attorney; *Ib.*

18. *Must protect client's interest and act bona fide.* An attorney having recovered a judgment for his client, the debtor offered to dismiss an action then pending in the name of his wife, to recover possession of a house claimed by the attorney, in satisfaction of the judgment. The debtor was insolvent, and was so represented by the attorney to his client, and he also urged the client to accept \$100 in full of the judgment, alleging that the debtor had offered that sum in full of the judgment, which was for a much larger sum, but concealing from the client all negotiations about the ejectment suit. The client accepted the \$100, which the attorney paid, and satisfaction of the judgment being entered by the attorney, the ejectment suit was dismissed: *Held*, in a suit by the client to recover the house, that the attorney's conduct was fraudulent, and that it was no defence to the suit to show that the judgment debtor was insolvent, or that the claim of his wife to the house could not be maintained, and that the client was entitled to the house, unless the attorney would elect to pay the client the full value of the judgment—which he had the right to do, as that would compensate the client for all damages he had sustained; *Hooper v. Burnett*, 4 C. 428; S. P., *Murphy v. Sloan*, 2 C. 658.

IV. Powers, and Responsibility for Executing them.

19. *Power to submit client's rights to arbitration.* The general doctrine is, that an attorney who is employed in a suit, may submit the matter in dispute to arbitration, because he may do anything, by the implied assent of his client, arising from his employment in the suit, which the court may approve in the progress of the cause. But, in order for him to have this implied authority, there must be a suit pending which the attorney is employed to manage. He has no such implied power where there is no suit pending, much less to change the terms of a submission agreed to by his client. Hence, if the client agree to submit to the arbitration of seven men, and the attorney agree with the other party, that five shall decide the matter, the award of the five will not be binding on the client; *Jenkins v. Gillespie*, 10 S. & M. 31.

20. *Has no power to release a levy on personality.* The general authority of an attorney at law—as such—does not embrace in it the power of releasing a levy made on personality, under a judgment recovered by him

for his client. And it seems, therefore, if the attorney make such release of the levy, that will be no satisfaction of the execution, and no postponement of the lien of the judgment in favor of a junior judgment against the same debtor; *Banks v. Evans*, 10 S. & M. 35. See *post*, 21.

21. *Has no power to grant indulgence to principal which will release the surety.* An attorney, as such, and in virtue of his authority arising from his employment to collect a debt, has no power to grant indulgence to the principal so as to discharge the surety; *Union Bk of Tennessee v. Goran*, 10 S. & M. 333; S. P., *Clarke v. Kingsland*, 1 S. & M. 248; *Dunn v. Newman*, 7 H. 582; *Garvin v. Lowry*, 7 S. & M. 24.

22. *Has no power to destroy lien of judgment by staying execution.* Nor has an attorney power, without special authority for that purpose, to destroy the lien of his client's judgment by staying the execution; *Reynolds v. Ingersoll*, 11 S. & M. 249 (citing *Dunn v. Newman*, *Clark v. Kingsland*, *Garvin v. Lowry*, *supra*, and *Keller v. Scott*, 2 S. & M. 81). And hence, if the sheriff return on an execution, "stayed by plaintiff's attorney," it will be construed to mean his attorney of record, and no more, and he who maintains the authority to grant the stay must show it specially and affirmatively; and it is not a contradiction, but confirmatory of the return for plaintiff to show that the stay was without authority, since such is in law its effect; *Doe ex dem. Reynolds v. Ingersoll*, *supra*.

23. *Has power to enter a remittitur.* An attorney has power to enter a remittitur on a judgment recovered by him for his client; *Packet v. Ford*, 4 H. 246.

24. *Has no power to assign client's judgment.* An attorney has no power as such, to assign a judgment which he has recovered for his client, to a party, who, at the request of the defendant, has paid the amount thereof to the attorney; and in such case, to make the transaction an assignment, and not a payment, there must be the express consent of the debtor; *Head v. Gervais*, W. 431.

25. *Has no power to compound client's debt.* Nor has he power to compound a claim placed in his hands for collection; nor to receive in satisfaction of it a debt on another party; and if he do so, he will be liable for the loss occasioned thereby; *Fitch v. Scott*, 3 H. 314.

26. *Has no power to receive anything in payment but lawful currency.* It is well settled, that an attorney, without special authority given for that purpose by his client, has no power to receive anything in payment of his client's debt, but legal currency; *Garvin v. Lowry*, 7 S. & M. 24 (citing *Scott v. Keller*, 2 S. & M. 81; *Wenans v. Lindsay*, 1 H. 577; *Gasquet v. Warren*, 2 S. & M. 514). And it is said *arguendo*, in this last case, that he has no power to receive anything but gold and silver in payment. And his statement at the time he receives claims on other persons in satisfaction of his client's debt, that he had authority to do so, is no

evidence that he has such authority; *Garvin v. Loory, supra*. Thus, his own unexecuted agreement to credit on his client's claim, a debt which the attorney owes to the client's debtor, is void, and not binding on the client; *Wenans v. Lindsay, supra*. And so, if he actually execute such agreement, by satisfying the client's judgment, the satisfaction is void, and the client may still collect it; *Keller v. Scott*, 2 S. & M. 81. And so, if he receive in payment of the client's debt, a claim or judgment on another person, it is no payment, and the client may disregard it; *Clark v. Kingsland*, 1 S. & M. 248; and he will also be liable for the debt; *Fitch v. Scott*, 3 H. 314; *Mangum v. Ball*, 43 M. 288. And if he dismiss his client's suit and take claims on third persons in payment, he will be liable for the debt as for so much money collected, unless he can show, that if he had prosecuted the suit and obtained judgment at the regular time, it would have been unavailing and useless; *Corpuwood v. Baldwin*, 3 C. 129. And it is incompetent to prove the authority of the attorney to accept other debts in payment of his client's claim, by showing a custom among attorneys to take complete control over claims in their hands belonging to non-resident clients; *Clark v. Kingsland, supra*.

27. *Same: When he collects depreciated bank notes.* Whatever may be the rule as between attorney and client, as to the former's responsibility when he has collected a debt in depreciated bank notes, it is settled that, when the client has drawn an order on the attorney payable out of funds to be collected by him, and the attorney accept the order, he cannot tender in discharge of the order depreciated bank paper collected by him—lawful funds alone are a discharge. But it must be noted, that the judgment in this case against the attorney which was affirmed by the court, was only for the value of the depreciated funds when tendered; *Van Vacter v. Brewster*, 1 S. & M. 400. The acceptor of such an order is liable only in the event of collection, and the declaration must aver collection; *Ib.*

28. *His authority over money collected by the sheriff on judgment.* An attorney who has recovered a judgment, has authority to receive it from the sheriff, and the latter will be justified in paying it to him, unless notified by the plaintiff not to pay it to the attorney. And the mere expression of a wish to the sheriff by the plaintiff, that the attorney should not get the money, is not sufficient notice to the sheriff to invalidate his payment subsequently made to the attorney; *Butler v. Jones*, 7 H. 587; *S. P. Hillar v. Ivy*, 8 G. 431. But the attorney has no other right or authority over the money collected on such judgment, than as a mere agent, after his fees are paid; the money belongs to the plaintiff, and the sheriff is bound to pay it to him, notwithstanding he may be forbidden to do so by the attorney; *Dunn v. Newman*, 7 H. 582.

29. *His power to enter an appearance.* The authority of an attorney at law to enter the

appearance of a party defendant, not served with process, cannot be denied after judgment; but if he acted without authority, he will be responsible in damages; *Jones v. Hunter*, 4 H. 342; *Miller v. Ewing*, 8 S. & M. 421. But if the attorney were insolvent, and not responsible in damages, would equity give relief in case he acted without authority? *Miller v. Ewing, supra*. See *ante*, 9, and *post*, 54.

30. *Party bound by judgment recovered in suit brought in his name by an attorney.* If a motion be made in the plaintiff's name by an attorney, for the recovery of money collected by the sheriff on execution, and a judgment recovered thereon, though without the knowledge or consent of the plaintiff, the judgment so recovered will be considered as evidence against the plaintiff, in the same manner and to the same extent, as if recovered by his authority—even to the extent of being considered as a circumstance to show the plaintiff's acquiescence in the illegal act of the sheriff in taking uncurrent funds in satisfaction of the execution; *Bright v. Ross*, 11 S. & M. 289.

V. Remedies Against.

31. *By motion.* The remedy by motion against an attorney is summary, and is confined to cases and to parties expressly enumerated in the statute, viz., his failure to pay over money collected, and in favor of his client. The statute is highly penal, and must be strictly construed; *Lombard v. Whiting*, W. 229; *Banks v. Cage*, 1 H. 293; *Sloan v. Johnson*, 14 S. & M. 47. Hence, a motion is not the proper remedy to recover what was lost, when the attorney has compounded a claim without authority for less than was due; *Lombard v. Whiting, supra*; and is not the proper remedy, where he has received claims on other persons in satisfaction of client's debt,—that being no collection of money; *Banks v. Cage, supra*. Nor does it lie in favor of an administrator *de bonis non*, to recover money collected by an attorney for the administrator in chief, before his removal, as none but clients can avail themselves of this extraordinary and highly penal remedy; *Sloan v. Johnson, supra*. Nor in any case where the owner of the money is not the attorney's client; *McCreary v. Hoopes*, 3 C. 428.

32. *Same: Defence of attorney.* It is no defence to a motion against an attorney for a refusal to pay over money collected by him, that he has been notified by others, claiming the fund, not to do so; and such notice will not excuse him from the statutory damages. The claimants should have sued out an injunction; *Dunn v. Vannerson*, 7 H. 579.

33. *Same: Set-off by attorney.* In this case, being a motion against an attorney for a failure to pay over money collected by him, the attorney's right of set-off was recognized only to the extent of his lien on the fund in his hands, which was held to extend only to the amount of his fees in that particular case; *Ib.*

34. *Action against: Disputed right to money collected.* An attorney recovered a judgment in the name of his client, and received the money; but a third party claimed it, and the attorney suspecting his client of fraud in getting possession of the claim sued on, notified him to come forward and show his title to the fund, which the client failed to do, and thereupon the attorney, believing the other party entitled, paid the money to him. Afterwards, being sued by his client for the money, he filed a bill of interpleader against the client and the party to whom he had made payment, but did not bring the money into court. After this he brought the money into court, it having been refunded by the party receiving it, and he then prayed that the parties might proceed by regular interpleader, which the chancellor refused. On final hearing of the bill, the chancellor gave the money to the client, and enjoined him from further proceedings at law, except for costs, and the attorney appealed: *Held*, that having undertaken in the first instance to decide the question of title to the money, he took the risk of deciding it right, and having decided wrong, he was liable for costs; *Topp v. Pollard*, 2 C. 682.

35. *Decision on motion: No bar to action.* A decision on a motion against an attorney, in his favor, in a case where a motion is not the proper remedy, is no bar to a subsequent action at law on the same cause of action; *Coopwood v. Baldwin*, 3 C. 129.

VI. Attorney's lien and fees.

36. *Lien on judgment: Extent of.* The lien of an attorney on a particular judgment extends only to the fees due in that case; *Harney v. Demoss*, 3 H. 174; *Dunn v. Vannerson*, 7 H. 582; *Pope v. Armstrong*, 3 S. & M. 214; *Cage v. Wilkinson*, *Id.* 223. And in these last cases it was said, perhaps, he has a lien on papers in his hands for a general balance due for professional services. And in the last two cases the client was a bankrupt, and the money was not actually collected until after he was so declared, though the judgments were recovered before; and so it seems that the lien attaches to the judgment before the collection of the money.

37. *Same.* Whether an attorney has a lien on a fund collected under a judgment recovered by him for the payment of his fees, when the amount thereof is not fixed by special contract, or established professional usage. *Quere?* But if he has, the lien will not be noticed or considered on a motion against the sheriff for a failure to pay over the money collected on the execution; *Pugh v. Boyd*, 9 G. 326.

37a. *Attorney's lien.* In this case the court elaborately discuss the doctrine of attorney's liens, and announce the following results: That the lien attaches—1st. Upon papers and writings, including deeds, &c., in their possession. 2d. Upon money in their possession. 3d. Upon notes deposited with them for collection. 4th. Upon a fund or estate. 5th. Upon judgments, with their inci-

dents or fruits. And applying these doctrines, it was held that an attorney had no lien in the following case:—The attorney commenced proceedings, and devoted much time and labor, and expended some money in their prosecution, without express agreement as to his fees, and then after repeated and fruitless solicitations for compensation, abandoned the cause, which was afterwards successfully prosecuted by another attorney, and the fruits of it, which were lands, were sold to strangers. The attempt was to enforce the lien on the unpaid purchase money due to the strangers who had bought; *Stewart v. Flowers*, 44 M. 513.

38. *Fee in particular case: Compromise of suit.* The claimant to slaves levied on under an attachment against another, employed an attorney to assert it—stipulating to give the attorney as his fee, in case he succeeded, a bill of sale to one of the slaves without warranty of title. The case was compromised without the attorney's consent: *Held*, that the attorney was entitled to recover, as his fee, not the actual value of the slave, but only the value of his client's interest in him; and if it be shown that the client's title was fraudulent as against the creditors of the defendant in the attachment, the value of the title would be nothing, and the amount of the attorney's recovery merely nominal; *Whitehead v. Ducker*, 11 S. & M. 98.

39. *Fee not to exceed demand once made.* An attorney will not be allowed, upon proof that his charge is reasonable and customary, to recover a greater sum for professional services than he has previously demanded, if the previous demand were not in the way of a compromise; *Ingersoll v. Morse*, 4 G. 667.

40. *Statute of limitations.* As to the time when attorney's fees are due, and the commencement of the running of the statute of limitations against them.

See LIMITATION OF ACTIONS, 13; *Johnson v. Pyles*, 11 S. & M. 189, there digested.

VII. Confidential Communications.

41. *Privileged, though no retainer: Case in judgment.* Communications from clients to attorneys are privileged on grounds of public policy, with a view to the safe and pure administration of justice. The privilege is not restricted to cases where the communications were made with reference to legal proceedings, either pending or in contemplation, but it extends to all cases where they are made to an attorney with a view to procure his action in that capacity, or his advice as a lawyer, though there has been no retainer. Hence, if a party apply to an attorney to write a deed, and make to him a representation that the deed was intended to secure his property from his creditors, and the attorney thereupon decline the employment, the communication is privileged; *Crisler v. Garland*, 11 S. & M. 136.

42. *Same.* If, touching matters that come within the ordinary scope of professional employment, an attorney receive a communication either directly from his client, or indi-

rectly on his account; or if he commit to writing, in the course of his employment, on the client's behalf, matters which he knows only through his professional relation to his client, he is not only justified in withholding such matters, but bound to do so. And this protection applies to every communication which the client makes to his legal adviser, with a view to defending or enforcing his rights, and is not limited to communications in reference to proceedings at law, either pending or in contemplation; *Parkhurst v. McGraw*, 2 C. 134. Hence an attorney, who drew up a mortgage, will not be permitted to disclose the statements of his client, showing that it was fraudulent; *Ib*.

43. *Same: Duty of an attorney in respect to.* It is the duty of an attorney to protect his client by refusing to disclose confidential communications, and it was remarked by the court in this case, that the fact that the attorney appeared to have been a willing witness to make such disclosure, thus showing himself faithless to his client, was a circumstance reflecting upon his credibility as a witness; *Parkhurst v. McGraw*, *supra*.

VIII. Miscellaneous.

44. *Striking attorney from the roll.* In this case an attorney was stricken from the roll by the High Court, and forbidden thereafter to practice in any court in this State, for unprofessional conduct in obliterating a record, and antedating a writ so as to avoid the bar of the statute of limitations; *Brown, ex parte*, 1 H. 303.

45. *Same: Notice of proceeding.* A judgment striking an attorney from the roll for malpractice, entered without notice to him, either actual or constructive, is void; *Hey-son ex parte*, 7 H. 127.

46. *Competency of attorney as a witness.* Whether an attorney, who is to receive a commission on the sum collected in a particular case, is a competent witness for his client in that case. *Quære?* But if that would disqualify him, his interest must be affirmatively shown, or it will not be presumed to exist; *Arthur v. Mitchell*, 10 S. & M. 326.

47. *Same: Where interest is equally balanced.* But if his testimony is to the effect that a payment made to him (and claimed as a credit by the defendant on the debt litigated in that suit) was not to be credited on that debt, except on a condition that has not happened, and on failure of that condition, the payment was to be a satisfaction by defendant for the plaintiff, of the attorney's fee, in a former suit on same debt, which had been dismissed in consideration thereof, then his interest is equally balanced and he is a competent witness; *Ib*.

48. *Admission by attorney evidence against client.* The unsolemn and extra-judicial admission made in a private conversation by an attorney, to the effect that he had received payment of a debt in his hands for collection, is admissible in evidence against the client to show the payment; *Wenans v. Lindsey*, 1 H. 577.

49. *Motion by attorney against sheriff.* An attorney cannot maintain a motion in his own name against a sheriff, to compel him to pay over money collected for the client, in satisfaction of a general balance due by the client to the attorney, for professional services; *Harney v. Demoss*, 3 H. 174.

50. *Bank director prohibited to act as attorney.* The Legislature may constitutionally enact a law, prohibiting any director of a bank from acting as an attorney in bringing suits for the bank; *West Feliciana R. R. Co. v. Johnson*, 5 H. 273.

51. *Attorney's receipt for claim for collection.* A receipt given by an attorney to his client for a claim left with him for collection, is not negotiable at common law, or by statute. The assignee of the receipt, however, is equitable owner of the claim; *Roberts v. Bean*, 5 S. & M. 590; *Fitch v. Stamps*, 6 H. 487; *Anderson v. Miller*, 7 S. & M. 586.

52. *Remittance of money to a client.* If an attorney at law remit funds to his client by a trustworthy and reliable man, without instructions to do so, and the money be stolen, the loss will fall on the attorney; and especially is this so if he had asked instructions from the client as to the mode of remittance, and had directed the client to draw on him at sight for the amount, which the client did, and the draft was presented during the attorney's absence and protested. Whereupon, the draft being returned, the attorney made the remittance as aforesaid; *Grayson v. Wilkinson* 5 S. & M. 268.

53. *No warrant of attorney required.* An attorney is an officer of court, and no warrant of attorney is required to enable him to represent a party in court. He is generally permitted to appear by verbal retainer, and it is only in cases of a clear want of authority or abuse of privilege, that he is held incompetent to represent a party in court. He is presumed to have authority when he appears in court, yet he may be required to show his authority, and if he acts in good faith under an authority appearing to be genuine, though informal, it then devolves on the party impeaching his authority to show the want of it; *Harden v. Ho-yo-po-nubby*, 5 C. 567.

54. *Same.* In this State it is not the practice to give attorneys warrants of attorney to prosecute or defend suits. They are officers of court, and the authority to act for their clients will be presumed. Hence an appearance for a party not served with process by an attorney, will warrant the court in rendering a judgment against him, and if the attorney appear without authority, the remedy of the party is against the attorney, except that in case the attorney be insolvent, or there be fraud and collusion between him and the plaintiff, equity will grant relief; *Schirling v. Scites*, 41 M. 644; *S. P., Lester v. Watkins*, 1b. 647. See *ante*, 9, 29.

55. *When process may be served on attorney.* A *scire facias* issued to obtain execution for a sum found due to the defendant, on a plea of set-off, may be served on the attorney who managed the cause for the plain-

tiff in court, though he be not the attorney of record; *Fisher v. Battaille*, 2 G. 471.

56. *Board of Police may employ attorney.* The Board of Police may employ an attorney in all civil suits in which their county is interested; *Cocke v. Board of Police of Copiah County*, 9 G. 340.

57. *Attorney's advice no evidence.* When a party supposing he has a valid claim against another, consults his attorney on the subject, and is advised that the evidence is not sufficient to establish it, and under that impression admits to the other that he has no claim against him, but subsequently brings suit to enforce the demand, the testimony of the attorney as to the advice given, is inadmissible to explain the motives of the plaintiff's admission that he has no claim. Such disclaimer, is however, no legal bar to the action; *Gilliam v. Brown*, 43 M. 641.

Auction.

See SALES.

Audita Querela.

1. *Remedy against clerks and other officers.* The proper mode of correcting the irregularities of clerks and other officers is by motion, or writ of *audita querela*; *Hicks v. Murphy*, W. 66.

2. *All parties must join in.* All the defendants to a judgment must join in a writ of *audita querela*; if one has just ground of separation from the others, his remedy is in chancery; *Milton v. Howard*, 7 H. 103.

Authentication of Foreign Records.

See EVIDENCE, 99 to 103, 108 to 113.

Autrefois acquit and convict.

See CRIMINAL LAW, sub-division Autrefois, &c.

Bail.

See CRIMINAL, sub-division Bail.

Bailment.

See COMMON CARRIERS. RAILWAYS. INNS AND INNKEEPERS. SHIPPING.

1. *Hiring of slave: When owner may annul the contract.* When a party hires a slave, he comes under an implied obligation to treat the slave with such care and moderation as an ordinarily prudent master would use towards his own slave, and a violation of this obligation will justify the master in treating the contract of hiring as at end, and retaining the slave escaping from the hirer into his possession for protection, and especially if he have reason to believe that such bad treatment will be continued; *Trotter v. McCall*, 4 C. 410. But in such case the burden of proof of showing the ill-treatment is on the master; *Ib.*

2. *Same: Loss of slave by ill-treatment.* If the hirer of a slave so ill-treat the slave,

as to cause him to abscond, and he is thereby lost, he will be liable to the owner for his value; but if he treat him with ordinary care and humanity, and the slave abscond and is lost, the hirer will not be responsible; *Young v. Thompson*, 3 S. & M. 129.

3. *Same: Loss of slave by removing him to infected district.* If the hirer of a slave, in violation of his agreement, remove the slave to a locality where he is subject to, and contracts a mortal disease, prevalent in that locality, he is liable for his value; *Wallace v. Seales*, 7 G. 54.

4. *Same: Held liable for wages though the slave die.* The hirer of a slave for a year is liable for the whole hire stipulated, notwithstanding the slave contract a mortal disease and die during the year; *Harmon v. Fleming*, 3 C. 135.

5. *Mandate: What is.* A mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them, and the bailee is called a mandatory; *Lampley v. Scott*, 2 C. 528.

6. *Liability of mandatory for loss.* A mandatory is not liable for the loss of the goods delivered to him, except the loss occurs through his gross negligence, and when the loss has been shown, the burden of proof to show the gross negligence is on the bailor, for every man is presumed to have done his duty until the contrary is shown; *Ib.* See post, 17.

7. *Same: Action: Declarations of mandatory evidence.* And when the mandatory alleges the loss to have occurred by robbery, with no witness present, his statements made immediately after the alleged robbery, detailing the circumstances, and also a letter written by him the next day to the bailor, giving an account of the robbery, are from the necessity of the case admissible in evidence in his favor; and for the same reason he is a competent witness to prove the loss, though he is a party to the record; *Ib.*

8. *Bailee of claims for collection without hire.* When a person receives claims from the owner which he promises to collect and pay over without compensation, he is bound to use ordinary diligence to collect them; and if through his want of ordinary diligence, the claims are not collected, and are thereby lost to the owner, he will be responsible for the damages sustained; *Moore v. Gholson*, 5 G. 372.

9. *Warehouseman: Bound to ordinary diligence.* A warehouseman is only bound to exercise ordinary and reasonable diligence in the keeping and preservation of goods committed to his keeping, such as men ordinarily and reasonably exercise in their own affairs; *Cowles v. Poin'er*, 4 C. 253.

10. *Same: Construction of the warehouse.* Nor is he bound to construct his warehouse, so as to make it secure against all possible contingencies; it is sufficient, if the house be reasonably safe against ordinary occurrences; *Ib.*

11. *Same: Care in removing property threatened by high water.* Nor is he bound

at once to commence to remove the goods from a building in which high water—by extraordinary rise, which had not occurred in fourteen years—might possibly enter, as soon as the water commenced to overflow the bank of the river (on which the building is located), that being a common occurrence, and the building being raised on pillars above ordinary overflows. But it will be due diligence on his part, if he commence to provide against the overflow as soon as it becomes probable that the water will reach the building, and he then use all the means in his power to preserve the goods from damage, although it may appear that if he had commenced sooner the property would have been saved; *Ib.*

12. *Same: Case in judgment.* A warehouse was built on the banks of the Yallahusha river, and was raised on pillars higher than the water had been for fourteen years; a freshet came, and the water in the river rose in the house, and injured cotton which had been stored there for shipment. The warehouseman did not commence to remove the cotton as soon as the water overflowed the banks of the river, for this was a common occurrence during the rainy season. But as soon as it seemed probable that the water would rise in the house, he commenced to remove the cotton by all the means in his power, but failed to get it all away: *Held*, he was not liable for the loss of the cotton which he failed to remove; *Ib.*

13. *Depository: Liable only for gross negligence: Case in judgment.* A stipulation in a sale, where it is complete and executed, that the vendor will transport the property sold to a certain place, when required by the vendee, does not constitute a contract for the safe keeping of the property, there appearing to be no compensation paid for the keeping; it will constitute the vendor, at most, a mere depository; and in such case, if the property be stolen, he will be liable for the loss only when he is guilty of fraud or negligence; *McKay v. Hamblin*, 40 M. 472.

14. *Same: Liability of merchant for deposit with his clerk.* A merchant is liable for money deposited with his clerk, if it come to the merchant's use and possession, and in such case the depositor is not bound to prove positively the identity of the bank bills or coin deposited, with those coming to the merchant's use and possession; it is sufficient if the proof show this to the reasonable satisfaction of the jury; *Dougherty v. Vanderpool*, 6 G. 165.

15. *Statute of limitations.* As to effect of the statute of limitations on bailments, and the time when that relation ceases.

See LIMITATION OF ACTIONS, 42; and *Hall v. Dickey and Wife*, 3 G. 208; *Crump v. Mitchell*, 5 G. 449, digested there.

16. *Bill of lading: Change of title.* As to effect of the delivery of a bill of lading to the vessel giving it, to be carried by her to the consignee, in changing the title to the goods. See SHIPPING, 1, 2; and *Bonner v. Marsh*, 10 S. & M. 376; and PRINCIPAL AND AGENT, 94.

17. *Mandate.* A mandate is a contract by

which business is committed to another who undertakes to perform it gratuitously. The mandatory is responsible for gross neglect only; the fact that the bailor derives no benefit from the acts of the mandatory, is no evidence of gross negligence. Thus when money is intrusted to another, to be by him gratuitously invested, and he is subsequently instructed not to invest, and if the funds begin to depreciate in the agent's hands, it is not his duty to return or offer to return them, the bailor having the same facility for knowing of the depreciation as the bailee; *Richardson v. Futrell*, 42 M. 525. See *ante*, 6.

Banks.

See BANK CHECKS. CORPORATIONS. QUO WARRANTO.

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I. Bank Notes.

1. *What is: Case in judgment.* A note in these words, viz.:

Commercial Bank of Rodney.
Post Note.

\$100.

No. 40.

Rodney, Miss., 8th March, 1839.

Six months after date we promise to pay to R. W. Worthington, or bearer, one hundred dollars, at the Bank of Rodney, with 5 per cent. interest till due.

THOMAS FREELAND, Pres.

J. LAWTON, Cash'r.

is *prima facie* the individual undertaking of the signers, and without other proof, is admissible in evidence against them, in an action thereon, by the holder, to recover the amount thereof from them as individuals; *Fitch v. Lawton*, 6 H. 371.

2. *When considered as money.* The circulating notes of a bank are admissible in evidence under the money counts, in an action against the bank; *Hughes v. Grand Gulf Bank*, 2 S. & M. 115.

3. *Sheriff has no right to receive them.* A sheriff has no right to receive anything in satisfaction of an execution in his hands, but legal tender. If he receive bank notes, it is no satisfaction; *Tutt v. Fulgham*, 5 H. 621; *Gasquet v. Warren*, 2 S. & M. 514; *Wood v. Robinson*, 3 S. & M. 271; and if the return of the sheriff show that it was paid in bank notes, an *alias* execution should be ordered; *Tutt v. Fulgham*, *supra*.

4. *Post notes.* If a bank have power, by its charter, to issue its own notes, to circulate as money, and there be no restriction in

the charter requiring these notes to be payable on demand, then the bank may lawfully issue its notes payable after date, which are commonly called post notes; *Campbell v. Miss. Union Bank*, 6 H. 625.

II. Set-off in Bank Notes.

5. *Act of 22d February, 1840. H. C. 328, art. 20.* The 2d section of this act provided "that all banks in this State shall, at all times, receive their respective notes at par, in liquidation of their bills receivable, and other moneys due them."

6. *Act 20th February 1842. H. C. 819, art. 13.* The 3d section of this act provided: that any person "summoned as garnishee," of any bank in this State, may either before judgment or after, tender in payment and satisfaction of such demand or judgment, the amount thereof in the issue of the bank.

7. *No set-off to a note, never owned by the bank.* The fact that a note is payable in bank, does not render the notes of that bank a legal set-off to it, if the note never was the property of the bank; *Bull v. Harrell*, 7 H. 9.

8. *Bank notes relied on as set-off, must be in court.* Where the bills of a bank are relied on as a set-off, they must be brought into court; *Harper v. Calhoun*, 7 H. 203.

9. *No set-off against surplus bid at sheriff's sale of bank property.* When the property of a bank is sold under execution for *par funds*, if there be a surplus bid after paying the execution against the bank, this surplus is also payable in specie, and the purchaser cannot compel the sheriff to receive for it the issues of the bank. The purchaser is not, as to the surplus, a debtor of the bank in the sense of the statute (see *ante*, 5), requiring banks to receive their own notes for debts due them. Whether the sheriff collecting the surplus in specie can force the bank to receive payment in its own notes. *Quære?* *Davis v. Pryor*, 6 S. & M. 114.

10. *When debtor of bank garnisheed in equity.* Where the judgment creditors of a bank, upon a return of *nulla bona*, filed their bill against the bank and its judgment debtor to compel the latter to pay to them his indebtedness to the bank, and the bill was filed after the Act of 1840 was enacted, which required the bank to receive its own issues in payment of all debts due it, but before the passage of the Act of 1842, which gave to the garnishees of a bank the right to pay also in the issues of the bank; it was held, that the complainants in the bill were entitled to recover legal tender, but, as at the date of the service of the injunction on the defendant, he was entitled to pay his debt to the bank in its issues, that he (the defendant) could only be compelled to pay so much gold and silver as was at that time (the service of the injunction) equal to the value of the debt due by him to the bank; *Robson v. Benton & Manchester R. R. & Bkg Co.*, 7 S. & M. 724.

11. *When dividend is declared by insolvent estate.* A bank entitled to a dividend from

an insolvent estate, is bound by the statute (see *ante*, 5) to receive it in its own notes, though they are depreciated, and were procured by the administrator, after the decree of the Probate Court fixing the dividend; *Dahlgreen v. Peale*, 2 C. 412.

See PROBATE COURT, 112.

12. *When bank debt assigned to trustees.* A bank debtor whose debt has been assigned to trustees for the benefit of the creditors of the bank, has the right under the statute (see *ante*, 5) to pay a judgment rendered against him in favor of the trustees, in the notes of the bank, at par. And the right of the debtor in this respect is not affected by the fact, that the judgment was rendered against him only for the value of the bank notes, which were then depreciated and of less value than his nominal indebtedness; *Mandeville v. Bracy*, 2 G. 460.

13. *Same: When assignment is not to trustees.* But if the assignment be in the course of trade, and not to trustee to pay debts, and a suit be brought on the debt, in the name of the bank for the use of the assignee, and the debtor fail to make his defence under the statute by pleading in abatement to the writ, and allow judgment to be recovered against him for the use of the assignee, this is a waiver of his right to pay the debt in the notes of the bank, and he cannot afterwards compel the assignee to take them; *Com'l Bank of Columbus v. Thompson*, 7 S. & M. 443. As to the statute prohibiting assignment by banks, and the defence against such, see *post*, 89, *et seq.*

14. *Same: Effect of foreign attachment, and garnishment, on set-off.* W. was indebted to the Union Bank of this State by bill of exchange, which was in the hands of the agent of the bank at Mobile, for collection. An attachment was sued out in April, 1840, in Alabama, against the bank as a foreign debtor, and her agent at Mobile was summoned as garnishee, and he answered, that he held the bill of exchange of W., among others, as the property of the Union Bank. Afterwards, on the 18th April, 1841, the attaching creditor filed a bill in the Chancery Court in Alabama against the bank, her agent at Mobile, and W., who being a non-resident, was notified of the suit by publication in a newspaper, and such proceedings were had, that in April, 1842, a decree was made ordering a sale of the bill of exchange, and accordingly, in June, 1842, it was sold, and purchased by the plaintiff.

On 1st October, 1841, the defendant, W., tendered to the Union Bank the amount of the bill of exchange in the bank's own notes, which were refused, on the ground that the bill was in Mobile, and the bank was ignorant of what had become of it. The purchaser of the bill under the chancery decree in Alabama, brought this action against W. on the bill, and W. pleaded to the action payment, and filed in court notes of the Union Bank sufficient to pay it: *Held*.

1st. That no transfer of the debt due by W. to the bank had ever taken place under the

attachment proceedings at law, commenced in Alabama in April, 1840; but that the transfer took place under the proceedings in chancery, which were commenced 18th October, 1841; and that conceding, which is doubtful, that the publication in a newspaper of notice of that suit, was notice to W. of the transfer, still the defendant had acquired the set-off on 1st October, 1841, when he made the tender, which was eighteen days before the chancery suit was commenced.

2d. That proof of the possession and tender of the notes of the Union Bank, on 1st October, 1841, was sufficient to authorize the jury to find, that the bank notes now filed with defendant's plea of payment, were the same as those tendered.

3d. That the sale and transfer of the bill of exchange, under the judicial proceedings in Alabama, were to be allowed no more effect than if W. had been directly garnished as a debtor of the bank; and that, as the decree condemning the bill of exchange to be sold was not made till April, 1842, W. was entitled to the benefit of the Act of the Legislature of this State, passed in February, 1842 (see *ante*, 6), securing to debtors of banks, who are garnished as such, the right to discharge their indebtedness in the notes of the bank to which they were indebted; *Riggs v. Dyche*, 2 S. & M. 606.

15. Where stockholders garnished. The Acts of 1840 (*ante*, 5) and 1842 (*ante*, 6), which provide for the payment of debts due to banks in their notes, even when the bank debtors are garnished, do not apply to a case where a stockholder of a bank is garnished for a debt due to the bank on his subscription for stock therein; that indebtedness of the stockholder is payable only in specie; *King v. Elliott*, 5 S. & M. 428. See *post*, 27, *et seq*.

16. *Same*. Whether garnish process is a proper remedy in such a case; *Quere?* But if the stockholder make no objection on that account, it will be sustained; *Id*.

III. Notes Payable in Bank.

See *BILLS OF EXCHANGE, &c.*, 101 to 103.

16a. When bank notes not a set-off. The fact that a note is payable in bank, does not render the bills of that bank a legal set-off to it, if it never was the property of the bank; *Bull v. Harrell*, 7 H. 9.

17. *Presentment of note payable in bank*. Generally, a note payable in bank ought to be presented for payment during banking hours, but if it be the custom of the bank to keep its back door open, with its teller present, after banking hours, to answer demands then made, and a note be then presented, and the teller answer according to the truth of the case, that there were then no funds, and had not been during the day, to pay the note, the presentment will be good; *Com'l & R. R. Bk v. Hamer*, 7 H. 448. In such case the maker is presumed to consent to be governed by the custom of the bank, with regard to

making demand of payment; *Harrison v. Crowder*, 6 S. & M. 464. See *post*, 22.

BILLS OF EXCHANGE, 32 to 34.

18. *Same*. A greater strictness must be observed in making demand of payment, when the demand is constructive by presentation at the bank where a note is made payable, than when the demand is made personally of the maker. In the latter case, the demand may be made at any time during the third day of grace; but a constructive demand made at a bank having regular banking hours, must be made *at the close of the business hours*, for the maker has until that time to deposit the money to pay the note. This rule, though more strict than reasonable, is yet firmly established; *Harrison v. Crowder, supra*. And when the note is held by the bank at which it is payable, it should remain in the bank until the completion of business hours; *Planters' Bank v. Markham*, 5 H. 397; but a literal compliance with this rule will not be exacted where the note is held by an individual, for there is no rule of law compelling him to deposit his note in the bank, and if the note be presented at the close of business hours, it will do. And this does not mean that the presentment and demand should be made at the very moment of closing the doors, but if made a few minutes before, it will do. But a charge to the jury, that if it were presented in a reasonable or convenient time before the doors were closed, it would be sufficient, is too indefinite, and is error; *Harrison v. Crowder, supra*.

19. *Same: Case in judgment*. The notary presenting the note and making the protest, testified that he had no recollection of the fact, or time of presentment, except from his protest, and from this he had no doubt that he did present the note; that his custom—which was founded on his belief that it was in accordance with law—was to present notes payable in bank during the last hour of business, and about the closing of the bank; that when payment was refused, he took the notes away with him; that he could not say, in the present instance, whether the note was presented a minute or an hour before the bank closed, except from his habit, as before stated: *Held*, that this testimony should have been left to the jury, for them to say whether presentment was at the close of banking hours or not; *Harrison v. Crowder, supra*.

See *BILLS OF EXCHANGE, &c.*, 37 to 40a.

IV. Notes payable in Bank Notes.

20. *Effect of non-payment at maturity*. Whether a promissory note payable in certain bank notes specified in it, upon non-payment in the currency specified at maturity, becomes absolute for the amount in specie, or whether the amount recoverable thereon, is the value of the bank notes, at the maturity of the note, not determined; but the question was noticed as one about which there is a conflict in the authorities; *Saunders v. Richardson*, 2 S. & M. 90. But it is now settled, if such a note be held by a third party, he can recover only the value of the bank notes at its

maturity; but if the bank in whose notes it is payable, be plaintiff, it can recover the full amount, since its notes even after judgment are a legal tender in satisfaction of the judgment; *Abbott v. Agricultural Bank*, 11 S. & M. 405. (*Sed Quære?*) Would this reason prevail, if the bank notes were at a discount at the maturity of the note, and subsequently became equal to specie and so remained? (G.) See *post*, 25.

V. Custom of Banks.

21. *Not evidence to show contract.* The custom of a bank may be proven with a view of interpreting contracts made with it, but the custom of the bank to make contracts of a particular kind, in a certain way, is no evidence to show that a contract of that class was made in that way in any particular instance; *Harper v. Calhoun*, 7 H. 203.

22. *Binding on parties to a note payable there.* Parties to a note payable at a bank are bound by the custom of the bank in reference to the presentment of the note for payment, and if by that custom notes payable there (and in possession of the bank), and not paid during banking hours on the day on which they fall due, are considered as dishonored, without any formal demand, then no such formal demand and presentment are necessary to charge an endorser; *Cohea v. Hunt*, 2 S. & M. 227. See *ante*, 17.

VI. Discount of notes by Banks.

23. *May give certificate of deposit.* A bank, in making the discount of a note, may give a certificate of deposit for the proceeds, instead of paying over the money to the borrower; *Miss. R. R. Co. v. Scott*, 7 H. 79.

24. *Discount by cashier: Ratification by directory.* Where a note is discounted by the cashier without authority from the directory, it will be valid if afterwards accepted and ratified by the bank, and a suit on it by the bank is such ratification. A subsequent confirmation of the unauthorized act of its agent, by a corporation, like a ratification by a natural person, is equivalent to a previous command, and validates the unauthorized act thus confirmed; *Planters' Bank v. Sharpe*, 4 S. & M. 75.

25. *Discount in depreciated bank notes.* In an action on a note payable to and discounted by a bank, it is incompetent for the purpose of diminishing the amount of the recovery, for the defendant to show that the bills of the bank were depreciated below par when the note fell due. What would have been the effect if the bank bills were depreciated when the note was discounted was not decided; *Commercial Bank of Vicksburg v. Atherton*, 1 S. & M. 641. See *ante*, 20.

26. *Same.* Where a bank loans her own bills when they are at a discount, and takes from the borrower his notes at their nominal value, he may show the amount of the discount at the time and place of the loan, with a view to getting a credit for the depreciation, but he cannot show the discount or depreciation at any other time or place; *Com-*

mercial Bank of Manchester v. Chisholm, 6 S. & M. 457. See *post*, 87, 88.

VII. Stock and Stockholders.

27. *Stock payable in specie only.* Where the charter of a bank provides that subscribers for stock shall pay, at the time of subscription, on each share taken, \$20 in specie, or in the notes of specie paying banks, and is silent as to the currency in which the remainder shall be paid, the remainder is payable in specie alone, that being an essential requisite to the existence of a bank; *King v. Elliott*, 5 S. & M. 428. And the capital stock being a trust fund for the payment of all the creditors of the bank, a stockholder has no right to pay his stock subscription in the notes of the bank; *Ib.* And if he be garnished by a creditor of the bank, he cannot pay his stock to the garnisher in the notes of the bank; such a debt not being within the Acts of 1840 and 1842. (See *ante*, 5, 6.) But it must be noted in this case that the court expressly refuse to decide whether a stockholder holding notes of the bank at the time a writ of garnishment is served on him, is entitled to use the same as a set-off, but the decision is confined to his right to pay his stock in the notes of the bank, under the said Acts of 1840 and 1842; *King v. Elliott*, *supra*. See *ante*, 15.

28. *Garnishment of stockholder.* Whether a stockholder, indebted on his stock subscription, is liable to *garnishee process* in favor of a creditor of the bank; *Quære?* But if he do not object, the process will be valid; *Ib.*

29. *Stock not a set-off to a debt due to the bank.* Stock in a bank is not a valid set-off in favor of the holder against a debt due by him to the bank, though by contract between him and the bank, the stock may be accepted in payment of the debt; *Harper v. Calhoun*, 7 H. 203.

30. *Subscription for stock: What necessary to validity of.* Where a bank charter requires a certain percentage on his stock to be paid by each stockholder at the time of his subscription for the stock, such payment is essential to the validity of the subscription, which, if made without the payments required by the charter, is void; and this invalidity exists *in toto* as well against the creditors of the bank seeking to hold the subscriber liable, as against the bank itself. But if at the time of subscription it is agreed that the subscriber's note should be taken payable to the bank for the purpose of being discounted, so as to raise the percentage required to be paid on the subscription, and the note is in fact made and discounted, and a check given by the subscriber to the bank for the proceeds to be applied by it to the payment of the percentage; this, though it may not validate the subscription to the whole amount subscribed, is yet a sufficient consideration to support the note so given to the bank, and to make the subscriber a stockholder to the amount of the note. Clayton, J., dissented, holding that as to the creditors of the bank the subscriber was a stockholder

to the full amount; *Hayne v. Beauchamp*, 5 S. & M. 515.

See CORPORATIONS, 18, *et seq.*

31. *Same: Note for.* A note executed by a stockholder of a bank (whose subscription was validly made), and discounted by the bank, and the proceeds applied by the bank to the payment of subsequent calls for instalments of his stock, due by the maker of the note, is assets of the bank, and may be collected as such by the trustee appointed, on a judgment of forfeiture against the bank, under the Act of 1843 (Briscoe Bill)—the stockholders being bound to pay arrearages of stock, after judgment of forfeiture, if necessary to pay the debts of the bank; *Lewis v. Robertson*, 13 S. & M. 558.

32. *Stock a trust fund.* Stock subscribed to a bank is in the nature of a trust for the payment of the liabilities of the bank (citing *King v. Elliott*, 5 S. & M. 447; *ante*, 15, 27, and *Arthur v. Commercial and R. R. Bank of Vicksburg*, 9 id. 43), and the stock subscribed but not paid in, is in the nature of a continuing trust on the part of the stockholders, for that purpose; and hence the statute of limitations will not run against a bill in equity to enforce the payment of arrearages for stock, brought by a creditor of the bank, who has obtained a judgment for his debt, and the execution has been returned *nulla bona*; at least, it will not so run as long as the bank keeps up its organization as such; *Payne v. Bullard*, 1 C. 88.

33. *Insolvent bank cannot release stockholder.* And it is such a trust, that the directors cannot release the stockholder from it by reducing the number of his shares to the amount he has actually paid, so as to defeat the claim of a creditor whose debt was created before the release. And if the stockholder relies on such release against the claim of a creditor of the bank, he must show affirmatively that the release was given before the debt was created. And this trust will be enforced by a court of equity, in favor of a creditor having a judgment and return of *nulla bona* against the bank; *Id.*

34. *Stockholders not creditors of the bank.* The stockholders are the owners of the bank and not its creditors in virtue of that relation. Hence the trustee of a bank, whose franchises were judicially declared forfeited, appointed under the Act of 1843 (Briscoe Bill), cannot in virtue of the powers vested in him by that act, to distribute the assets among the creditors of the bank, pay anything to the stockholders; *Coulter v. Robinson*, 2 C. 278.

35. *Remedy of bank to collect stock.* Where the charter of a corporation provides for the forfeiture and sale of the stock of delinquent stockholders, this remedy is merely cumulative. The company may also sue the delinquent subscribers; *Freeman v. Winchester*, 10 S. & M. 577.

VIII. Cashier.

35a. *Powers of, generally.* The cashier is the executive officer of the bank, through whom and by whom, in the absence of all positive

restrictions, the whole moneyed operations of the bank, in paying and receiving debts, and discharging and transferring securities, are to be conducted. He is held out to the world *virtute officii*, as general agent of the bank in this respect, and if there be any limitation or restriction upon his powers, the bank must show it, if the bank seeks to be absolved from the consequences of his acts within the general scope of his authority; *State v. Commercial Bank of Manchester*, 6 S. & M. 218. And if he do an illegal act, in the general scope of his authority, yet contrary to the express restrictions imposed on him by the board of directors, the bank will not be responsible therefor to the extent of becoming thereby liable to have its charter declared forfeited, but such act is *prima facie*, binding to that extent, and to be relieved therefrom the bank must show affirmatively the restrictions imposed on his authority; *Id.*

36. *Same: Case in judgment.* Hence, where the charter of a bank required the stock to be paid in specie, or in the notes of specie paying banks, and the directors expressly commanded the cashier to receive nothing else, which command he violated, it was held that the bank was not responsible for his illegal act. That the directory, through the cashier, might do acts which would forfeit the charter, but the cashier cannot, contrary to their directions; *Id.*

37. *Power to release debtor of bank.* Whether the cashier has power to release a debtor of his bank; *Quere?* *Payne v. Commercial Bank of Natchez*, 6 S. & M. 24.

38. *Power to endorse negotiable paper of the bank.* The cashier of a bank is the proper officer to endorse its negotiable paper, and his endorsement of such paper is *prima facie* evidence of his authority to do so; *Harper v. Calhoun*, 7 H. 203; *Crocket v. Young*, 1 S. & M. 241.

39. *Same: Judgments and other property.* But, *prima facie*, he has no power to transfer judgments in its favor, or to dispose of its property. This power is in the board of directors. The cashier's authority extends only to the transfer of negotiable securities, without special authority conferred by the directors; *Holt v. Bacon*, 3 C. 567.

40. *Power to discount a note.* He has no power to discount a note, but if he do so his act will be valid, if afterwards ratified by the bank; *Planters' Bk v. Sharpe*, 4 S. & M. 75.

See sub-division Directors.

IX. Directors.

41. *Power of single director.* A single director of a bank has no power, in virtue of his office, to make contracts for the bank. He must have authority from the board to enable him to act for the bank; *Harper v. Calhoun*, 7 H. 203; as to directors of railways, *S. P., Shackelford v. N. O. J. & G. N. R. R. Co.*, 8 G. 202, for which see RAILWAYS, 60.

42. *Board of Directors' Powers.* The directors of a bank are its representatives. They have the supreme control, and the corporate functions are concentrated in them,

and their acts are considered as the acts of the bank. The cashier and other officers of the bank are but sub-agents and servants of the bank, being appointed by the directors, and responsible to them, and the acts of these sub-officers are governed by the same rules of law which regulate agency among individuals, and the directors, as to them, are regarded as principals; *State v. Com'l Bk of Manchester*, 6 S. & M. 218.

43. *Minutes of board.* A bank can receive notes and agree to propositions at the board of directors, without any entry upon the records at the time, but the same may be entered subsequently, and if such subsequent entry be of an agreement to a former proposition to the bank, it will relate back to the time when the proposition was first made and agreed to; *Com'l Bk of Manchester v. Bonner*, 13 S. & M. 649.

X. Charter.

44. *Charter—a contract with the State.* A bank charter is a contract within the meaning of that clause of the Constitution of the United States which prohibits the States from passing laws impairing the obligation of contracts; and any legislation which impairs it, by enlarging the powers of the State over the body corporate, or by abating its franchises, or which alters it in any material part, is unconstitutional and void; *Com'l Bk of Natchez v. The State*, 6 S. & M. 599; *Payne v. Baldwin*, 3 S. & M. 661. But only such franchises, powers and privileges as are granted, either expressly by the charter or by necessary implication, are protected from legislative interference. The power of legislation over all persons and property within the State, resides in the government, as a part of it, and it remains with the Legislature when a grant is made without any express reservation; and hence a bank or other corporation claiming to be exempt from the power of the Legislature in any respect, must show a grant in the charter by which this power in that respect is contracted to it. And a corporation claiming to exercise powers under the general laws of the State, cannot claim that, as to it, these shall always remain the same; and the Legislature may prohibit the corporation, as it may other persons, from exercising a power so existing only under the general laws of the State; *Payne v. Baldwin*, *supra*.

45. *Construction of—as to power to assign notes.* The 6th section of the charter of the Planters' Bank, granting to the bank power "to receive and possess lands, goods and chattels, and effects of whatever kind, * * and the same to demise, alien, grant, and dispose of," does not confer the power to assign promissory notes. The word "effects," though broad enough in its specification to include within it promissory notes, yet, when construed with the context, and especially with the 17th section of the charter, which expressly treats of the powers of the bank in reference to promissory notes and bills of exchange, is not to be interpreted to include negotiable securities. The Act of 1840,

therefore, prohibiting banks from assigning their promissory notes, is constitutional, so far as the Planters' Bank is concerned; *Payne v. Baldwin*, *supra*.

And so, where the bank charter conferred the power "to purchase and possess lands, tenements and hereditaments, and personal estate of any kind whatever, and to sell and dispose of the same;" and as to that bank the said Act of 1840 is constitutional; *McIntyre v. Ingraham*, 6 G. 25.

46. *Construction of charter, as to exemption from taxation.* When the extent of the power of the State to levy taxes on a bank is specified in its charter, this cannot be exceeded either by the State, directly or by a municipal corporation, acting under power conferred by the State; such a stipulation is a contract within the meaning of that clause of the Federal Constitution, prohibiting laws imposing the obligation of contracts. Therefore, where a bank charter provided that "after the expiration of one year from the organization of the bank, the Legislature might impose a tax not exceeding one-fourth of one per cent. on the stock subscribed, to be paid into the State treasury," it was held that the stipulation was a contract, and that no tax could be imposed for a greater amount than one-fourth of one per cent., nor for any other purpose than for the use of the State, and that a tax of any amount for county or municipal purposes was a violation of the charter; *O'Donnel v. Bailey*, 2 C. 386.

47. *Effect of power reserved to repeal.* If in a bank charter the Legislature reserve the power to repeal it to a limited extent, this remedy so reserved, if not exercised by the Legislature, does not deprive the courts of the power to proceed against the bank by *quo warranto* for a violation of its charter. The two remedies are cumulative; *Grand Gulf Bank v. The State*, 10 S. & M. 428.

XI. Forfeiture of Charter.

See *Quo Warranto. Corporation*, 44 to 51.

48. *Illegal acts of cashier and agents.* The illegal acts of the cashier and other sub-agents of a bank are no cause of the forfeiture of its charter, if such acts were unauthorized by the directory, who alone have power to do acts, or authorize the doing of acts, which amount to such forfeiture. Therefore, where the cashier in violation of the charter and against the direction of the board of directors, receives depreciated bank notes from a stockholder in payment of his subscription for stock, this is no ground of forfeiture of the charter; *State v. Com'l Bank of Manchester*, 6 S. & M. 218.

49. *Effect of illegal act of commissioners appointed to organize a bank.* Commissioners appointed in a bank charter, to receive subscriptions for stock, and to organize the bank, are the agents of the State, and not of the bank or its stockholders, and the illegals acts of such commissioners, are therefore no ground of forfeiture of the charter of the bank; *Com'l Bank of Natchez v. The State*, 6 S. & M. 599.

See *INTEREST, &c.*, 36.

50. *Effect of failure to use a remedy granted by the charter.* A provision in a bank charter that upon the failure of a stockholder to pay an instalment due on his subscription for stock, "the bank shall sell his stock on giving notice," &c., is not an imperative duty imposed on the bank by the State but a mere cumulative remedy to enable the bank to collect the amount due on its stock, and a failure to use it is no ground for the forfeiture of its charter; *Ib*.

51. *Refusal to redeem its notes good ground for forfeiture.* A refusal by a bank on proper demand made, to pay its notes, bills, bonds or other liabilities in specie, is a cause of forfeiture of its charter. But whether a mere temporary suspension would have that effect, and what is a temporary suspension: *Quære?* *Ib.*; *S. P., Planter's Bank v. State*, 7 S. & M. 163.

52. *Same.* And to constitute such refusal a cause of forfeiture, it is not necessary that the duty of paying its debts in specie on demand after maturity should be expressly imposed by the charter. That duty is implied from the nature of such an institution and the purposes for which it was created. And a penalty imposed by the charter, requiring the bank to pay a heavy interest, as 12½ per cent. per annum, on its suspended paper, is no license for such suspension, but only a provision to prevent it; *S. P., Planter's Bank v. State* 7 S. & M. 163; *Ib*.

53. *Partial suspension: Effect.* And it is no excuse for suspension, that the bank always paid specie on its notes and all other liabilities except certain checks, which it had drawn on another bank, and placed in the hands of the drawee funds to pay, which the drawee had failed to do, and the bank was therefore compelled to suspend payment as to them; but had, before the commencement of proceedings to declare its charter forfeited, resumed payment as to all its liabilities. The failure to pay the checks equally with a failure to pay its notes was a cause of forfeiture, which being once established is not taken away, by a subsequent performance of its legal duties by resumption; *Ib*.

54. *Law compelling resumption: Waiver.* The Legislature may constitutionally pass a law declaring that all banks in this State shall resume specie payments by a day fixed in the act, and in default thereof, their charter shall be forfeited; since such a law is but the express declaration by the Legislature of a duty already imposed by law. But such an act would have the effect to excuse or waive, by implication, the forfeiture caused by suspension prior to the day fixed in it for a resumption of specie payments; *Com'l Bank of Natchez v. The State*, 6 S. & M. 599; *Planter's Bank v. The State* 7 S. & M. 163.

55. *Forfeiture by assignment of its assets: Non user.* It is settled that a bank may make a general assignment of its assets for the benefit of its creditors, and the surplus to go to the stockholders; such an assignment, if made fairly, though made pending proceedings by *quo warranto*, for a forfeiture of its char-

ter, and for the purpose of preventing its assets from being thereby extinguished, is not *per se*, a cause of forfeiture of its franchises, though it may place the bank in such a condition as to cause a forfeiture of its franchises by *non user*; *State v. Com'l Bk of Manchester*, 13 S. & M. 569. And it is a condition annexed to every private corporation, that it may lose its franchises by a *misuser* or *non user* of them; *S. P., Com'l Bk of Rodney v. The State*, 4 S. & M. 439; *Ib*.

56. *Same: Temporary suspension of operations allowed.* The furnishing of a sound and reliable medium of currency, is the primary object of the creation of banks of discount, the accommodation of those who deal with them, and the interests of the stockholders being secondary objects. The law, therefore, requires such a continuous exercise of its functions, as will not defeat the primary object of the creation of a bank of discount, and will not tolerate a total suspension by the bank of their exercise; but it is difficult to draw a line between legitimate acts of prudence in suspending operations, and that *non user*, which must be an abuse of its franchises. Every suspension of the use of its franchises for a limited time, is not a *non user*, but a reasonable allowance must be made for peculiar circumstances and exigencies; for the fluctuations of commerce may make it necessary for a bank to suspend its discounts in order to preserve its integrity (citing *Com'l Bk of Natchez v. The State*, 6 S. & M. 599); *Ib*.

57. *Same: Continued suspension is non user.* But a continued suspension of the principal corporate franchises, and a failure to comply with the implied conditions on which the charter is granted, will amount to a *non user*, and so be ground of forfeiture. But a mere assignment of the property and assets of a bank (which is nearly out of debt), in trust to pay its debts, and to divide the surplus among the stockholders, made, pending proceedings by *quo warranto*, to declare a forfeiture of its franchises, with the view of saving the assets from extinction, should forfeiture be declared,—the bank in the meantime keeping up its corporate existence by the regular election of its officers,—is not a *misuser* or *non user* of its franchises. Yet it seems, if after a decision in favor of the bank, on the *quo warranto* proceedings, the trustees made no re-assignment of the assets to the bank, and the latter omitted the exercise of its corporate franchises for a long period, it amounts to a *non user* and is ground of forfeiture; *Ib*.

See CORPORATION, 44 to 48.

58. *Effects of forfeiture: Extinguishment of debts.* It is now well settled, that at common law, upon the dissolution of a corporation, the debts due to and from it are extinguished, and its real estate reverts to the grantors, and its personalty vests in the State; *Bk. of Port Gibson v. Moore*, 13 S. & M. 157. And this rule is applicable to banks; *Com'l Bk of Natchez v. Chambers*, 8 S. & M. 9; *Coulter v. Robertson*, 2 U. 278. And this

extinguishment of the debts is not a mere incapability in them of being enforced, a valid contract still remaining; but a debt being an incorporeal essence, and not a matter of substance, it is essential to its very existence, that there shall be both a debtor and creditor, a person to perform and a person to accept performance, and without these, or the legal possibility of them, a debt cannot in any sense exist; and hence, on the dissolution of a corporation at common law, which was an absolute and complete destruction of one of those necessary parties, the debts due to and from it, and their obligation, were utterly extinguished and annihilated; *Coulter v. Robertson*, 2 C. 278.

59. *Same: Right of Legislature to preserve debts from extinction.* And this extinguishment of the debt arises solely from the causes mentioned in the last section, and not in virtue of any implied condition in the contract between the bank and its debtors or creditors, and therefore, if before the dissolution of a corporation, the Legislature provide by law, that upon its dissolution, its debts and credits shall not be extinguished, and also provide for the appointment of a trustee to pay the one and collect the other, they will continue in full force, as well in favor as against the bank; and the assets of the corporation thus preserved in the trustees will be a fund out of which the creditors of the bank have a right to be paid; *Com'l B'k of Natchez v. Chambers*, 8 S. & M. 9.

60. *Same: Rights of creditors to assets thus preserved.* And if the Legislature should before the dissolution of the bank, pass an act preserving the assets of the bank, and also saving the debts due by it from extinction, the creditors, whose debts are thus saved, will be entitled to the preserved assets, not in virtue of the Legislature's appropriation of them, but in virtue of the equity existing in them as creditors to apply the assets of the bank to the payment of their debts. The Legislature in the exercise of its general powers to make laws, has the right, before the dissolution of a corporation to abrogate the common law rule in relation to the assets of dissolved corporations, and the debts due by them, but having exercised this power so as to preserve the debts due by and to them from extinction, and the other assets from destruction, it has no power afterwards to deprive the creditors of their rights in such assets, or to deny them an adequate remedy to enforce their claims. And if the act thus preserving the assets, provide no remedy for the creditors, a court of equity will supply one; *Ib.*

See further on this subject, sub-division Quo Warranto.

XII. Quo Warranto Act of 1843, or Briscoe Bill, and Amendment thereto of 1846.

See Quo Warranto.

61. *Act of 1843; Provisions of.* This act, H. C. 329, provided, that it should be the duty of each district attorney, when he had

grounds to suspect that any bank had violated its charter, or whenever the affidavit of one or more credible persons should be presented to him, charging such violation, to file in the circuit clerk's office an "information in the nature of a *quo warranto*, against such bank," and the clerk was thereupon to issue the proper process, and the clerk was also required upon the filing of such information, "as a matter of right on the part of the State," to issue an injunction, restraining all persons whatever from collecting any claims or demands due the bank, "until said information be finally tried and determined," which injunction "shall have the office and effect of an injunction in chancery."

62. *Same.* By the 8th section of the act, it was provided, that upon judgment of forfeiture, the debtors of such bank should not be released from their debts, but the court should appoint one or more trustees to take charge of the books and assets of the bank, "to sue for and collect all debts due the bank, and to sell and dispose of all property owned by the bank," and the proceeds "to apply as may hereafter be directed by law" to the payment of the debts of the bank."

63. *Same* These provisions were also applied by the act in reference to persons who had usurped the privilege of being a corporation.

64. *Act of 1846, amendatory of the "Briscoe Bill."* The Act of 1846, H. C. p. 332, amendatory of the foregoing, among other provisions, enacted, That the trustees should give bond conditioned to perform their duties generally, and also those required of them by this act; and all persons having assets of the dissolved bank in their hands, should at once surrender the same to the trustees; that the trustees of the dissolved bank "shall proceed, under the order of the court (pronouncing judgment of forfeiture) to sell to the highest bidder, for cash, all the real and personal property of the bank, and all the debts of whatever kind due to the bank;" and by section 13 it was provided, that the debtors of the dissolved bank "shall have the right to redeem, from the purchaser or his assignee, the evidence of his debt, by paying to them the amount of his bid, and twelve and one-half per cent. interest per annum thereon.

65. *Trustees appointed under Act of 1843 are private, not public.* The trustees appointed under the Act of 1843 by the court rendering judgment of forfeiture against a bank are not public officers, subject to legislative control as such, but private agents; *Commercial Bank of Natchez v. Chambers*, 8 S. & M. 9.

66. *Same: Title of the trustees.* The act of 1843 (*ante*, 61, 62) conferred powers and imposed duties on the trustees appointed under it, which could only be exercised and discharged by investing them with the legal ownership of the property of the dissolved bank, and with the right to maintain actions at law for its recovery. The succession was cast upon the trustee, and he became the

real owner of the assets of the bank, subject to a trust in favor of the creditors of the bank, who have a vested interest in them, and a remedy to enforce their rights; *Nevitt v. Bank of Port Gibson*, 6 S. & M. 513; which was confirmed in *Commercial Bank of Natchez v. Chambers*, 8 S. & M. 9.

67. *Same: Right of creditors: Power of Legislature.* And the rights thus vested in the creditors by the Act of 1843 cannot be taken away by a subsequent Legislature, either in virtue of its general powers of legislation, or in virtue of that provision of the Act of 1843, which directs the appropriation of the assets of a dissolved bank "as might be thereafter directed by law." This phrase reserved no power to the Legislature which it would not otherwise have had; for the Legislature did not attempt, by the Act of 1843, to transfer to the State any right or interest in the assets of dissolved banks, but directed the application of such assets to the creditors; and the Legislature, reserving no special right or interest in the assets, possesses, since the passage of the act, only the same general power of legislation over them which it possesses over the property of private individuals. Therefore, the Act of 1846 (*ante*, 64), which undertook to deprive the trustees of their right to, and control over these assets, by directing a peremptory sale thereof, is unconstitutional and void; *Commercial Bank of Natchez v. Chambers*, 8 S. & M. 9; *S. P., Bingham v. Robertson*, 3 C. 390.

68. *Same: Power to set aside fraudulent assignment by the bank.* The Act of 1840, prohibiting assignments by banks, being declared unconstitutional, a general assignment by a bank of its assets to pay creditors will be good and valid, and the trustees, in the deed of assignment (it being made before judgment of forfeiture), will be entitled to hold the assets of the bank against the trustees appointed under the judgment of forfeiture subsequently recovered; and it is doubtful whether the last named trustees have the power to assail the deed of assignment on the ground that it is fraudulent as to creditors; *Montgomery v. Galbraith*, 11 S. & M. 555; *Marsh v. Mandeville*, 6 C. 122.

68a. *Same: Judgment of sale under Act of 1846.* And if it were conceded that a judgment directing a sale of the assets to be made by the trustee, under the Act of 1846, is not absolutely void, but only voidable, still such judgment would not deprive the trustee of the power to sue until the sale was actually made; *Bingham v. Robertson*, *supra*.

69. *Same: Sale by: Case in judgment.* The Union Bank assigned all of its assets to three persons, in trust for the benefit of its creditors and stockholders; and these assignees received a deed for land, in payment of a debt due the bank. Afterwards the bank was dissolved by judgment of forfeiture rendered against it by *quo warranto* proceedings under the Act of 1843, and the assignees in the assignment made by the bank, surrendered their trust, and gave up all the assets to the trustees appointed by the court ren-

dering the judgment of forfeiture, who afterwards sold the land: *Held*, that the conveyance to the assignees vested in the bank a complete equitable title to the land, which passed to the purchaser of the trustees; *Fitz & Cordell v. Lawson*, 6 C. 790.

70. *Same: Act of 1843 vests no rights in the stockholders.* The Act of 1843 provided for the appointment of a trustee on the dissolution of a bank by judgment of forfeiture, whose duty it was to sell the real and personal estate of the bank, and collect the debts due it, and to apply the proceeds to the payment of the debts of the bank. This statute changed the common law rule on the subject of debts due by dissolved corporations (*see ante*, 58), and preserved them from extinction, and also provided for their payment. It also preserved the debts due to the dissolved bank from extinction, and its real estate from reverting to the grantor, and its personalty from vesting in the State. But this preservation of the assets of the bank was only for the purposes of the act, to wit, the payment of its debts. The common law rule on this subject was changed no further than to supply a fund for the payment of the debts of the bank; and when all these were paid, the purpose of their preservation was accomplished, and such debts as remained then due to the bank were subject to the common law rule, and became extinguished; *Coulter v. Robertson*, 2 C. 278.

71. *Same.* Nor is this rule at all changed by the fact of the appointment of a trustee, who became in law the representative of the bank, and a creditor in its stead. The estate and title of the trustee in the assets are not specifically declared in the act, but certain duties are imposed on him by it, and it is a rule of law, that the estate of a trustee, by implication, shall be as great and as ample as is necessary to enable him to discharge the trust, but no greater; and the estate of a trustee arising by implication, whose whole trust duty has been fully discharged, from that moment ceases. And the trustee of a dissolved bank having no other duty with regard to the assets of the bank, than to apply them to the payment of the debts of the bank, and such assets having been preserved from the operation of the common law rule of forfeiture, and extinction to that extent and for that purpose, and no other, it follows that as soon as the debts of the bank are paid, there remains no other duty or trust for the trustee to perform, and his estate and title cease, and his right to collect debts due the bank is gone; hence, it is a good plea to an action by the trustee to recover a debt due the bank, that all the debts due by the bank have been paid; *Id.*

See EXECUTOR AND ADMINISTRATOR, 139, *et seq.*

72. *Same.* The stockholders of a bank are its owners and not its creditors, with respect to their stock in it, and hence the trustee appointed under the Act of 1843, on the rendition of a judgment of forfeiture against a bank, cannot, after all the debts of the bank

are paid, collect the remaining assets for their benefit; *Ib.*

XIII. Collection of Bills, Notes, &c.

73. *Duty as to paper received for collection.* A bank receiving a note or bill for collection, is bound to use due diligence to present the note or bill, and make demand and protest, and give notice so as to charge the parties to it. Whether the delivery by the bank of the bill or note, to a competent notary in due time, with instructions to collect it, or protest on failure of payment and give notice, is sufficient to relieve the bank, if the notary fail to discharge his duty; *Quære?* *Com'l & R. R. B'k v. Hamer*, 7 H. 448.

It is sufficient; *Tiernan v. Com'l B'k of Natchez*, 7 H. 648; *Agricultural B'k v. Com'l B'k*, 7 S. & M. 592.

XIV. Powers of Banks.

See CORPORATIONS, 26 to 38.

74. *Subject to general laws.* A bank or other corporation is subject to the general laws of the State in force, at the time of its creation, in the same manner and to the same extent as natural persons, except so far as the general laws may be changed by its charter, and so is liable to the general usury laws; *Commercial Bank of Manchester v. Nolan*, 7 H. 508.

75. *As to post notes.* If a bank have power under its charter, to issue its own notes to circulate as money, and there be no restriction in the charter requiring such notes to be payable on demand, the bank may issue such notes payable after date; *Campbell v. Miss. Union Bank*, 6 H. 625.

76. *Power to sue after proclamation of forfeiture by governor.* A bank whose charter has been declared forfeited by a proclamation of the governor, issued under the Act of 21st of February, 1846, may nevertheless sue for and recover debts due to it, since that act expressly authorizes this to be done notwithstanding the forfeiture; *Ib.*

77. *Power to take a mortgage or pledge.* The Commercial Bank of Manchester, under that provision of its charter, which declares that, "it is made capable of buying, receiving and holding property and estate of whatever nature, and the same to alien and dispose of at pleasure," may receive cotton by way of pledge or collateral security, and ship and sell the same. The power to purchase includes within it, the power to take a mortgage, as the power to alien includes in it, the power to make a mortgage. Besides, it is a power incident to every bank, to secure its loans in any manner, not prohibited by its charter or the general laws of the State; *Com'l B'k of Manchester v. Nolan*, 7 H. 508.

78. *Same: Liability as to price of cotton pledged.* Where a debtor of a bank, by agreement with it, has furnished cotton to the bank to be shipped by it to Liverpool, to be there sold on account of the debtor, and the avails to be credited to him; in the absence of proof of the price the cotton sold for, the bank would be liable to account for a fair average

of the prices of cotton at Liverpool about the time the cotton would have arrived there; and in ascertaining the value, it would be competent to prove that the cotton crop of that year was of extra good quality, and it is also competent to show the usual weight of the packed bales; *Com'l B'k of Manchester v. Chisholm*, 6 S. & M. 457.

79. *Power to buy land: Act of 1840, H. C. 325, § 5.* By this act it was provided, that "it shall not be lawful for any bank in this State to deal in stocks of any kind; to purchase and hold in trust, by mortgage or otherwise, any real or personal estate, except such alone, or so much as may be necessary for the proper conducting of its immediate affairs; and at no time to exceed \$100,000 in value," * * * Provided, that such prohibition shall not prevent any bank from taking mortgages or other liens upon land or other property to secure debts already existing: *Held*, that this act does not prevent a bank from purchasing at sheriff's sale, real estate sold under an execution in favor of the bank, and based on a debt due to the bank before the passage of the act. And that wherever a corporation has the power to take a mortgage or lien on real estate to secure the payment of a debt due it, it may purchase the land on which the mortgage or lien exists, when sold at a judicial sale to satisfy the debt; *Ingraham v. Sheed*, 1 G. 410.

80. *To transfer notes to pay its debts.* A bank has power to transfer a promissory note held by it, to one of its creditors in payment of a debt due by the bank to him; *Crocket v. Young*, 1 S. & M. 241.

81. *Assignments for the benefit of creditors.* The Act of 1840, prohibiting banks from assigning their assets, having been declared unconstitutional, there is no want of power in a bank to make a general assignment of its assets to pay its creditors, if it be not fraudulently made; and the assignees under such an assignment would hold the assets in preference to the trustees appointed by the court rendering judgment of forfeiture against the bank, after the assignment; *Montgomery v. Galbraith*, 11 S. & M. 555; *Marsh v. Mandeville*, 6 C. 122; *Grand Gulf Bank v. State*, 10 S. & M. 428.

And a bank may also make a particular assignment of part of its assets to pay particular creditors, and preferences may be given, either in a partial or general assignment, to certain creditors, if done in good faith. Still these preferences are liable to objection, and are watched with jealousy, though not fraudulent in themselves; *Arthur v. Com'l & R. R. Bank of Vicksburg*, 9 S. & M. 394.

82. *Same.* When the deed of assignment made by a bank to trustees for the benefit of its creditors, authorizes the trustees to pledge or sell any of the property or effects conveyed, including the issues or notes of the bank, in case of any pressing necessity not otherwise provided for, should render it necessary so to employ said bank notes; this

does not of itself render the deed fraudulent in law. Such a provision is not an improper appropriation of assets, though it may lead to such a result. If the power be improperly exercised, so as to amount to fraud in fact, a court of chancery may check and control the abuse upon the applications of creditors and stockholders; *Montgomery v. Galbraith*, 11 S. & M. 555.

83. *Same*. And it is no objection to such general assignment, even when it provides that the surplus, after paying debts, shall go to the stockholders, though it were made pending proceedings by *quo warranto* against the bank, and with the view of preventing the consequences of such a judgment on the assets of the bank; *State v. Com'l Bank of Manchester*, 13 S. & M. 569.

84. *Power of bank to assign its bills and notes*. The power to assign negotiable promissory notes, is not essential to the business of banking, and does not, therefore, pass under a charter granting banking privileges as an implied power; *Payne v. Baldwin*, 3 S. & M. 661.

And when no express power to assign such notes is granted in the charter, the bank's power to do so is derived from the general statutes authorizing all persons, the legal owners of notes and bills to assign them; and if that law be repealed, the power of the bank, like that of all other persons, to assign such notes, is gone; *Ib*.

85. *Same: Examples*. The 6th section of the charter of the Planters' Bank, granted the power to the bank "to receive and possess lands, goods, chattels, and effects, of whatever kind. * * * and the same to demise, grant, alien, and dispose of," but this does not confer the power to assign promissory notes. The word "effects," though broad enough to include notes in its signification, yet when construed with reference to the context, and especially with the 17th section of the charter, which expressly treats of the powers of the bank in reference to bills and notes, and does not mention this power of assignment, cannot have that effect here; *Payne v. Baldwin*, *supra*.

And the power is not granted where the charter provides that the bank shall have power "to purchase and possess lands, tenements, and hereditaments, and personal estate of every kind whatever, * * * and to sell and dispose of the same;" *McIntyre v. Ingraham*, 6 G. 25.

86. *Effect of making contracts ultra vires*. If a corporation make a contract which exceeds its powers in part, the excess only will be void; *Grand Gulf Bk v. Archer*, 8 S. & M. 151. And when it is legal in part and illegal in part, that which is legal will be good, if it can be separated from the illegal part. And this rule is applicable when the bank takes usury; *Com'l Bk of Manchester v. Nolan*, 7 H. 508.

See CORPORATION, 38.

XV. Interest and Usury by Banks.

67. *Effect of usury*. The general laws of

the State, in force at the time of the charter of a bank, apply to and govern its transactions, just as they do natural persons, except so far as these general laws are changed by the charter. Hence, when no provision is made in the charter of a bank, in reference to its taking usury, if the bank take usury, the effect thereof will be as prescribed in the general law, viz: a forfeiture of the interest (now, however, by statute, only the excess is forfeited), and not the loss of the whole debt, for though the contract of loan be illegal as to the interest, it is valid as to the principal, and in such case, that which is legal will be sustained, and only the illegal part will be bad. This rule, as to the separation of the legal and valid part of a contract from the illegal and void, is as applicable to corporations as to individuals. It is only when the contract is wholly foreign to the purposes of the corporation, that it would be wholly void; *Com'l Bk of Manchester v. Nolan*, 7 H. 508; *Grand Gulf v. Archer*, 8 S. & M. 151.

Moreover, it is now well settled that an inquiry into a violation of its charter by a bank or other corporation, can only be had in a direct proceeding for that purpose, by the State, and not in a collateral way by individuals; and for this reason, if the corporation make a contract which it is prohibited from making, it is no defence to the parties contracting with it, if they have received the consideration of the contract, that the corporation had no right to make it; *Grand Gulf Bank v. Archer*, 8 S. & M. 151.

88. *Effect of clause fixing interest in the charter*. A clause in the charter of a bank, which authorizes it to discount at a specified rate, notes and bills having less than twelve months to run, does not fix the rate of interest which may be collected on the notes or bills so discounted, after maturity, if they be not then paid. That interest will be regulated by the general law, or the contract of the parties in pursuance of it, as if the notes or bills were made between other parties; *Chambless v. Robertson*, 1 C. 302.

See INTEREST, 31 to 36.

XVI. Assignment of debts by Banks, under the Act of 1840. H. C. 325, sec. 7.

See BILLS OF EXCHANGE, 101 to 103, and 156, 157.

89. *Act of 1840, H. C. 325, § 7*. The 7th section of this act is as follows: "It shall not be lawful for any bank in this State to transfer, by endorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or evidence of debt, that the same was so transferred, the same shall abate upon the plea of the defendant."

90. *Assignee cannot sue on assigned debt*. The assignee of a note transferred by any bank in this State, since the passage of the Act of 1840, and to which the power to assign its notes was not granted by its charter, either expressly or by necessary implica-

tion, cannot maintain an action on it in his own name; *Payne v. Baldwin et al.*, 3 S. & M. 661. Nor can the bank maintain a suit on a note it has thus transferred, whilst the assignment still subsists. Whether upon a re-transfer to the bank, by the assignee, the bank can maintain the suit, was left expressly an open question; *Planters' Bank v. Sharpe*, 4 S. & M. 17.

91. *Defence to suit by assignee.* But the defence to such an action by an assignee can be made only by plea in abatement; *Lanier v. Trigg*, 6 S. & M. 641; *Com'l Bk of Columbus v. Thompson*, 7 S. & M. 443; *Hazlip v. Leggett*, 6 S. & M. 326, citing *Planters' Bk v. Sharpe*, *supra*. And the Act of 1840 being for the benefit of the debtors of the bank, if the defendant in an action by such assignee fail to plead the assignment in abatement, it will be a waiver of the defence, and if judgment be rendered, it will be dischargeable only in legal tender; *Com'l Bk of Columbus v. Thompson*, 7 S. & M. 443.

92. *Constitutionality of the Act of 1840.* The Supreme Court of the United States in *Planters' Bank v. Sharpe*, 6 H. S. C. R., taken to that court under the 25th section of the Judiciary Act of 1789, having decided the Act of 1840, above quoted, to be unconstitutional, that decision is conformed to by this court; *Grand Gulf Bank v. The State*, 10 S. & M. 428; *Montgomery v. Galbraith*, 11 S. & M. 555; and in these cases effect was given to a general assignment of its assets by a bank, even as against the trustees appointed under the Act of 1843, upon the rendition of a judgment of forfeiture against the bank; *S. P., Marsh v. Mandeville*, 6 C. 122.

93. *Sume.* But in *McIntyre v. Ingraham*, 6 G. 25. The court examined a bank charter, as to the question whether the power to assign notes and bills was granted on it, and reached the conclusion that it was not, and therefore applied the Act of 1840 to an assignment made by such bank, holding that it did apply, except where the power to assign was given on the charter, and was not exercised solely under the general law allowing the assignment of such notes.

94. *Effect of equitable assignment after the passage of the Act of 1840.* The Act of 1840 also required banks to receive their own notes in payment of deb's due them; and when a note was made payable to a bank after the date of that act, it will be considered as between the bank and the maker, that that provision of it, was a part of the contract. And so if the note be transferred by the bank so as to vest in the assignee only an equitable title—the legal title being still in the bank, a court of equity will give relief to the assignee only to the same extent that it would give relief to the bank, and will require payment of the note to the assignee only in the notes of the bank, or in default of the makers paying in that currency, then the highest market price of the bank notes between the maturity of the note assigned, and the trial. Whether this would be the rule at

law where the legal title was transferred; *Quere? Raily v. Bacon*, 4 C. 455.

XVII. Miscellaneous.

94a. *Admissions of agent evidence.* An account proved to be taken from the books, or to be in the handwriting of one of the clerks of the bank, whose duty it was to make out such accounts, is admissible in evidence against the bank; *Forniquet v. West Feliciano R. R. Co.*, 6 H. 116.

94b *Right to sue: Where forfeiture proclaimed by the governor.* A bank whose charter has been declared forfeited by a proclamation of the governor, under the Act of 1840, H. C. 326, § 10, may nevertheless sue for and recover debts due to it, since that act expressly authorizes this to be done, notwithstanding the forfeiture; *Campbell v. Miss. Union Bank*, 6 H. 625.

95. *Surrender of charter.* It seems that a majority of the stockholders of a bank cannot surrender its charter by mere resolution; *Id.*

96. *Fraud in organization of bank.* In an action by a bank on a note payable to itself, it is not competent for the defendant to defeat a recovery by showing that it was given for stock in the bank and that there was fraud in the payment of the stock and in the organization of the bank; *Smith v. Miss. & Ala. R. R. Co.*, 6 S. & M. 179.

97. *Tax on foreign bank lending money here.* Under the Revenue Act of 1841, which levies an *ad valorem* tax on all money loaned by individuals in this State, a foreign bank lending money here will be liable to be taxed therefor—a corporation being included in the term individual; *Bank of U. S. v. The State*, 13 S. & M. 326.

98. *Agents of banks.* A bank necessarily transacts all its business through agents having separate and independent duties; it is bound by the acts of any one of its agents only in the scope and sphere of his duties, and his agency extends no farther than that; and hence notice to one of the agents, of a matter not within the scope and sphere of his duties and agency, is no notice to the bank, nor to its other agents; *Goodloe v. Godley*, 13 S. & M. 233.

99. *Demand on bank.* Where a demand is made on a bank, it must be made on some legally authorized agent of the bank; *Com'l Bank of Manchester v. Bonner*, 13 S. & M. 649.

100. *Agencies of foreign banks in the State illegal.* Since the year 1840, the policy of this State has been against the exercise within its limits of the franchise of banking. The Act of 1841, H. C. 328, prohibits the issuing of bank notes in this State to circulate as money. This prohibition extends to the establishment of agencies here by foreign banks, to loan their notes or to use them in the discount or purchase of commercial paper, and any such contract of agency is void, including the bond given by the agent to the bank, for a faithful performance of his duties; and a stipulation in such a bond to

account for the money the agent receives, is also illegal, for it is so connected with the illegal purchase to dispose of the money in this State in violation of law, and the stipulations in the bond to secure the performance of that illegal purpose, that it cannot be separated from them; *Bank of Newbury v. Stegall*, 41 M. 142.

101. *Custom of banks.* See *BILLS OF EXCHANGE*, &c., 29, 39, 40a.

Bank Checks.

1. *In what currency payable: Parol proof.* It is not competent to prove by parol, that a check payable in "dollars" simply, was intended by the parties to be paid in depreciated bank notes, as that would be to vary a written contract by parol; *Pack v. Thomas*, 13 S. & M. 11.

2. *Notice of non-payment of check, when necessary.* Bank checks are not governed by the same rules as commercial paper, as to demand and notice of non-payment. They are supposed to be drawn on cash deposits of the drawer, and if not paid, it is considered that the cash still remains to the drawer's credit. The drawer is not released by a failure of the holder to give notice of non-payment, even if he had reasonable ground to believe it would be paid, or had a cash deposit with the drawee sufficient to pay it. He is released by a failure to give him notice of non-payment only to the extent of the injury he has received thereby. In case of failure of the drawee, then proof of notice of non-payment is necessary to rebut the presumption of injury arising from the failure; and when the drawer has no funds in the hands of the drawee to meet the check, demand and notice are necessary; *Ib.*

Bankruptcy.

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[Note.—The cases digested under this title are decisions under the Act of Congress of 1841.]

I. Assignee in bankruptcy, and assignments to and by him.

1. *His title.* By the mere act of adjudication of bankruptcy, the assignee is invested with all the rights of property of the bankrupt, and he can maintain any action thereon that the bankrupt could. But his rights are not superior to the rights of the bankrupt, but the same; *Porter v. Douglass*, 5 C. 379; *Abbey v. Commercial Bank of N. O.*, 5 G. 511; *S. P., Wilson v. McElroy*, 2 S. & M. 241; *Anderson v. Miller*, 7 S. & M. 586. See *post*, 22, as to power of assignee to sue for and recover property fraudulently assigned by the bankrupt.

2. *Assignment by.* And having no other right or title than was vested in the bankrupt, he can convey no other to an assignee under him; and hence, if the bankrupt only had an equitable title to property, a transfer or sale of it by the assignee will convey only an equity; *Wilson v. McElroy*, *supra*. And so if the bankrupt return in his schedule of assets a judgment rendered in his favor, and he assignee sell it to another, who has not notice of a transfer of it by the bankrupt before his bankruptcy, the prior transferor will have the superior title; the sale by the assignee conveying no title but what is in the bankrupt at the time of his declaration as such; *Anderson v. Miller*, *supra*.

3. *Form of assignment to.* If a note payable to the bearer be a part of the assets of a bankrupt, a formal assignment of it in writing by the assignee is unnecessary; delivery alone is sufficient, as in assignments of such notes by other parties; *Arnold v. Leonard*, 12 S. & M. 258.

4. *May assign to the bankrupt if he purchase.* A certificated bankrupt who has made a surrender of his estate, including debts due him, may lawfully purchase from his assignee any of these effects or debts, and maintain an action therefor; and though such transfer may look suspicious, yet it cannot affect the bankrupt's right to sue, unless upon proof of fraud in fact; *Ib.*

6. *Proof of appointment of assignee.* And in an action by the purchaser from an assignee in bankruptcy to recover the property so purchased, it is competent to prove the acts of the assignee without producing the record of his appointment; so far as the interests of the public are concerned, and the rights of third parties, proof that he acted as assignee is sufficient; *Ib.*

II. Jurisdiction of U. S. and of State courts in cases of.

7. *Jurisdiction of U. S. District Court as to liens.* The U. S. District Court having the jurisdiction of the proceedings in bankruptcy of a bankrupt, has also jurisdiction over liens and encumbrances on the property of the bankrupt; and the assignee, may, in that court, compel a foreclosure of mortgages, and the enforcement and adjustment of liens generally, on the bankrupt's estate, so as to ascertain and distribute properly the bankrupt's assets; *Russell v. Cheatham*, 8 S. & M. 703.

8. *Jurisdiction of State courts as to liens.* But the Act of Congress does not necessarily withdraw from the State courts jurisdiction over liens acquired on the bankrupt's estate before bankruptcy. The State courts may enforce these liens according to State laws, unless the Bankrupt court interfere and assume exclusive jurisdiction thereof, by injunction against the creditor holding the lien; and this interference will not take place, unless a case exists, where such interposition is necessary for the benefit of the general creditors. When the Bankrupt court does interfere, however, its judgment is final;

Russell v. Cheatham, supra. And if a judgment lien be acquired in a State court against a bankrupt before declaration of bankruptcy, it may be enforced afterwards by issuing and levying the execution; *Russell v. Cheatham, supra*; *Talbert v. Melton*, 9 S. & M. 9. And so, if a lien be acquired by the service of an attachment before the declaration in bankruptcy, the State court will, notwithstanding the declaration in bankruptcy, proceed to give it effect; *Wells v. Brander*, 10 S. & M. 348.

9. *Jurisdiction as to fraudulent conveyance by bankrupt.* And a creditor of a bankrupt who has a lien by judgment prior to the bankruptcy, may (when he has not received a *pro rata* dividend from the bankrupt's assets), after the bankrupt's discharge, proceed in a State court to set aside a fraudulent conveyance made by the bankrupt, and subject the property so assigned to the payment of his debt; *Wooten v. Clark*, 1 C. 75; *Edwards v. Gibbs*, 10 G. 166.

III. Liens attaching before Bankruptcy.

10. *Liens preserved.* Under the Bankrupt Act of 1841, all liens, including those created by service of attachment, existing on a debtor's property at the time he is declared a bankrupt, are preserved; *Wells v. Brander*, 10 S. & M. 348. And that judgment and attachment liens may be enforced in the courts in which they were created. See *ante*, 8.

11. *Preserved as to the property, even after bankrupt's discharge.* And under that clause of the act, which provides "that nothing in this act shall be construed to annul, destroy, or impair, any lawful rights of married women or minors, on any liens, mortgages, or other securities, on property real or personal," a mortgage or lien is preserved in full force, as to the property on which it attached, notwithstanding the bankrupt's personal discharge from liability for the debt; *Bush v. Cooper*, 4 C. 599.

12. *Effect of expiration of the lien on rights of assignee.* The liens were preserved as before stated, but, subject to these liens, the property is vested in the assignee, and when, by the operation of the State law under which they were created, the liens ceased to have operation (as in case of bar by the statute of limitations), then the assignee took the property exempt from the liens, and held it for the benefit of the general creditors; *Bruner v. Sherley*, 5 C. 407.

IV. Discharge and its Effects.

13. *Discharge of husband as to wife's debt.* The discharge in bankruptcy of the husband, would be a bar to an action at law against him and his wife, to recover a debt created by the wife *dum soba*; but it would not be a release or discharge of the liability of the wife for the debt, for the recovery of which the creditor might still proceed in equity. And it would be no obstacle to such a bill, that a judgment had been rendered for husband and wife, in an action at law for the same debt, upon his plea of bankruptcy; *Dickson v. Miller*, 11 S. & M. 594.

14. *Only releases from debts provable under the act.* A discharge under the Bankrupt Act of 1841, is a release only from liabilities which were provable under that act, and the plea of the debtor setting up his discharge, must aver that the claim sued on was so provable; *Hayes v. Flowers*, 3 C. 169.

15. *Covenant of warranty of title to land not provable.* A covenant of general warranty of title to land by the grantor, is not provable as a debt against the covenantor, under the Act of 1841, and a discharge of the covenantor under that act, does not release him from liability on his covenant; *Burrus v. Wilkinson*, 2 G. 537; *Bush v. Cooper*, 4 C. 599. And when a mortgagor makes such a covenant, though he be released by his discharge from the mortgage debt, he is not released from his covenant, and hence he cannot, after his discharge, purchase the mortgaged property under a lien or encumbrance prior to his mortgage, and hold it against the mortgagee; *Bush v. Cooper, supra*.

16. *May be waived.* A discharge in bankruptcy is a personal privilege of the bankrupt, and may be waived by him, and hence if the second endorser of a bill or note, notwithstanding his discharge, pay the debt, he may recover against the first; *Bouman v. Pope*, 4 G. 94. And so if after his discharge he permit a judgment to be rendered against him upon a contract from which his discharge released him, this is a waiver of the privilege, and he cannot afterwards be permitted to rely on his discharge, in bar of a suit in equity to enforce the judgment; *Marsh v. Mandeville*, 6 C. 122. But if the judgment were rendered against the bankrupt, pending the proceedings in bankruptcy, and before the final discharge, he will be relieved from it by the discharge; *McDonald v. Ingraham*, 1 G. 389.

17. *Effect of subsequent promise to pay a debt released by discharge.* Whether a subsequent promise to pay a debt, from which a bankrupt is discharged, is binding on the bankrupt; *Quære?* *Prewett v. Caruthers*, 12 S. & M. 491. But if such promise be binding, it must be of the most unequivocal character; a vague or conditional promise will not do; and loose declarations made by the bankrupt to third persons to the effect of his having promised the creditor to pay the debt to him, will not be sufficient to establish the promise; such declarations afford some ground for a presumption that a promise has been made, but of themselves they do not amount to a promise; *Id.* It is, however, now settled that a bankrupt is under a moral obligation to pay his debts, although the legal remedy of his creditors be barred by his certificate; consequently the law will give effect, not only to a new contract founded on a debt contracted before bankruptcy, but also to an express and distinct promise to pay such debt made by the bankrupt, without any new consideration, either after the issuing of the commission and before final discharge, or after the final discharge, and this though the debt

were provable under the commission; *Mc-Willie v. Kirkpatrick*, 6 C. 802, overruling, *Rice v. Maxwell*, 13 S. & M. 289, where it was held that a subsequent promise to pay a debt from which the bankrupt is discharged, is without consideration and void. If the promise be to pay the debt when the bankrupt is able, it devolves on the creditor seeking to recover on the promise to show the ability of the defendant to pay; *La Tourette v. Price*, 6 C. 702.

18. *Same: Where the promise is to buy off creditors' opposition to the discharge.* But if a note be given by an applicant for a discharge in bankruptcy to secure a debt, upon the condition that the creditor will not oppose his discharge, the contract is against public policy and void, though it were executed after the discharge was actually granted; *Rice v. Maxwell*, 13 S. & M. 289.

19. *What discharges the bankrupt.* It is the final discharge and certificate which discharges a bankrupt from his debts; *Hayes v. Flower*, 3 C. 169.

20. *Debtor proving his debt and receiving dividend, cannot impeach discharge.* The 5th section of the Bankrupt Act of 1841, provides "that all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects *pro rata*, and no person coming and proving his debt or other claim, shall be allowed to maintain any suit at law, or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt, and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." This section is a bar to any creditor so proving his claim and receiving his dividend therefor, from bringing any suit after the discharge to impeach it for fraud; *Buckner v. Calcote*, 6 C. 432.

21. *Statute of limitations on bill to impeach discharge.* As to the effect of the statute of limitations on a bill to impeach a bankrupt's discharge for fraud,

See LIMITATION OF ACTIONS, 105, 106, 107, 108, 109.

V. Fraudulent Conveyances by Bankrupt.

22. *Power of assignee in respect to.* Under the Bankrupt Act of 1841, the assignee in bankruptcy was, by the mere act of adjudicating the party a bankrupt, invested with all the rights of property of the bankrupt, and the assignee could maintain any action which the bankrupt could have maintained before he was adjudicated a bankrupt. His rights were however not superior to, but the same only as the bankrupt's; and hence where the bankrupt has made a fraudulent conveyance of his property *before the bankrupt act was passed*, the conveyance being good as to the bankrupt it is good also as to the assignee; since this transaction, having taken place before the passage of the bankrupt act, could not come within the operation of the 2d sec-

tion thereof, which avoided sales, conveyances, payments, &c., made in contemplation of bankruptcy. And in such a case it is not the duty of the bankrupt to return in his schedule of assets, property so fraudulently conveyed before the passage of the act, though the conveyance was made for the benefit of his wife, and the property still remains in possession of himself and wife; *Porter v. Douglass*, 5 C. 379; S. P., *Abbey v. Com'l Bk of N. O.*, 5 G. 571. But the rule would have been different, if the conveyance had been made after the passage of the act; *Id.*

22a. *Vested remainder must be included in schedule.* The willful omission from his schedule by a bankrupt, of his interest in a vested estate in remainder to take effect in possession after the termination of a precedent life estate, is such a fraud as will vitiate his discharge; *Edwards v. Gibbs*, 10 G. 166.

VI. Bankruptcy of Partners.

23. *Bankruptcy of one partner: Suit in such case.* Where one of several partners become bankrupt, his title in the partnership property vests in his assignor and not in his solvent partners; and in such cases an action cannot be maintained in the partnership name, on a security payable to the partnership; it should be brought in the names of the solvent partners and of the assignee. And the objection may be made under the general issue. *Sims v. Ross*, 8 S. & M. 557; S. P., *Burrus v. Fisher*, 5 C. 418.

24. *Several firms; Individual bankrupts; balances due by one firm to another.* There were three firms, X, Y, & Z., all composed of the same three members, and all engaged in the same business. One firm was domiciled in New Orleans, one at Natchez, and one at Yazoo City, and at each of these places one of the members resided and conducted the business there. One of the members died, and the other two being insolvent, each for him self and as an individual, applied to be discharged as a bankrupt. The partner at New Orleans, returned in his schedule of assets of the firm X, (domiciled there), a balance of \$320,000, due by the firm Y., at Natchez, and \$200,000 due by the firm Z., at Yazoo City. These balances were sold by the assignee of the partner at New Orleans, and purchased by O., who proved the same against the estate of the member at Natchez and the firm Y., and received a dividend thereon. Afterwards O. who had purchased the claim from Y., brought this bill in chancery to collect the debt from the two discharged bankrupts, setting up that their discharges were fraudulent: *Held*,

1st That these balances returned by the member at New Orleans, as due to firm X, by the firms Y. and Z., of all which firms he was a member, did not constitute such a debt against Y. and Z., as would authorize the purchaser of them to assail his discharge; that the purchaser only got the right by his purchase, which the firm at New Orleans had against the others, viz.: the surplus remaining after paying all their debts; and as all the

firms were insolvent, there was no surplus, and therefore no right passed to the purchaser.

2d. That the member at New Orleans in returning the balances in his schedule, returned only his interest in them, and did not return them as debts due by him, but only as part of the assets of his estate, and when the sale was made by his assignee, only his interest in these balances passed, and not his liability on them.

3d. That as the member at New Orleans did not apply for a discharge on behalf of the firm X. (domiciled there) but only as an individual to be released of his individual debts, and also of his liabilities as a member of firms X., Y., and Z., a general order of the Bankrupt Court, authorizing the assignee of such members to sell his assets, did not authorize a sale of the assets of the firm X. That it required a special order for that purpose, so as to divest the interest of the other partners; and the power of that assignee to sell the interests of the other partners, being an extraordinary one, it was incumbent on the purchaser to show it, and the power not being shown, it was to be presumed, that he was not the purchaser of the other two-thirds interest belonging to the other partners; and the fact that the two surviving partners (viz., the members at New Orleans, and at Natchez) were by private agreement between themselves taking the benefit of the bankrupt law in concert, made no difference in this respect, it not being shown that the Bankrupt Court acted on such agreement; and if the agreement could have had the effect contended for (viz., of making the order of sale apply to the partnership interest), then the member at Natchez could object, that as the surrender of his interest in the balances, was based on the idea, that therefore he was to be discharged from liability on them, his said interest could not be used to prevent the very object for which the surrender was made; *Buckner v. Calcote*, 6 C. 432.

25. *Same: When balance due by one firm, assets to creditors of the other.* Where there are several firms and they are entirely separate and distinct, a debt due upon distinct dealings from one firm to the other, is, as to the creditors of the latter, considered as assets of the latter, and a trust fund for the payment of the creditors who have dealt with it; and such creditors in case of the bankruptcy of the firms are entitled to prove their claim against the debtor firm in virtue of their claim as creditors of the creditor firm—the firms being considered as distinct for the purpose of distributing their assets among their respective creditors; *Ib.*

26. *When the foregoing rule applies.* The above rule for the administration of assets, only applies in the following circumstances:

1st. The firms must not only be separate and distinct, but there must be some of the members belonging to one of the firms, either actually or in law as to the rights of creditors, who do not belong to the other; or

2d. When all the firms are composed of the same members, not only the firms but the "trades" must be separate and distinct; or otherwise they will be considered merely as one partnership, arranging different concerns belonging to them in different ways; e. g., if all be engaged in the same general business as "cotton factors," though at different points, and under different names, and though the books of each be kept entirely separate and distinct, the rule will not apply; and

3d. The rule applies only where all the partners are included in the same general commission, and all the estates are under administration in the same bankrupt court; for when that is not the case, the individual interest of the bankrupt partner only passes to his assignee, which interest is but a right to have an account taken to get his share of the surplus, if there be any. *Ib.*

37. *Extent and effect of the rule.* And when this rule is applied, it gives merely a right to the assignee of the creditor firm to prove against the debtor firm, the balance due from the latter to the former, and receive a dividend thereon for distribution among the creditors of the creditor firm; and when these avails have been received, the object of the equitable rule is accomplished, and it can be used no further, and for no other purpose; *Ib.*

VII. Miscellaneous.

27a. *Declaration of bankruptcy: Effect.* The mere declaration of bankruptcy is but an incipient step in the proceeding for a final decree, and is not evidence of the transfer of all the bankrupt's assets under the act of Congress; *Wells v. Brander*, 10 S. & M. 348; it does not discharge the bankrupt from his debts; that is done by the final discharge. *McDonald v. Ingraham*, 1 G. 389; *Hayes v. Flowers*, 3 C. 169.

28. *Equity will not aid fraudulent bankrupt.* A court of equity will not aid a bankrupt to enforce a judgment recovered in his own name prior to his bankruptcy, and which he failed to return in his schedule of assets; *Planters' Bank of Tenn. v. Conger*, 12 S. & M. 527.

29. *Power of bankrupt to purchase his own assets.* See ante, 4.

30. *Construction of.* The Bankrupt Act will be construed by the State courts, in accordance with the decisions of the United States courts; *Russell v. Cheatham*, 8 S. & M. 703.

Bastardy.

1. *Legitimation by subsequent marriage.* Bastards are not "children" in the sense of the statute of distribution. They have no inheritable blood; but by the statute of 1821, H. C. 502, art. 3, a bastard is rendered legitimate by the subsequent marriage of the parents, and the acknowledgment of him by the man; *Porter's Heirs v. Porter*, 7 H. 106.

2. *Same: Conflict of laws: Effect of foreign marriage and acknowledgment.* But it is a settled principle that the status of a per

son as to legitimacy or otherwise, is to be determined by the law of the country where the *status* had its origin. Hence, a subsequent marriage of the parents of a bastard, and their acknowledgment of him taking place in a foreign state, which was also the place of the birth of the bastard, will not, upon the removal of the parents and bastard here, have the effect to render him legitimate, if such effect did not follow by the laws of such foreign state. The character *there* impressed on him will follow him everywhere; *Smith's v. Kelly's Heirs*, 1 C. 167.

3. *Their right to inherit under Act of 1846, H. C. 501, art. 2.* This act provided, that the Circuit and Chancery Courts should have power, on the petition of any person, to make legitimate any of his offspring not born in lawful wedlock; and it also provided, in section 4, that "hereafter all illegitimate children shall inherit the property of their mothers, and from each other, as children of the half blood, according to the statute of distribution," &c. This act was held to be an innovation on the common law, and therefore to be construed strictly, and that it did not remove any disability, or confer any right on illegitimates except such as are specially mentioned in it. And consequently, that the legitimate children of a bastard who died before the passage of the act, are not entitled to inherit the estate of their illegitimate uncle or aunt, dying after the date of the act; *Edwards v. Gaulding*, 9 G. 118.

4. *Evidence to prove paternity of bastard.* In a case of bastardy, the mother, if introduced to prove the paternity of the child, may be asked on cross-examination if she did not have sexual intercourse with other men about the period of conception; but she cannot, for the purpose of attacking her credibility, be interrogated as to her want of chastity at other times; *Anonymous Case*, 8 G. 54.

5. *Same: Testimony of experts.* And in such a case it is incompetent to show by the testimony of professional persons, in impeachment of the mother's testimony, that it is highly improbable that impregnation can be produced by the first act of coition; *Ib.*

6. *Proof of bastardy when mother is married.* A child born after marriage, and during the husband's life, is presumed to be legitimate; and anciently, this presumption could not be rebutted except by proof that the husband was impotent, or that he was beyond the four seas during the whole period of conception and gestation. This rule, however, has been relaxed, and the presumptions may be rebutted by showing that the husband had no opportunity of intercourse, and the jury are to infer from all the evidence whether the intercourse did take place or not. Hence, where in an answer to a petition by the husband claiming the guardianship of the child, the paternity of the petition is denied upon the ground of non-intercourse, the birth during the marriage being admitted, it is incumbent on the defendant to rebut the presumption of legitimacy by proof showing non-intercourse; *Herring v. Godson*, 43 M. 392.

Bequest to Children.

See LEGACY, 1.

1. *Construction of.* If a contrary intention do not appear on the face of the will, the rule is that when a gift is made to the children of several persons, as a gift to the children of A. and B., or to the children of A. and the children of B., they take *per capita*, and not *per stirpes*; *Nichols v. Denny*, 8 G. 59 (citing 2 Jarm. on Wills, iii.; *Weld v. Bradly*, 2 Verm. 705; *Lugan v. Harman*, 1 Cox, 250; 10 Ves., Jr. 166; 8 Ves., Jr. 604; 1 Beav. 607; *Ex parte Leith*, 1 Hill Chy. R. 153).

2. *Same: Remainder to children.* Where a remainder is limited to the children of the tenant of the particular estate, or to the children of any other person, the gift embraces not only the children living at the testator's death, but all who may subsequently be born before the period of distribution; *Ib.* (citing 2 Jarm. on Wills, iii).

Betterments.

1. *Right of trespasser to.* No man ought to be entitled to the extraordinary benefits of a *bona fide* possession of land, unless he entered and improved, in a case which appeared to him, after diligent and faithful inquiry, to be free from suspicion. There is no moral obligation which should compel a man to pay for improvements on his own land which he never authorized, and which originated in *tort*; *Learned v. Corley*, 43 M. 687.

See EJECTMENT, 41 to 45. CHANCERY, subdivision Betterments.

Bigamy.

See CRIMINAL LAW.

Bill of Credit.

1. *Meaning of the term.* The words "bill of credit," as used in that clause of the Constitution of the United States which prohibits the States from emitting bills of credit, means a paper medium, intended to circulate, between individuals, and between the government and individuals, as money for the ordinary purposes of society; *Pagault's Case*, 5 S. & M. 491.

2. *Auditors' warrants not bills of credit.* Auditors' warrants, which are but mere orders given by the auditor on the treasurer in favor of persons having claims against the State, as the authority or warrant to the treasurer for paying the same, are not "bills of credit," within the meaning of the Constitution of the United States, prohibiting the emission by the State of that kind of paper; and the occasional use of such warrants by individuals as a circulating medium does not invest them with that illegal character; *Ib.*

3. *Same: Intention of Legislature: How proven.* In determining whether paper issued

by the State is a bill of credit, the intention of the Legislature in issuing it is an important inquiry; but this intention can be deduced only from the statute authorizing its issue. Testimony *aliunde*, to explain the motives, or point out the objects of the law-makers, is wholly inadmissible. And so of evidence offered to show the intention of the auditor in issuing the paper; *Ib.*

Bill of Discovery at Law.

1. *Act of 1828, H. C. 865, art. 6.* By this act the Circuit Court, in which an action is pending (the parties being all residents of the State), are vested with power to compel discoveries *in aid of actions* at law, whenever by the rules of equity, a discovery would be compelled in a chancery court; and it was provided that the party desiring the discovery, should embody the facts about which the discovery is sought with the reasons for asking it in a sworn petition to the court, who, on examining it, should determine whether a discovery should be had, and if allowed, the court should direct a discovery to be made forthwith, and at such time as it should appoint; and if the defendant in the petition was not in attendance on the court, a subpoena was to issue for him, and if he failed to make discovery, after due notice served, "the facts stated in the petition concerning which a discovery was prayed, shall be taken as confessed, and go to the jury as though they were admitted" under oath. By section 3, the right to have the action of the court in granting or refusing a petition for a discovery reviewed by the High Court, was allowed. By section 5 it was provided, that "a discovery made by one defendant should not operate against his or her co-defendant, who shall on a like discovery, deny the same facts discovered by such defendants.

2. *Act of 1846, H. C. 871. art. 15.* This act extended the petition of discovery, where one or more of the parties were non-residents, and provided for publication in a newspaper of notice to a non-resident from whom discovery was sought. By section 3, it was provided, that "this act (and the Act of 1828) shall be considered as authorizing the defendants in actions at law to compel discoveries in defence in the same manner as plaintiffs are allowed to compel them in aid of actions at law."

3. *Rev. Code of 1857, p. 520.* Is in substance the same as the Acts of 1828 and 1846, except that the provision in section 5 of the Act of 1828, in relation to the effect of the answer of one defendant against his co-defendant, is modified so as to provide that such answer shall not be evidence against a co-defendant, unless he has been made a party to the petition, and has failed to deny the facts discovered by a co-defendant, and it also provides that the petition shall be considered as true, where there is an answer, as to those facts stated in it, and not denied by the answer.

4. *Granting petition: Discretionary dili-*

gence required. The granting or refusing leave to file a bill of discovery at law under the Act of 1828, is a matter of sound discretion in the court, but leave will not be granted where the party applying has not used diligence so as to make the application at such time as will not, if granted, unnecessarily delay a trial of the cause; *Dillahunt v. Smith*, 7 H. 673.

5. *Though discretionary, the High Court may review it.* Notwithstanding the action of the Circuit Court in granting or refusing a petition for discovery, is to a large extent a matter of sound discretion in the court, yet by the express terms of the statute, this action is subject to review by the High Court of Errors and Appeals; *Scott v. Hamblin*, 3 S. & M. 285. But if the prayer for the allowance of the petition be accompanied by a prayer also for a continuance of the cause (which would be necessary if the petition be granted), then as the granting of the continuance is a matter of discretion in the Circuit, and rarely if ever revisable by the High Court, the refusal to grant the petition for a discovery is not assignable as error; *Rule v. Taylor*, 4 S. & M. 577.

6. *When petition ought to be granted.* A petition for a discovery ought to be granted, though presented for the first time on the day the cause is set for trial, if it appear that the petitioner was not aware of the materiality of the evidence sought to be elicited by it till that day, and it also appear that the party who is to answer it resides in the county where the court is held; *Scott v. Hamblin*, 3 S. & M. 285.

7. *Nominal plaintiff may file petition.* It is no objection to a petition for discovery that it is filed by the nominal plaintiff; if it be in relation to matters which took place before the assignment; *Minor v. Gaw*, 11 S. & M. 322.

See ACTION, 11.

8. *Must be answered, though it involves a forfeiture of interest.* A petition for discovery at law must be answered, though it subjects the defendant to a forfeiture of legal interest by establishing usury; *Taylor v. Mitchell*, 1 H. 596.

9. *Allegations of the petition not denied by answer, are confessed.* The allegations of a petition for a discovery not denied in the answer, are to be taken as true; *Taylor v. Mitchell*, *supra*.

10. *The whole answer must be read to the jury.* The whole of an answer to a petition for a discovery must be read to the jury, as it is to be regarded in the nature of a confession by the respondent; but only such parts of it as are strictly responsive to the petition, or necessarily connected with, or explanatory of the responsive matter, are evidence. Hence, when the petition charged, that the defendant took from the petitioner, by force, the note sued on; and the defendant answered admitting the allegation, but stated as an excuse for that conduct, that the note had been delivered by him to the complainant on a condition which had not been complied with;

it was held, that the latter statement in reference to the delivery, and the condition, was not responsive to the petition, and therefore no evidence; *Massingill v. Carraway*, 13 S. & M. 324.

11. *When petition no evidence; answer conclusive.* When the answer to the petition denies all the material allegations of the petition, the latter cannot be considered as evidence by the jury; the answer, when submitted, is conclusive; *Robinson v. Francis*, 7 H. 458; and the petition admits that complainant has no other witness to prove the facts concerning which discovery is brought, and hence, the petitioner is not entitled to another term of the court to take testimony to overturn the answer; *Ib.*

12. *Petitioner may withdraw petition and answer.* If the petition be not answered, nor entered as taken for confessed, the petitioner may abandon it, and prove by a witness the matters sought to be discovered by the petition; *Foster v. Pinckard*, 5 S. & M. 792. And even after answer, the petitioner may dismiss his petition, and show by other evidence the facts sought to be proven by the discovery; *Carson v. Flowers*, 7 S. & M. 99.

13. *Striking out parts of answer not admissible.* If so much of the answer to a petition for discovery, as states the substance of a correspondence, be stricken out, it will be error; but if the correspondence itself be attached to the answer, and be read to the jury, the error committed in striking out will be immaterial; *Fox v. Fisk*, 6 H. 328.

14. *Petitioner must take notice of the answer when filed.* When the answer to a petition for a discovery has been on file for three months, the petitioner is bound to take notice of it, and he cannot complain on a motion for a new trial, that he was surprised by finding the answer on file after the cause was submitted to a jury, even when the opposing counsel, upon the case being called for trial admitted, in answer to the petitioner's application for a *pro confesso*, that no answer had been filed, and asked leave to file a demurrer; *Robinson v. Francis*, 7 H. 458.

15. *Answer overrules demurrer: Withdrawal of demurrer.* An answer to a petition for a discovery overrules a demurrer previously filed; and if a demurrer be filed after the answer is in, the court will disregard it. And a demurrer may be withdrawn after the cause is submitted to a jury, if there be an answer on file; *Ib.*

16. *Answer of one joint maker of a note evidence against the other.* The answer of one joint maker of a note to a bill of discovery is evidence against his co-maker, if both be sued in the same action; *Montgomery v. Dillingham*, 3 S. & M. 647.

17. *Answer of one partner.* When a petition for a discovery was filed against two partners, who were plaintiffs, and it was answered by one of them, but not by the other, it was held to be error for the court to allow the petition to be read as evidence, and to refuse to allow the answer of the partner to be read, and to charge the jury that the pe-

tition was to be taken as true for want of an answer. A petition for discovery, when notice of it has been duly served on the defendants, may be taken for confessed; but service on one partner is not service on both, and as it did not appear that the partner failing to answer had been served with notice, a *pro confesso* as to him was improper, and, moreover, the court say it is doubtful, whether the answer of one partner, after the petition was read to the jury was not evidence; *Fugua v. Tindall*, 11 S. & M. 465.

18. *Petition and answer not a part of the record.* A petition for the discovery and the answer, are evidence, and not a part of the record, unless made so by bill of exceptions; *Ib.*

19. *Want of interest of petitioner not a good plea in bar.* It is not a good plea to a petition for a discovery, that the plaintiff has no interest in the subject-matter of the suit. The defendant should answer the petition, and make that defence to the action at law; *Green v. McCarroll*, 2 C. 427.

Bills of Exceptions.

See HIGH COURT, 116 to 129a.

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I. Nature and office of, and what they are.

1. *Office to make matter in pais a part of the record.* The office of a bill of exceptions is to make that a part of the record of a cause, which, unless incorporated in it, would not be matter of record, and hence, that which is *per se* matter of record, as the pleadings and judgment, cannot be certified to the Appellate Court in a bill of exceptions; and if so certified it will not be noticed; *N. O. J. & G. N. R. R. Co. v. Albritton*, 9 G. 242; *S. P., Whitfield v. Westbrook*, 40 M. 311; *Porter v. Porter*, 41 M. 116; *Moody v. Nichol*, 4 C. 109; *Jamison v. Moore*, 43 M. 598; *McKnight v. Dozier*, 44 M. 606. Thus the judgment of the Circuit Court, overruling a motion for a new trial, is a part of the record and cannot be certified to the High Court in a bill of exceptions; *Ib.* and *Barrington v. Miss. Cent. R. R. Co.*, 3 G. 370. And so of a motion for a new trial; *Albritton's Case, supra*. And if the whole record be certified in a bill of exceptions, the cause will be dismissed; *Smith v. Calcote*, 41 M. 656. And so if the judgment be so certified; *Moody v. Nichol*, 4 C. 109.

2. *Must show on its face that it is a bill of exceptions.* A paper in the record containing evidence given on the trial of a cause, which does not purport on its face to be a bill of exceptions, and does not show to what alleged error of the court it was taken, nor whether taken pending the trial, or to the judgment on the motion for a new trial, cannot be noticed as a bill of exceptions; *Windham v. Williams*, 5 C. 313.

3. *Not necessary to be entitled in the cause.* When a bill of exceptions is regularly certified by the clerk of the court below, as pertaining to a particular cause, it is not necessary that it should be entitled of any court or cause; *Gordon v. Parker*, 2 S. & M. 485.

4. *A ministerial and not a judicial act: Signed by two attorneys.* The signing and sealing of a bill of exceptions, which is but a means of making matter in pais a part of the record, is but a ministerial act, and no part of the judicial prerogative, and hence the statute which allows such bills to be signed and sealed by two attorneys in certain cases, is not unconstitutional; *Van Buren's Case*, 2 C. 512.

II. How Certified.

5. *Must be sealed and signed.* It must appear from the record that bill of exceptions was signed as well as sealed, and that it was ordered to be made a part of the record, or it will not be noticed; *Stephenson v. Smith*, 1 C. 507.—It must be under seal; *Forniquet v. Tegarden*, 2 C. 96. But now they need not be sealed; Rev. Code of 1857, p. 505, art. 162. And unless signed by the presiding judge, a bill of exceptions is worthless; nor will the want of the signature of the judge be obviated by a paper in the record, appearing to be a protest of counsel, which treats the bill of exceptions as signed, and which also undertakes to set out the true facts, and is signed by two counsel not engaged in this cause; *Graves v. Monet*, 7 S. & M. 45.

III. How documents are incorporated in them.

5a. *Written evidence.* Written evidence, like oral testimony must be set out in the bill of exceptions if desired to be brought before the High Court; *Rogers v. McDaniel*, 3 H. 172.

6. *Should embrace all papers and not merely refer to them.* A bill of exceptions being the only means of placing on the record matters not a part of it, should contain in itself all the matters intended to be made a part of the record. A reference to a paper with directions (here insert it) will not do, unless, perhaps, the paper be so aptly described as to leave no doubt as to its identity, and render it certain what was referred to; *Berry v. Hale* 1 H. 315; *Preston's Case*, 3 C. 383.

Thus a statement in the bill of exceptions, "that the marriage contract and will of Butler found among the papers of the suit, and marked A. and B., were read in evidence," do not make papers purporting on their face to be a will and marriage contract of Butler, and marked A. and B., and copied by the clerk in the transcript of the record, a part of the record; *Carmichael v. Browder*, 4 H. 431; S. P., *Pickett v. Doe*, 5 S. & M. 470; S. P., *Wadlington v. Gary*, 7 S. & M. 522; *Wright v. Bank of Alabama*, 6 S. & M. 251; *Maulding v. Rigby*, 4 H. 222; *Oliver's Case*, 5 H. 14.

And so if the bill recite, "the following evidence was offered (here insert the same),"

it will be incomplete and does not incorporate evidence copied by the clerk in the record and certified by him as that referred to; *Ran-kin v. Holloway*, 3 S. & M. 614.

7. *Disposition no part of the record.* A disposition, though copied in the transcript, if not incorporated in the bill of exceptions, is no part of the record, and cannot be noticed; *McRaven v. McGuire*, 9 S. & M. 34.

8. *Forthcoming bond, judgment and execution.* A forthcoming bond is no part of the record of a motion to quash it, nor is the execution or judgment under which it was taken; and if not incorporated in the bill of exceptions, though copied in the record, it cannot be noticed; *Abbott v. Hackman*, 2 S. & M. 510.

They are but evidence in that proceeding, and whatever is but evidence in a cause, is no part of the record of that cause, though the evidence itself be matter of record; *Merritt v. Vance*, 6 H. 498; *Huston v. Hayter*, 6 H. 580; *Matthey v. Totten*, 2 S. & M. 52; *Kerr v. Robertson*, 5 H. 278; *Sprawles v. Barnes*, 1 S. & M. 629.

9. *Trial of right to property: Execution.* The execution levied on property claimed by another, is no part of the record in the trial of that claim, unless made so by bill of exceptions; *Ross v. Gary*, 7 H. 47.

10. *Affidavit for new trial.* Is no part of the record unless made so by bill of exceptions; *Id.*

11. *Impression of wax seals need not be copied in.* When a bill of exceptions is taken on the trial of a plea of *non est factum* to a bond made in a foreign state, where an actual impression in wax is necessary for a seal, and it recites that the signature of the defendant was proven by two witnesses, and attached to his name, is the word seal in the copy of the bond contained in the bill of exceptions, and the bond recites on its face that it is sealed, and there is nothing more in the bill of exceptions to show that it was not sealed with wax; it was held that it did not appear that the bond was not properly sealed; *Hines v. North Carolina*, 10 S. & M. 529.

See REGISTRATION, 23.

IV. Bills taken pending the trial.

12. *Exceptions to charges, etc.* Exceptions to the charge of the court will not be noticed unless taken by bill of exceptions duly signed and sealed, *Hacken v. Cabel*, W. 91. But this is now changed by statute in civil cases, where the charges are marked by the clerk "given" or "refused." In criminal cases, however, the exception must be taken at the time; *Haynie's Case*, 3 G. 400. Nor will it do that the granting of the instruction was assigned as a ground for a new trial; *Brown's Case*, 3 G. 433.

And when the bill of exceptions is taken to the refusal of the court to grant an instruction asked for, only so much of the evidence as bears on the propriety of the charge need be set out; *Muirhead v. Muirhead*, 8 S. & M. 211.

A bill of exceptions embracing the evidence and charges of the court which recites, "and thereupon the jury returned a verdict for defendant, to all which the plaintiff excepted," amounts to nothing more than a bill of exceptions to a refusal to grant a new trial, and is not good to show that exceptions were taken to the charges when given; *Anderson v. Hill*, 12 S. & M. 679.

13. *To competency of a witness.* If a witness be objected on the ground that he is incompetent, the bill of exceptions to his admission should set out his testimony, for the judgment will not be reversed on that account unless his testimony be prejudicial to the party objecting; *Hoy v. Couch*, 5 H. 188.

14. *To admission of evidence.* Where the exception is to the relevancy or competency of evidence admitted, it must be set out in the bill of exceptions; *Harris v. Newman*, 5 H. 634; *Townsend v. Blewett*, 5 H. 503; *Bone v. McGinley*, 7 H. 671; and all the evidence in the case should be set out in the bill of exceptions, otherwise the action of the court will be presumed correct; *Organs Case*, 4 O. 78. And where the bill of exceptions is taken to the judgment of the court overruling a motion for a new trial, the High Court will not reverse for the admission of illegal evidence, if all the evidence be not certified in the bill of exceptions; *Phipps v. Morton*, 4 G. 211; and such bill must show that the evidence was objected to at the time it was offered; *Exum v. Brister*, 6 G. 391.

See EVIDENCE, 329, 330.

15. *Separate and single bills.* Exceptions taken during the progress of the trial may be embodied each in a separate bill of exceptions, or several exceptions may be embodied in the same bill. The practice of embodying all the exceptions and all the evidence in the same bill is commended; *Lindsey v. Henderson*, 5 C. 502.

16. *To the exclusion of evidence.* When the exception is to the exclusion of evidence offered, and the question is as to its materiality to the issue, the bill of exceptions should set out the excluded evidence; but when the offer is to prove a fact, as payment, release, failure of considerations, &c., and the question is as to the materiality of the fact, and the court below refused to hear any evidence to prove it, the specific evidence intended to be introduced need not be set out; *Neal v. Saunderson*, 2 S. & M. 572; and it is not necessary in such a bill, to set out all the evidence on the trial; *Worten v. Howard*, 2 S. & M. 527.

17. *Same: Where there is a set off.* Where a bill of exceptions is taken to the exclusion of evidence offered to prove a set-off, the bill of exceptions must set out the items of the set-off filed with the plea, otherwise the High Court will not notice the objection; *Rankin v. Butler*, 2 S. & M. 473.

18. *Must show it was taken before jury retired from the bar.* The bill of exceptions must show affirmatively on its face that the exception was taken before the jury retired from the bar; *Patterson v. Phillips*, 1 H.

572. A statement of the clerk in the transcript of the record to that effect, will not do; *Harris v. Planters, B'k*, 7 H. 346. But if it show on its face that it was taken during the progress of the trial, and state it was then and there sealed, &c., this is sufficient to show that it was taken before the jury retired from the bar, *Muirhead v. Muirhead*, 8 S. & M. 211. And it will be sufficient if exceptions be taken and noted during the progress of the trial by consent of the parties and of the court and the bill afterwards be drawn up and signed *nunc pro tunc*; *Wilcox v. Mitchell*, 4 H. 272.

Yet if objection be made to the introduction of evidence when it is offered, its admission may be assigned as ground for a new trial, though no exceptions were taken at the time of its admission; but if no objections were made at the time, this is a waiver of all objections to it; *McRaven v. McGuire*, 9 S. & M. 34; *Phillips v. Lane*, 4 H. 122. A statement in the bill of exceptions as to the time it was taken will prevail over a contrary recital in the record by the clerk; *Carpew v. Canavan*, 4 H. 370.

19. *Same.* A bill of exceptions taken to the ruling of the court on the trial is irregular if taken at a term subsequent to the trial, and this is so though the bill was taken at a term when the judgment was rendered *nunc pro tunc* on the verdict returned at the term at which the trial was tried; *Gray v. Thomas*, 12 S. & M. 111.

20. *Motion ore tenus.* Exceptions to the overruling of a motion *ore tenus* in the court below must be taken at the time, or it will be too late; *Green v. Robinson*, 3 H. 105.

V. On Motion for a New Trial.

21. *Act of 1830, H. C. 885, art. 7* By this act a bill of exceptions was allowed to be taken to the judgment of the court on a motion for a new trial, in which was to be embodied the reasons offered for the new trial, and the substance of the evidence offered on the trial; and the granting or refusing of a new trial was made assignable as error in the High Court.

22. *Office of such bill.* The office of a bill of exceptions taken to the judgment of the court on a motion for a new trial, is to embody the substance of the proceedings in the court below, so that the High Court, in determining upon the propriety of the judgment on the motion, shall be placed in the same position that the court below was in when it pronounced the judgment under review; and the High Court is authorized to notice no objection, and consider no question other than such as might have been legally noticed and considered by the court below in considering said motion; *Phillips v. Lane*, 4 H. 122.

23. *What it should contain.* It should contain all the evidence in the cause whether excepted to or not; *Carpew v. Canavan*, 4 H. 370; or the substance of all the evidence *Terry v. Robins*, 5 S. & M. 291; *Wright v. Bank of Alabama*, 6 S. & M. 251. And if it do not contain all the evidence the High Court

cannot grant a new trial (refused in the court below), on the ground that the verdict is against the evidence; *McRaven v. McGuire*, 9 S. & M. 34. But the bill of exceptions may, instead of setting out the evidence in detail, set out the facts which both parties admit, were established by it; *Porter v. Duglass*, 5 C. 379. Where, however, the bill of exceptions to the judgment of the court on a motion for a new trial, contains evidence given on the trial, it will be presumed that it contains all the evidence, unless the contrary expressly appears from the bill of exceptions, or some other part of the record, it being the duty of the court to set out all the evidence in such a bill; *Stamps v. Bush*, 7 H. 255; *Porter v. Duglass*, 5 C. 379. And, hence, if such bill of exceptions do not show that the note, which was the foundation of the action, was read to the jury, a verdict for plaintiff, will be set aside; *Dalrymple v. Buckingham*, 1 C. 597. It should contain an exception to the judgment overruling a motion for a new trial; *Jamison v. Moore*, 43 M. 598.

24. *When signed and sealed.* Such a bill is necessarily taken after verdict and after the judgment of the court on the motion for a new trial, and it is no objection to the bill, therefore, that it was not signed and sealed during the progress of the trial; *Robbins v. Pinckard*, 5 S. & M. 51. And if it appear that the exception to the judgment on the motion was taken at the same term of the court, at which the verdict was rendered, this will be sufficient; *Porter v. Duglass*, 5 C. 379.

25. *What exceptions may appear in it.* Where objection is made to the admission of evidence at the time it is offered, but no exception taken to the action of the court in admitting it, this action may be assigned as a reason for a new trial, and in reviewing the propriety of the action of the court below in refusing a new trial, the High Court will determine upon the propriety of admitting the evidence so objected to; *McRaven v. McGuire*, 9 S. & M. 34; *Philips v. Lane*, 4 H. 122; *S. P., Ezum v. Brister*, 6 G. 391.

26. *When taken to judgment of court on new trial in vacation.* A bill of exceptions taken in vacation to the judgment of the court overruling a motion for a new trial, is a nullity, unless it appear from the record that the judge took the motion under advisement. Nor is the defect helped by the statement in the certificate of the judge, "that it is certified as of the term of trial aforesaid;" *Tucker v. Gordon*, 7 H. 306.

27. *Same.* In a case where a motion for a new trial was taken under advisement, and a bill of exceptions had been taken during the progress of the trial, which embodied all the evidence, and the motion was overruled in vacation, a bill of exceptions taken at the next term to the order of the court overruling the motion for a new trial is regular, if signed by the judge who presided in the court at that term, though he be not the same judge who presided at the trial and overruled the motion for a new trial in vacation; *Doe v. Parker*, 3 S. & M. 114.

28. *What question such bill presents to High Court.* A bill of exceptions taken to the action of the court in overruling or refusing a motion for a new trial, can present to the High Court only the question, as to the propriety of the action of the court in that respect. It can present no question for the High Court, which the Circuit Court could not consider on the trial of the motion. And hence, if taken to the action of the court below, in overruling a motion for a new trial—two previous new trials having been granted—which motion, by the statute, the court has no power to grant; it cannot present errors committed by the court during the progress of the trial. For these errors should be excepted to in special bills taken during the progress of the trial, and are always good grounds for setting aside the verdict and awarding a *venire de novo*; *Ray v. McCary*, 4 C. 464.

VI. Miscellaneous.

29. *Must show ground of exceptions.* A bill of exceptions must show the precise ground of exceptions, and must embody the facts on which it is taken; *Friar's Case*, 3 H. 422.

30. *Proceedings cannot be shown by affidavit.* An affidavit of counsel stating that a motion *ore tenus* was overruled, and a certificate of the court below in the bill of exceptions, that the affidavit was presented—is no evidence that the motion was made and overruled—the proceedings cannot be made a part of the record in that manner; *Green v. Robinson*, 3 H. 105.

31. *Contradiction between bill of exceptions and other parts of record.* Where there is a contradiction between the bill of exceptions and other parts of the record in matters which ought to be certified by bill of exceptions, the bill must prevail. Thus a statement in the bill of exceptions as to the time when it was taken, will prevail over a different statement made by the clerk in the transcript for the High Court; *Carpew v. Canavan*, 4 H. 370; *Helm v. Smith*, 2 S. & M. 403. So where a bill of exceptions is taken to the entry of a judgment *nunc pro tunc*, and shows that the judgment was so entered at a subsequent term, when the bill was taken, and the judgment appears in the record as entered of the former term, when it ought to have been entered, the recital in the bill of exceptions will prevail; *Rhodes v. Sherrod*, 8 S. & M. 97. But where a bill of exceptions taken by the plaintiff to the action of the court in dismissing his suit, recites that the motion to dismiss was made by the plaintiff, and the judgment of dismissal shows the motion was made by the defendant, the court will consider the contradiction in the record, so as to make it sensible and consistent, and will hold it to mean that the motion to dismiss was made by the defendant; *Wooten v. Wingate*, 6 S. & M. 271.

32. *Is the only means of making matter in pais a part of the record.* A bill of exceptions is the only means of making the evidence and other proceedings in *pais*, a part of the

record; or by which such matters can be certified to by the High Court. Hence the certificate of the clerk containing a copy of the note on file, with the declaration, and showing it to be different from the one declared on, cannot be noticed so as to reverse a judgment *nil dicit*, on the declaration and note; *Barfield v. Impson*, 1 S. & M. 326.

33. *Verity and effect of.* A bill of exceptions is a judicial certificate of record, importing absolute verity on its face, whether the facts therein stated appear to be within the personal knowledge of the judge signing the exceptions or not; for when the judge certifies to what did not transpire before him, it must be taken that he had proof of it, and his certificate as to such matter is as much a part of the record as any other part of the proceedings in a cause; *Kane v. Burrus*, 2 S. & M. 313.

34. *Same: Case in judgment.* It appeared from the bill of exceptions, which was signed and sealed at the May term, A. D. 1842, of the Circuit Court, that at the November term, A. D. 1841, a motion for a new trial had been made, and that certain affidavits in support of the motion were filed; that when the motion was called at the November term, 1841, another judge, by interchange with the judge of the district, presided in the court, who refused to decide the motion because he had not heard the trial, and that he continued the motion till the next term; that at the next term the judge who presided on the trial was again present and presided in the court, and he refused to entertain the motion on the ground that it expired with the term at which it was made; but he signed a bill of exceptions certifying to the above facts. It did not appear from the record, otherwise than by the bill of exceptions, that a motion for a new trial had been made or continued in November, 1841: *Held*,

1. That it was competent to show by the bill of exceptions thus taken and certified, that the motion for a new trial was made and continued at November term, 1841, and that the affidavits in support of it were then filed.

2. That a motion for a new trial can be continued from the term at which it is made to the next term, and may be then granted or overruled, as appears legal on its merits.

3. The High Court believing that the new trial should have been granted in this case, allowed it; *Kane v. Burrus*, *supra*.

35. *One bill of exceptions may refer to another.* Evidence made a part of the record by bill of exceptions at a former trial, remains a part of the record of the cause; and if the same evidence be introduced on a subsequent trial, it is not necessary to incorporate it in a bill of exceptions then taken. It will be sufficient if the latter bill of exceptions state the introduction of the evidence, and refer to the former bill to show what it is; *Harris v. Newman*, 5 H. 654.

35a. *Loss of bill of exceptions.* The loss of a bill of exceptions is no ground for granting a rehearing of a cause in the Probate Court at a subsequent term. What is the

remedy for such loss; *Quære? Planters' Bank v. Neely*, 7 H. 80.

36. *Imperfect bill of exceptions.* The High Court will not revise matters imperfectly stated or referred to in a bill of exceptions; but this does not prevent its reviewing and examining the rest of the record to ascertain if there be error, irrespective of the matter thus imperfectly stated in the bill of exceptions; *Rankin v. Holloway*, 3 S. & M. 614.

37. *May be waived in certain cases.* On appeal from the Board of Police to the Circuit Court, the bill of exceptions required by statute may be waived by consent of the board and of the appellant; *Fallabusha Co. v. Carbry*, 3 S. & M. 529.

38. *As evidence.* In a suit against a guarantor of a note for a breach of his guaranty, that the note was good and valid in law, it is competent to show that suit had been instituted on the note, and judgment rendered for the maker; and this may be shown by the record of that judgment. It is also competent to show that in that suit the defence was failure or want of consideration (it having been shown that the guarantor had notice of it); but this can be proven by the witnesses, and cannot be proven by the bill of exceptions taken on that trial; *Robinson v. Lane*, 14 S. & M. 161; *S. P., Shottwell v. Hamblin*, 1 C. 156. But whilst the party offering the record in evidence cannot read the bill of exceptions contained in it, yet the bill being a part of the record, the other party may, if he sees proper, read it in evidence as a part of the same record as has already been read in evidence against him; *Shottwell v. Hamblin*, *supra*.

39. *Right of court to grant.* Any court from which a writ of error lies has the right to make the evidence on which it acts a part of the record by bill of exceptions; *Covington v. Arrington*, 3 G. 144.

40. *Construction of.* If the bill of exceptions recite that "the land in controversy was entered" (from the United States) by one of the parties, it will be presumed that proof of a legal entry was made without setting out the certificate of entry; *Carter v. Blanton*, 4 G. 291.

41. *Failure to state that charges were given or refused.* It is no ground for reversing a judgment, that the bill of exceptions does not show that the instructions asked were given or refused. And if it appear that the plaintiff in error moved for a new trial upon the ground that the jury disregarded the instructions of the court below, it will be presumed, if the contrary do not expressly appear, that the instructions asked for by him were given; *Hamilton's Case*, 6 G. 214.

Billiard Tables.

1. *When liable to taxation.* A billiard table kept for public use is liable to taxation under the Act of 1865; *O'Harra v. Cox*, 42 M. 496.

Bills of Exchange and Promissory Notes.

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I. What is a bill or note, and its requisites.

1. *Bills single.* Bills single, or promissory notes under seal, are not by the law merchant commercial paper, but by our statute they are put on the same footing with bills and promissory notes; *Murrell v. Jones*, 40 M. 565. They are entitled to days of grace; *Skinner v. Collier*, 4 H. 396. See *post*, 16.

2. *Note payable in cotton.* A note for a sum, certain in dollars, but payable in cotton at a future day, and at a particular place, is a promissory note. The stipulation for payment in cotton is a mere privilege to the maker, to be enjoyed only by payment in cotton at the time and place designated, and a failure to do this renders the note absolute for the money specified in it; *Rankin v. Sanders*, 6 H. 52. And so a note for a specified sum, payable in cotton, at a stipulated price

per pound, becomes absolute for the money, if the cotton be not paid at maturity; *Hardeman v. Cowan*, 10 S. & M. 486.

3. *Note payable in bank notes.* A note payable in bank notes of any bank in this State, but in all other respects like a promissory note, is, under the statutes H. & H., p. 373, § 12; *Ib.* p. 594, § 25, a promissory note; *Besancon v. Shirly*, 9 S. & M. 457. Citing *Rankin v. Sanders supra*; *Bonnell v. Covington*, 7 H. 322; *Gordon v. Parker*, 2 S. & M. 485. See *post*, 110, *et seq.*

4. *Must have payee, and be for a specified sum.* A sheriff who has collected money on an execution, made the following agreement in reference to paying the same, endorsing it on the execution: "In this case I engage and promise on honor, punctually to pay the amount received on said execution" by a named day, "and costs accruing to plaintiff's attorney." *Held*, that the writing was not a promissory note, it not being payable to any named person, nor specifying an amount to be paid; *Matthews v. Redwine*, 1 C. 233. (Citing *Besancon v. Shirly supra*.)

5. *Same: Note payable to an estate.* An instrument for the payment of money, not payable to bearer, is not good as a promissory note, unless a payee be mentioned in it, either expressly and formally, or by such designation as certainly identifies the person intended; *Tittle v. Thomas*, 1 G. 122. And for this reason the following instrument, duly signed by the makers, was held not to be a promissory note, viz.: "Twelve months after date we promise to pay to the estate of Ben Thomas, eighteen hundred dollars for value received;" *Ib.*

6. *Order payable on a contingency not a bill of exchange.* An order from a client to his attorney, directing the latter to pay a certain sum out of the proceeds of a claim, in his hands for collection, when the same should be collected, is payable on a contingency, and therefore not a bill of exchange; *Fitch v. Stamps*, 6 H. 487; *Van Vacter v. Flack*, 1 S. & M. 393. Such an order, at common law, did not import a consideration, but it seems under the statute H. & H., p. 372, § 6, the rule is different, and the order imports a consideration. Such order is an equitable assignment of the fund, though the drawee has not assented to it; *Fitch v. Stamps supra*. If the drawee accept such an order generally, he will not be liable to pay till collection be made; but if collection be made in depreciated currency, the payee will be entitled to lawful money; *Van Vacter v. Flack supra*.

See ASSIGNMENT, 9. ATTORNEY AT LAW, 27.

7. *Same: Statute H. & H. 372, § 6.* This statute, which is above referred to, provides that when any person, &c., shall, by order in writing, signed, &c., direct the payment of any sum of money in the hands of another, the money therein specified shall, by virtue thereof, be due and payable to "the payee, and may be put in suit against the drawer, and if accepted, against the drawee," &c.

II. Consideration.

8. *Promissory note imports a valuable consideration.* A promissory note is *prima facie* upon a valuable consideration; *Moore v. Mickell*, W. 231, and so under the statute (see *ante*, 7) is an order payable on a contingency; *Fitch v. Stamps*, 6 H. 487.

9. *Consideration impeached: Partial failure: Depreciated bank paper.* If a note be given for the loan of depreciated bank paper, at its nominal value, a recovery can be had only for the real value of the bank paper at the time of the loan; *Scott v. Hamblin*, 3 S. & M. 285. But though it be proven that the note was given for the loan of such paper, this will not entitle the maker to a reduction by the amount of the discount, unless he also show what amount of depreciated bank paper was loaned; for it will be presumed, unless the contrary be shown, that the discount was taken off when the loan was made, and that the note was given for the real value of the bank paper loaned; *Walker v. Meek*, 12 S. & M. 495.

10. *Note given by administrator for debt of intestate: Assets: Forbearance to sue.* An administrator will not be liable on a note given by him to a creditor of the estate, if it be without consideration; but if he have assets, that will be a valid consideration; and so an agreement to forbear suit for a definite period is a valid consideration; and he will also be bound, if he receive credit for the intestate's debt, as paid by him; *Turner v. Brown*, 3 S. & M. 425.

See CONSIDERATION, 4, 5, 6.

11. *Pre-existing debt of another.* And so, if a note be given for the pre-existing debt of another, it is without consideration, unless it were received in payment of the debt. But if the payee transfer the note, this makes it a payment of the debt, though taken at first only as conditional payment, and therefore also makes a valid consideration for the note whereby it becomes binding on the maker; *Wren v. Hoffman*, 41 M. 616.

12. *Failure of consideration: Case in judgment.* If a note be given to one who claims to be the owner of a judgment, in satisfaction of it, but upon the express condition that if another, who claims to be the owner of the judgment, shall establish his title, and thus set aside the satisfaction, the note is not to be paid, and the condition is broken, by the happening of that contingency, the maker will not be liable, though the note be in the hands of an innocent holder, who has taken it in payment of a pre-existing debt; *Brooks v. Whiston*, 7 S. & M. 513. See *post*, 124, 145, 146, 233.

13. *Gaming consideration.* A note on a gaming consideration is void both at law and in equity; *McAuley v. Mardis*, W. 307.

14. *For import duties to a State.* A note to "the city of Natchez, for duties to be collected," is an illegal contract, being in violation of the act admitting this State into the Union; *City of Natchez v. Trimble*, W. 376.

15. *Proof of: By circumstances: Case in*

judgment. Where a note and a certificate of stock made by the payee in the note, in favor of the maker, exactly correspond, in date and amount, in the absence of all other proof of the consideration, that exact correspondence is sufficient to uphold the verdict of a jury finding that the stock was the consideration of the note; *Barringer v. Nesbit*, 1 S. & M. 22.

See CONSIDERATION.

III. Days of Grace.

16. *Promissory notes entitled to.* Promissory notes are entitled to three days of grace in this State; *Fleming v. Fulton*, 6 H. 473; and so are bills single; *Skinner v. Collier*, 4 H. 396. But a bill single which contains an obligation to pay money and to deliver other things, is not entitled to days of grace; *Lamkin v. Nye*, 43 M. 241. See *ante*, 1.

17. *Effect of.* Days of grace, though incident to a promissory note payable after date, are not to have the effect of making a note payable on its face four months after date, a note having a longer time to run than four months, within the meaning of a bank charter, which allowed seven per cent interest on notes payable in four months, and eight per cent interest on notes having a longer time to run. Notwithstanding the days of grace, the note is to be considered as a four months' note, and therefore entitled to draw only seven per cent interest; *Forniquet v. West Feliciana R. R. Co.*, 6 H. 116.

18. *When third day of grace is Sunday.* When the third day of grace falls on Sunday, only two days of grace are allowed, and the note or bill must be presented on Saturday, and payment then demanded. And the notice must be given on Monday, or deposited in the post office in time to go by the first mail of that day. Sunday not being a business day, is not counted; *Fleming v. Fulton*, 6 H. 473; *Barlow v. Planters' Bk.* 7 H. 129.

19. *Maker entitled to the whole of the days of grace before suit.* The maker of a note is entitled to the whole of the third day of grace in which to make payment, and if suit be commenced against him on that day, it will be premature; *Wiggle v. Thomasson*, 11 S. & M. 452; *Winston v. Miller*, 12 S. & M. 550. And if, in such suit, no objection be made on that account, but judgment by default be rendered, it will be error; *Winston v. Miller*, *supra*.

IV. When Note or Bill is due.

20. *Payable after date.* A note payable thirteen months after the 1st of February, 1838, is due 1-4 March, 1839, and not on 2-5 of that month; *Barlow v. Planters' Bk.* 7 H. 129.

21. *Payable on demand, after a specified time.* A note payable "on demand, five months after date," is due at the end of five months, without demand. Whether a note payable on demand at a particular place (without any specification as to the lapse of any time before demand is to be made), can be sued on without a demand first made; *Quære?* *Cook v. Martin*, 5 S. & M. 379.

V. Protest of Bills and Notes.

1. Promissory notes not protestable paper.

22. *Act of protest no evidence of demand of promissory note.* A promissory note is not required by law to be protested for non-payment; and hence, the act of protest is no evidence of the presentment of a note, nor of demand of its payment; but evidence *aliunde* of these facts must be adduced; *Smith v. Gibbs*, 2 S. & M. 479; *S. P., Carpenter v. Reynolds*, 42 M. 807.

23. *Same: Notary not bound to give notice at common law.* By the common law, a promissory note, not being protestable paper, in case it is protested, the notary is only bound to give notice to the party from whom he received it; but this rule is changed by the Act of 1833, H. C. 867, art. 9, requiring notaries protesting such paper to give notice; and now the notary is bound to give notice of dishonor to all the parties, as in case of the protest of a bill of exchange; *Bowling v. Arthur*, 5 G. 41; citing *Tiernan v. Com'l B'k of Natchez*, 7 H. 648; *Agricultural B'k v. Com'l B'k of Manchester*, 7 S. & M. 592.

2. Notary and his deputies and their duties.

24. *Notary must give notice by statute.* As above seen, a notary public, to whom a note or bill is delivered for protest, is bound to give notice of the dishonor to all the parties who are entitled to notice, and on his failure to give proper and legal notice, in the manner prescribed by law, whereby any party is released, he is liable for the damages thereby sustained; *Bowling v. Arthur*, 5 G. 41.

25. *Clerk of notary.* The clerk of a notary has no power by the law merchant to make presentment and demand payment of a bill or note; it should be done by the notary himself; *Ellis v. Com'l B'k of Natchez*, 7 H. 294; *Smith v. Gibbs*, 2 S. & M. 479; *Car-michael v. B'k of Pennsylvania*, 4 H. 567. And hence, if the act of protest state that the demand was made by the notary, and his deposition show it was made by his clerk, the protest is a false certificate, and should be ruled out as evidence; *Smith v. Gibbs*, *supra*; *sed vide post*, 26. *Contra*, in Louisiana, where there is a statute allowing notaries to appoint deputies; *Dwight v. Richardson*, 12 S. & M. 325.

3. Notarial Record.

26. *Act of protest.* A promissory note by the law merchant, is not protestable paper, and the act of protest of such a note is no evidence of presentment and demand, but these must be established by proof *aliunde*. But the rule is different under the Act of 1833, H. C. 867, art. 12, by which a notary protesting a bill, note, or bond, is required to make a record of his acts, in relation to the protest and giving of notice, and swear to it; and this record is then made evidence of the facts stated in it. The Rev. Code of 1857, contains a similar provision. See p. 413, art. 39, and p. 519, art. 240. And the act of protest being itself evidence of due demand,

when it is so stated in it, if the deposition of the notary state the demand was made by his deputy, it will be immaterial, as the act of protest proves a legal demand; *Chew v. Real*, 11 S. & M. 182; *Sed vide ante*, 25.

27. *Statute of 1833, H. C. 867, art. 12: Notarial record under.* This statute applies, however, only to protests in this State, made by officers of the State; *White v. Englehard*, 2 S. & M. 38. This statute does not require the record to be made out at the time of the protest; the notary should, however, note the facts as he progresses, or within a reasonable time afterwards; and if he do so, he may make out the record and certificate at any time afterwards; *Grimball v. Marshall*, 3 S. & M. 359. And where the certificate and record are regular on their face, though made two years after the protest, they will be good, as it will be presumed that the notary did his duty in making a note or memorandum of the facts in proper time; and the record and certificate (sworn to) are admissible to prove notice as well as the protest; *Grimball v. Marshall*, *supra*.

28. *Record and certificate of a deceased notary, under Act of 1833.* The notarial certificate of a deceased notary, concerning the protest of a note made by him, purporting on its face to be made several months after the protest, is admissible in evidence to prove demand and notice, even though it be proven, that they were the only record ever kept by the notary of his acts in the premises; such certificate with the record is a mere deposition, taken *ex parte* it is true, but authorized by law; *Booth v. Watson*, 5 S. & M. 595 (citing *Fleming v. Fulton*, 6 H. 473; *Wood v. Am. Life Trust Co.*, 7 id. 609; *Grimball v. Marshall*, 3 S. & M. 359).

4. Demand and Presentment.

See *post*, 67a.

29. *Personal.* When the bill or note is not payable at any particular place, the demand on the maker or acceptor should be personal, in order to hold the drawer and endorser responsible. The mere fact that it is placed in possession of a bank for collection, does not authorize a demand at the counter of the bank, although such is the custom of the bank. Parties to notes not payable in bank, are not bound by its custom, unless, perhaps, there be a further custom at the place the note is made, that it should go unto the bank for collection; *Lewis v. Planters' B'k*, 3 H. 267.

30. *Same: When acceptor not found, case in judgment.* The notary "went to the counting house of the acceptor, found it shut up, and no person there to answer for the payment," and thereupon protested the bill. The court say (but expressly decline to decide the point), the notary ought to have made inquiry for the acceptor in the neighborhood of the counting house; *Ellis v. Com'l B'k of Natchez*, 7 H. 294.

32. *Same: Made at any time on third day of grace.* A personal demand may be made at any time during the third day of grace; the rule is more strict as to constructive demand,

made at a bank, when the note or bill is payable there; in such case the demand must be made just before the close of banking hours; *Harrison v. Crowder*, 6 S. & M. 464.

See *BANKS*, 17, 18, 19, 22; and *post*, 34.

33. *When third day of grace is Sunday.* When the third day of grace falls on Sunday, the demand must be made on the second day, Saturday; *Fleming v. Fulton*, 6 H. 473; *Barlow v. Planter's Bank*, 7 H. 129. See *ante*, 18.

34. *Constructive demand when note or bill is payable in bank.* The rule requiring a constructive demand, when the note is payable in bank, to be made just before the close of banking hours, is more strict than reasonable; yet it is firmly established; *Harrison v. Crowder*, 6 S. & M. 464. Where the bank itself is the holder of the paper, the rule is that it should remain in the bank until the completion of business hours on the third day of grace; *Planters' Bank v. Markham*, 5 H. 397; *Harrison v. Crowder*, *supra*; but this rule is not applicable strictly to persons holding notes payable in bank, for there is no law compelling them to deposit their notes in bank. If the holder of such note present it at the close of business hours, this will do; and this does not require the presentation to be made at the very moment of closing the doors. The presentation, if made a few minutes before, will do; but a charge to the jury, that if it were presented in a reasonable and convenient time before the doors were closed, would be too indefinite, and therefore erroneous; *Harrison v. Crowder*, *supra*.

35. *Same: Case in judgment.* The notary who presented the note and made the protest, being examined as a witness, stated, that he had no recollection of the fact, but did not doubt that he did it on seeing his notarial record; that his custom, which was founded on his belief that it was in accordance with law, was to present notes payable in bank during the last hour of business, and about the close of the bank; that when payment was refused, he took the note away with him; that he would not say in this instance, whether the note was presented a minute or an hour before the bank closed, except from his habit as before stated: *Held*, that this evidence should have been submitted to the jury, and they might properly have found a verdict on it for plaintiff; *Harrison v. Crowder*, *supra*.

36. *Presentment necessary.* If the act of protest state a demand merely, it is not sufficient evidence of a legal demand; presentment (except when the note or bill is lost) being essential to a good demand, the protest should state a presentment; and so, if the demand is undertaken to be proven by the deposition of the notary who made the protest, presentment must be proven; *Smith v. Gibbs*, 2 S. & M. 479.

37. *Remaining in bank equivalent to presentment.* If a note remain during the whole of the third day of grace in the bank at which it is payable, this is a sufficient presentment and demand; *Duncan v. Watson*, 6 C. 187; and hence no demand being necessary, proof

that an actual demand was made after the close of business hours, and that the answer was, that the maker had no funds, is sufficient; *Goodloe v. Godly*, 13 S. & M. 233; *S. P., Commercial & Railroad Bank v. Hamer*, 7 H. 448; *Planters' Bank v. Markham*, 5 H. 397. And so the notary being dead, proof that the note remained in bank at which it was payable, during the whole of the day of its maturity, is good; *Bland v. Commercial & Railroad Bank*, 3 S. & M. 250.

38. *Transfer by bank of its business.* When a bank at which a note is made payable has transferred its business to another bank, at which place it transacts all its business, presentment and demand at the latter bank is sufficient; *Duncan v. Watson*, 6 C. 187.

38a. *Conflict of laws.* Demand and protest of a bill must be made according to the law of the place where it is made payable; *Ellis v. Commercial Bank of Natchez*, 7 H. 294.

5. Custom of Banks as to Demand and Presentment.

39. *In what cases it applies.* Parties are bound by the usages of a bank in reference to the presentment and demand of commercial paper, only where it is made payable and negotiable at the bank; or possibly where a custom exists at the place where a note or bill is made, that it shall go into a bank there for collection, the parties may be supposed to contract with reference to it, and therefore to be bound; but where there is no such custom, and the bill or note gets in possession of a bank for collection, the demand and presentment must be made in accordance with law, and not in accordance with the custom of the bank; *Lewis v. Planters' Bank*, 3 H. 267; *S. P., Planters' Bank v. Markham*, 5 H. 397.

The custom of the bank will control when the note is payable there; and if by that custom the maker has until the close of banking hours to pay, a presentment and demand at the bank before that hour, will be bad, unless the note be left with the bank until the close of banking hours; *Planters' Bank v. Markham*, *supra*. As a general rule, demand of payment of a note payable in bank should be within banking hours; but there are exceptions to this rule, and among them is, that if the note be presented immediately after the close of banking hours, and there is a refusal to pay, accompanied by an answer "that the note could not be paid, and that no funds were deposited in bank for that purpose;" in such case the demand is good. And there need be no actual demand if the custom of the bank be that notes not paid within banking hours, nor funds deposited there to meet them, are considered as dishonor; *Coehe v. Hunt*, 2 S. & M. 227.

40. *Custom as to presentment after banking hours.* Where a note was made payable in bank, and the notary did not demand payment until after banking hours were over, and the front door of the bank was closed, but he went to the back door and finding the teller in, according to the custom of the bank, demanded payment and was refused, the teller stating there were no funds in bank that day

of the maker, it was held that the demand was sufficient. But it was also said the demand would not have been good if there had been no officer present to answer the demand; *Com'l & R. R. Bank v. Hamer*, 7 H. 448; *S. P., Cohea v. Hunt*, 2 S. & M. 227.

**6. Presentment and demand of Notes, &c.,
Endorsed after maturity.**

41. *Must be presented in reasonable time:* *Case in judgment: Notice.* The rule in relation to the time when a demand should be made of a note endorsed when it is overdue, is not very definitely settled. Some of the cases say it must be made in a reasonable time, but what is a reasonable time depends very much on the circumstances of each particular case. Other cases say that it is like a note payable on demand, or a bill payable at sight, as to which the presentment and demand must be made on the next day after the instrument is received, if the parties live in the same place, or if they live in different places, it must be forwarded on that day for presentment and demand. In this case it was held, that the presentment and demand made on the next day after the endorsement (or the second day, if the next be Sunday), is sufficient. And it was also said, that the notice of failure to pay on demand, must be given exactly as if the note had been endorsed before it was due; *Fortner v. Parham*, 2 S. & M. 151.

42. *Same: Case in judgment.* It is the duty of the holder of a note endorsed to him, after maturity, to make a demand of the maker, in a reasonable time, and give notice to the endorser of non-payment. What is a reasonable time, when the facts are ascertained, is a question of law for the court. And in this case the failure to present the note and demand payment, from June, 1862 (though the maker was absent in the army till June, 1865), until January, 1866, was held an unreasonable delay; *Baskerville v. Harris*, 41 M. 535.

VI. Notice of Dishonor.

1. Character of the Notice.

43. *Must be sufficient to put the party on inquiry: Effect of mistake.* If the notice be such as reasonably to put the party on inquiry, it will be sufficient; *Chewning v. Gatewood*, 5 H. 552. It is well settled that notice to an endorser, in which there is an error, either in stating the date of the note, the day when it fell due, the maker's name, or the amount of the note, is, nevertheless, sufficient, if the note be in other respects sufficiently described, so that the endorser could not be misled by the mistake. And the rule covers a mistake made by the notary in his deposition in proving notice; *Rowan v. Odenheimer*, 5 S. & M. 44.

But when a note fell due on the 29th of a month, and was duly protested on that day, but the notice of protest was dated on the 26th, and stated that the protest was made on that day; it was held that the notice was legally insufficient to charge the endorser; that it notified him of an illegal demand and

protest, by which he was released from liability, and the holder could not afterwards render the endorser liable by showing that demand and protest was duly made. That this case differed from one where the protest and demand being properly made, the notice so stated them, but at the same time contained a mis-description of the note. In this last case it is proper to submit the question to a jury, to say whether the endorser had been misled by the mis-description, to his injury. But in the case of the notice stating an illegal demand and protest, the endorser was, in effect, notified that he was released, and had a right to rely on it. Clayton, J., dissented, being of opinion that the question should be submitted to a jury, as in case of a mis-description of the note; *Routh v. Robertson*, 11 S. & M. 382.

2. Time of giving Notice.

44. *Personal on same day, or day afterwards.* Where the endorser resides in the same place where the note is protested, notice should be given to him on that day or the day afterwards; *Fortner v. Parham*, 2 S. & M. 151. But if the next day be Sunday, then notice on Monday will be sufficient, Sunday not being counted as a business day; *Fleming v. Fulton*, 6 H. 473; *Barlow v. Planters' Bank*, 7 H. 129. And when an endorser receives notice by mail, he must give notice to a prior endorser, at farthest on the next day after its reception by him; *American Life Ins. & Trust Co. v. Emerson*, 4 S. & M. 177. It was held in *Harrell v. Bigler*, W. 176, that protest of a note and notice on the day the note fell due, excluding the days of grace, was sufficient.

45. *Constructive notice by mail: Time of deposit in post office.* When the notice is to be transmitted by mail, it must, at farthest, be deposited in the post office in time to go by the mail which leaves the day next succeeding the protest, if there be a mail leaving that day, and if not, then in time to go by the first mail leaving after that time. But the holder is not required to deposit the notice in the post office on the day of protest, it must, however, be done on the next day, in time to go by the mail of that day, unless the mail depart at an unusually early hour; *Downs v. Planters' Bank*, 1 S. & M. 261; *S. P., Deminds v. Kirkman*, 1 S. & M. 644; *S. P., Hoopes v. Newman*, 2 S. & M. 71. But if the mail of the next day depart at sunrise, that is an unusually early hour, and the notice need not be deposited in time for that mail; *Deminds v. Kirkman*, *supra*. Nor is it necessary to send it by the mail of the next day, when that mail is closed on the night of the day of protest; *Wemple v. Dangerfield*, 2 S. & M. 445. It would seem, however, that 9 o'clock A. M., of next day, was not an unusually early hour, since it was held that if the proof of the notice show only that it was deposited in the post office by that hour, without further stating that it was in time to go by the first mail, it is insufficient; *Downs v. Planters' Bank*, *supra*.

46. *Same: Where protest is on Saturday.* Where the third day of grace is on Sunday, and the protest is on Saturday, the next business day is Monday (Sunday not being counted) and notice deposited in time for the mail of Monday, will do; *Fleming v. Fulton*, 6 H. 473; *Barlow v. Planters' Bank*, 7 H. 129.

3. How Notice must be given.

A. WHEN PERSONAL AND HOW SERVED.

47. *Must be personal: Where endorser's nearest post office is place of protest.* It was held in *Stamps v. Brown*, W. 526, that notice of protest left at the nearest post office of the endorser, when he does not reside in the town where the protest was made, was sufficient, but this is overruled, and now it is settled that the notice must be personal when the endorser either lives in the town where the protest was made, or where he lives in the country, and the post office in the place of protest, is his nearest post office. That notice through the post office is never sufficient, unless where it is to be transmitted by mail to another post office, which last is the post office of the endorser; *Patrick v. Beasley*, 6 H. 609; *Hoggatt v. Bingham*, 7 H. 565; *Bowling v. Arthur*, 5 G. 41. And it is incompetent to prove a custom of the notaries in a city, to give notice to resident parties by depositing in the post office; *Wilcox v. McNutt*, 2 H. 776.

48. *When personal to an endorser residing at another post office.* When an endorser, residing in a different town from the one in which the note was made payable, is present in the latter town when the note is protested, personal service on him there, is good; and it seems, if his presence there be known to the holder, notice sent to him through the post office would be bad; *Miles v. Hall*, 12 S. & M. 332.

49. *How personal notice must be given.* Personal notice may be given either by delivering it to the party entitled to it, or leaving it at his dwelling or usual place of business; *Patrick v. Beasley*, 6 H. 609. So where letters and papers are frequently left at a particular house in the town, for a drawer or endorser, which he receives, when he comes to town or sends for them, and he has also received notices of protest from a particular bank, at the same place, without objection; this was held to give authority to that bank to give notice to him by leaving it there; *Wilcox v. Routh*, 9 S. & M. 476. But handing the notice to a clerk of the endorser on the street, with the request to hand it to him, without calling at his residence or business house, is not good, it not appearing that the clerk handed the notice to the endorser, within the time prescribed by law; nor that he had authority from his employer to receive such notices for him; *Fortner v. Parham*, 2 S. & M. 151. See post, 52.

50. *Same: Endorser being sick: Case in judgment.* The endorser was sick and the notary took a written notice of the protest to his room, and approaching his bed, remarked

to the endorser, that he had that day protested a note on which he was endorser, without, however, describing the note. The notary could not say that the endorser heard his remarks. He then left the written notice on the mantelpiece of the room in which the endorser was sick, and it was held that the service of the notice was good; *Miles v. Hall*, 12 S. & M. 332.

B. WHEN TO AN AGENT.

51. *Notice to agent good.* Notice of protest left with an agent who has either express or implied authority to receive it, is good; *Wilkins v. Commercial Bank of Natchez*, 6 H. 217. A notice to one partner is good as to all; and if one be dead, notice to the survivor binds the representatives of the decedent; *Darbig v. Stidger*, 4 S. & M. 749.

52. *Agent's implied authority: Case in judgment.* A. was in the habit of receiving at the post office all letters addressed to B. (as they were put regularly in A.'s post office box), and of carrying them to his own office, where B. either called for them, or sent for them. A. sometimes opened letters of B. thus received, when he supposed they contained notices of protest, and A. (who was examined as a witness), stated he recognized among the letters he so received, notices to B. of protest. The notary left the notice of protest in controversy with A., who stated he did not remember it, but if it had been left with him, it had been delivered to B. The jury found that the notice was sufficient. The court said, though they entertained doubts of its sufficiency, yet they would not disturb the verdict; *Id.*; S. P., *Wilcox v. Routh*, 9 S. & M. 476; See ante, 49.

53. *Same: Express authority: Case in judgment.* The principal, by letter of attorney, constituted an agent "general and special," with full power to the agent, for the principal and in his name, or for the use and in the name of the agent, or for the use and in the name of any person whatsoever, "to make, endorse, draw, accept, and negotiate, all promissory notes, bills of exchange, drafts and other securities of whatever kind; to issue letters of credit, to transact all banking business, to make all manner of renewals and endorsements of my name on all promissory notes, bills of exchange, drafts, or other securities of any kind whatever, consequent, or in any way dependent upon said renewals, whether the same be payable to the principal or agent, or to any other person. And generally to do all lawful acts and things whatsoever concerning, or in any wise appertaining to the premises; or that the principal might or could do, were he personally present and acting therein;" and the letter of attorney further stated that "it was to be taken in its fullest and most comprehensive sense;" Held, that receiving notice of protest was a matter "concerning and appertaining to a note," and that the agent was authorized to receive for the principal, notice of the protest of a note

which he had endorsed in the name of the principal; and where the note was payable in bank he had authority to receive it, under the clause in the letter of attorney which authorized him "to transact all banking business" for the principal; *Wilcox v. Routh*, 9 S. & M. 476.

54. *How notice left with agent should be addressed.* When notice of protest is left with an agent, it is not necessary that it should be addressed to him, if from an inspection of the envelope, he could know that it contained a notice of protest; *Ib.*

55. *Knowledge of agent: Notice to principal.* If an agent comes to a knowledge of a fact while he is concerned for the principal, this operates as constructive notice to the principal himself; therefore, where an agent having general powers, to make, endorse, renew, and negotiate all manner of promissory notes, bills of exchange, drafts, &c., and to transact all the principal's banking business, makes his own note, and endorses it in the principal's name, and fails to pay it at maturity; it was held, that the knowledge on the part of the agent, that his own note, thus endorsed, was unpaid, was sufficient notice to bind the principal; *Ib.*

See PRINCIPAL AND AGENT, 9, 10, 89, 90, 91; VENDOR AND VENDER, 51b., 137, 138.

56. *When bill or note transmitted to agent for collection.* If the real owner of a note or bill, not residing at the place where it is payable, endorse it, and transmit it to an agent residing there for collection, notice of protest may be given exactly as if the agent were the real owner, and the real owner were a mere endorser. That is, notice of protest may be transmitted by mail to the owner as endorser, who may on its reception, give notice, as other endorsers may, to the other parties; *Ellis v. Com'l Bk of Natchez*, 7 H. 294; *Coffman v. Bk of Kentucky*, 41 M. 212. But whether if the owner reside at the place of protest, he can send notice through the post office to his agent residing where the bill was drawn, and who endorsed it, but only in his character as agent, to be by him transmitted to the other endorsers, or for him to give notice to them, as if he were a real endorser. *Quære?* *American Life Ins. and Trust Co. v. Emerson*, 4 S. & M. 177.

57. *Notice to cashier of bank.* Notice of protest, directed to the cashier of a bank who had endorsed it for collection, if directed to the post office of the bank, is good, though the cashier may have removed to another place, it being in fact, a notice addressed to the bank; *Bank of Kentucky v. Coffman*, 41 M. 212.

C. BY MAIL.

58. *When by mail.* As to when notice may be given through the post office. See *ante*, 47.

59. *To what post office directed.* Notice must be sent to the nearest post office of the endorser, or at the one at which he usually receives his letters; *Walker v. Tunstall*, 3 H. 259; and when it is deposited in the post

office in time, the holder has done his duty, and he is not responsible if it is not sent; *Ellis v. Com'l Bk of Natchez*, 7 H. 294.

60. *When endorser is absent as member of Congress.* The notice must be sent to a member of Congress directed to his post office in this State, if he have a residence here. Notice sent to Washington City, will not do, though he be there at the time the notice is mailed. But if contrary to the constitution, he never had a residence here, or having had one, has lost it, notice sent to Washington will do; *Ib.*; S. C., 2 S. & M. 638.

4. Excuses for not giving Notice.

A. IGNORANCE OF ENDORSER'S RESIDENCE; DILIGENCE.

61. *Same: If after reasonable diligence, the residence of the endorser cannot be ascertained, this is an excuse for not giving notice.* But the rule in such case is not that the notice must be sent to the last place of residence of the endorser, or to the place at which the bill or note is dated, but that it is sufficient to send the notice to the post office, believed to be the proper one from information acquired upon due diligence to ascertain it; *Hoopes v. Newman*, 2 S. & M. 71. If, however, on inquiry, the residence of the endorser cannot be ascertained, notice sent to the place where bill bears date, will do; *Godley v. Goodloe*, 6 S. & M. 255 (citing *Walker v. Tunstall*, 3 H. 259, and *Hoopes v. Newman*, *supra*); S. P., *Commercial Bank of Manchester v. Lewis*, 13 S. & M. 226. But if the holder be ignorant of the endorser's residence, he will not be justified in sending notice to the place of date of the note, without making inquiry for the endorser's residence; *Wilcox v. Mitchell*, 4 H. 272.

62. *What is diligence: Inquiry at the bank where the note is payable.* The notary protesting a bill, and ignorant of the endorser's residence, need apply at no other place than the bank where the note is made payable, to ascertain it; inquiry there constitutes due diligence, and this is the rule, though the note be handed to the notary for protest by the bank at which it is made payable, and the inquiry be made only of the proper officer of the bank; *Goodloe v. Godley*, 13 S. & M. 233 (citing S. C. 6 S. & M. 255); S. P., *Hunt v. Nugent*, 10 S. & M. 541. And in such case the notary is not bound to make inquiry of all the officers and agents of the bank, but only of the cashier, or other officer or agent charged by the bank with the duty of collecting the note. And if the cashier be ignorant of the residence, it will excuse want of notice, though there was another officer or agent of the bank who knew it; for where a party has several agents, with separate and distinct duties, notice to one in relation to a matter not within the scope of his agency, is not notice to the principal or the other agents; *Goodloe v. Godley*, *supra*.

63. *Same: Change of residence.* When a party to negotiable paper changes his residence, after the making and before the matu-

city of it, the holder, if he be ignorant of the removal, and had no reason to suspect it, may send the notice to his old residence; *Wilcox v. Mitchell*, 4 H. 272; *Union Bank of Tennessee v. Govan*, 10 S. & M. 333. If the removal be known it should be sent to the new place of residence, if upon reasonably diligent inquiry it could be ascertained; but the rule requiring diligence is applicable only where the removal is known, for the holder has a right to presume, until he has information to the contrary, that the residence continues the same till the maturity of the bill, and there can be no reason to put him on inquiry as to the new residence until he has knowledge of the removal from the old one. And this rule is the same where new paper has been given in renewal of the old at its maturity, and when the change of residence occurred after the making of the first, and before its maturity, the renewed paper and the old one being considered, as to this point, the same transaction; *Union Bank of Tennessee v. Govan*, *supra*. And if the endorser, in fact, have no known place of residence, it is unnecessary to make inquiry, for the inquiry could result only in showing that there was no place to which notice could be sent; *Tunstall v. Walker*, 2 S. & M. 638.

64. *Function of court and jury as to diligence and notice* The question of diligence in making inquiry as to the residence of an endorser, when it depends on the testimony of witnesses before a jury, must be submitted to the decision of the jury under appropriate instructions from the court; *Hoop's v. Newman*, 2 S. & M. 71; *Godly v. Goodloe*, 6 S. & M. 255. If the evidence be agreed on, or if the facts be found by special verdict, it is a question of law for the court; *Godly v. Goodloe*, *supra*. And so if the evidence be uncontradicted, the court may charge directly that it is sufficient or insufficient; *Fleming v. Fulton*, 6 H. 473. And when the question was for the jury, it was held error for the court to refuse to instruct the jury "that the endorser is liable, if the holder was ignorant of his post office, and after using due diligence to ascertain it he failed, and then sent notice to the place where the bill bears date;" *Godly v. Goodloe*, *supra*.

B. WHEN ENDORSER HAS NO RESIDENCE.

65. *Notice unnecessary*. When the endorser, at the date of the maturity of the note, has no known place of residence or business, no notice is necessary to fix his liability on the note; *Tunstall v. Walker*, 2 S. & M. 638. And the object of requiring diligence in making inquiries for an endorser's residence being to enable the holder to send him notice there, it follows that where he has no residence to which notice can be sent, that it is unnecessary to make any inquiry concerning it. In such case the holder making no inquiry takes the risk to show that the endorser has no known residence; *Id.*

65a. *Same: Case in judgment*. R. J. Wal-

ker was the endorser of a promissory note, which fell due and was protested on 1st February, 1837, at which time he was a member of the United States Senate from this State, and in Washington City engaged in the discharge of his official duties, where he remained till the 4th of March of that year. He was in the habit at that time, and during his stay in Washington, of receiving his letters through the post office in that city. At his last place of abode, in this State, he had left no agent to forward his letters to him. There was a variety of evidence on both sides as to whether he had a residence in the State. The jury found he had a residence here. The court reviewed the evidence on this point, and a majority came to the conclusion that he had no residence here, and set aside the verdict, and held that no notice to Walker was necessary; and if it were, that the notice sent to him at Washington City was sufficient; *Tunstall v. Walker*, *supra*.

C. WHEN DRAWER HAS NO FUNDS IN THE HANDS OF DRAWEE.

66. *Drawer without funds in the hands of drawee*. If the drawer of a bill have no funds in the hands of the drawee from the date of the bill to its maturity, and no just ground to believe that it would be honored, he is not entitled to notice of dishonor; *Cook v. Martin*, 5 S. & M. 379; *S. P., Wood v. Gibbs*, 6 G. 559; *Dunbar v. Tyler*, 44 M. 1. But if the drawee was indebted to the drawer, or if the latter had made consignments to the former, or if want of notice from other causes would produce a detriment to the drawer, then he is entitled to notice. In case of a want of assets in the hands of the drawee, the holder is not bound to prove affirmatively that the drawer was not damaged by a want of notice. It is sufficient to prove that the drawer had no funds in the hands of the drawee, and then if there be circumstances which entitle the drawer to notice, he must show them; *Cook v. Martin*, *supra*.

67. *When the bill has been accepted*. In the absence of proof of notice of dishonor to the drawer of an accepted bill, it is not sufficient to charge him, merely to show that he had no funds in the hands of the acceptor, from the making of the bill to its maturity; but it must also be shown affirmatively by the holder, that the drawer had no right to expect payment of the bill, the acceptance of the bill being a *prima facie* showing in behalf of the drawer, that he had reasonable ground to believe that the bill would be paid at maturity; *Richie v. McCoy*, 13 S. & M. 542. But in such case, if the acceptor has failed before the maturity of the bill, and that fact is known to the drawer, it is unnecessary to present the bill for payment, or give notice of its non-payment; *Harvey v. Troup*, 1 C. 538, *sed. vide post*, 67c.

67a. *What is reasonable ground to expect payment*. D. drew his bill on N., of New Orleans, who accepted it. D. was a planter, and had for many years consigned his crops

to N., who was his factor, and as such received and sold the same, and accepted and paid the bills of D. from time to time, there being all the time running accounts between D. and N., and the bill was drawn on the expectation that the proceeds of the then growing crop would be realized to meet its payment: *Held*, that these facts constituted reasonable ground for D. to expect that N. would pay the bill at maturity, and that he was entitled to notice of non-payment; *Dunbar v. Tyler*, 44 M. 1.

D. WAIVER OF DEMAND AND NOTICE.

67b. *Same: Case in judgment.* The endorsement on a note was in these words, signed by the endorser, "Protest waived," and I hold myself liable as endorser, January 3d, '63." *Held*, that this was a waiver of demand of payment, and notice of non-payment, and that the endorser was absolutely liable as if he were maker; *Carpenter v. Reynolds*, 44 M. 807.

E. PROTEST AND NOTICE EXCUSED BY REASON OF WAR; DILIGENCE.

67c. *Duty to protest excused from unavoidable obstruction: Rule on the subject.* It is incumbent on the holder of a bill of exchange payable at a particular time, to present it on that day, make demand, and give due notice of non-payment in order to fix the liability of the drawer. But if he has made every reasonable effort and used proper diligence to make demand, and has been prevented by impediments not caused by his own conduct, he will be excused, if he give prompt notice of such failure and efforts to the drawer. The duty, however, to make the demand is so peremptory, that nothing short of absolute necessity will excuse it. Bankruptcy, insolvency, absconding, or death of the acceptor does not absolve him from that duty (*sed vide ante*, 67). And when the presentation at the proper time has been prevented by an unavoidable cause then existing, the presentment and notice should be made and given in a reasonable time after such cause is removed; *Dunbar v. Tyler*, 44 M. 1.

67d. *Same: War as an obstruction: Case in judgment.* The bill was drawn in April, 1862, due at six months and duly accepted. The drawer and holder resided at Natchez in this State, and drawee in New Orleans, Louisiana, where the bill was payable. Before the bill matured, New Orleans was occupied by the Federal forces, and all intercourse between that place and Natchez prohibited by the laws of war. No demand was made at maturity and none afterwards: *Held*, that the drawer was not liable; and that although the holder was excusable by reason of the war from presenting the bill at maturity, yet his duty to present revived on the termination of the war, notwithstanding the insolvency of the drawee; *Id.*

67e. *Same: Another instance.* The drawer resided in this State, and the acceptor in New Orleans, and the holder in New York, and the bill fell due on 11th March, 1862. On

the 6th May, 1862, New Orleans was captured by the Federal forces, and intercourse between that place and New York became lawful on 12th August, 1862; but from the capture to the close of the war, all intercourse between New Orleans and the residence of the drawer was unlawful. The bill was protested for non-payment on 24th February, 1863, about six months after intercourse between New Orleans and New York became lawful. The notary stated in his protest, that the office of the acceptors was closed, and there was no person about the premises of whom demand could be made, and that notice was sent the next day through the mail to the drawer at his post office: *Held*, that the protest was not in reasonable time, that the drawer was discharged; *Gale v. Lancaster*, 44 M. 412.

5. Effect of Promise to Pay, and taking Indemnity, on Notice.

68. *Subsequent promise considered in two ways.* A subsequent promise by a drawer or endorser to pay the bill or note, or a part of it, is considered in two aspects; first, as a waiver of notice, and second, as presumptive evidence, that notice had been duly given, or of the existence of such facts as excuse the want of notice. It has the first effect, when the promise is made with a full knowledge on the part of the promisor, of the laches of the holder in giving notice; and it has the second, when made in ignorance of such laches; *Robbins v. Pinckard*, 5 S. & M. 51; *Harvey v. Troupe*, 1 C. 538. When it amounts to a waiver, it is binding on the party absolutely, without any new consideration. When it has not this effect, it is merely *prima facie* or presumptive evidence that notice has been given, or that the promisor was not entitled in law to have notice, and it may be rebutted by proof, that no notice was given, and that the party was entitled to notice; but this rebutting proof must be made by the drawer or endorser; *Robbins v. Pinckard supra*; *Harvey v. Troupe, supra*; *S. P., Offit v. Vick*, W. 99; *Baskerville v. Harris*, 41 M. 535; *Moore v. Ayres*, 5 S. & M. 310. Whether when a promise to pay is proven by the holder, it is incumbent on him, if he seeks to make it operate as a waiver, to prove irregularity in, or want of, notice, and that the party making the promise was aware of the laches; or whether it is incumbent on the party making the promise, if he seeks to be relieved therefrom, to prove the laches, and that he made the promise in ignorance of his exoneration thereby; *Quere?* *Robbins v. Pinckard, supra*. And a promise made in ignorance of the laches is not binding; *Offit v. Vick*, W. 99; *Baskerville v. Harris*, 41 M. 535; and if the money be actually paid under such circumstances, it may be recovered back; *Offit v. Vick, supra*. And the foregoing rules apply where instead of a subsequent promise the endorser writes over his name, "Waiving demand and notice;" *Baskerville v. Harris, supra*.

69. *Effect of promise to pay, or the payment of part.* But if the payment of a part of the bill, or the promise to pay a part of it, be

accompanied by a statement of the drawer or endorser expressly limiting his liability to the part so paid or promised, he will not be bound beyond such limit; *Harvey v. Troupe*, 1 C. 538.

70. *Promise considered as a waiver: Case in judgment.* The endorser agreed at the maturity of the note, that eighteen months' indulgence should be granted to the maker. When the indulgence expired, the endorser was threatened with a suit on the note in the United States Court, and he begged to be sued in the State Court held in the county where he resided, and promised to procure the consent of the maker to the rendition of a judgment against them at the first term of the Circuit Court. He reported to the holder that the consent was given, and he and the maker were sued in the State Court as requested. The maker, however, put in a plea to the action, and would not allow judgment to go at the first term as promised; the endorser urged the maker's attorney to withdraw the plea and let the judgment be entered at the first term, as had been promised. These acts were held to amount to an absolute promise by the endorser to pay the note, and a full admission that he had no defence to make. And the court cited *Tebbitts v. Dowd*, 13. Wend. 379, as containing a full exposition of the law on this subject; *Robbins v. Pinckard*, 5 S. & M. 51.

71. *Partial payment, not a waiver.* Proof of a partial payment on a note, made by the endorser after its maturity, is sufficient to authorize the inference that due demand was made and notice given; it does not, however, amount to a waiver of notice; *Bibb v. Peyton*, 11 S. & M. 275.

72. *When endorser gives security.* It seems that where after a note has been duly protested for non-payment, the endorser executes a deed in trust to secure the debt, that this would furnish a strong presumption, that due notice had been given, or else waived, but its effect was not absolutely decided by the court; *Union Bank of Tennessee v. Gevin*, 10 S. & M. 333. See *Offit v. Vick*, digested in *ante*, 68.

73. *When endorser takes indemnity.* An endorser who takes indemnity from his principal, thereby dispenses with notice of demand and non-payment, and especially is this so, if the endorser obtain as indemnity a mortgage on a large amount of property, and of his own motion without the consent of the holder releases the principal part of it; *Watt v. Mitchell*, 6 H. 131.

74. *Whether declaration of endorser amounts to a waiver: For the jury.* Whether declarations made by the endorser amount to a waiver of demand and notice, is a question of fact to be determined by the jury, and not a question of law to be settled by the court in charge to the jury; *Carmichael v. Bank of Pennsylvania*, 4 H. 567.

6. Proof, Notice and Pleading in relation thereto.

75. *Pleading and proof.* Whether, when the declaration against an endorser avers that due notice was given, it is competent to show

a valid excuse for not giving notice; *Quære?* *Hoopes v. Newman*, 2 S. & M. 71; *Hunt v. Nugent*, 10 S. & M. 541. In the first case cited, the court in reversing the judgment on another point, advised the plaintiff to amend his declaration so as to make it correspond with the proof; and in the second, it was held that under such an averment, proof that the notary made diligent inquiry as to the post office of the endorser, and sent the notice to the place where the information was that the endorser lived, was properly admitted; In *American Life Ins. & Trust Co. v. Emerson*, 4 S. & M. 177, it was said that if the declaration averred that due and legal notice was given, that the notice must be proven as averred.

76. *Certainty in proof.* Proof of notice of protest should be made with reasonable certainty, but it need not be positive. When the notary, who made the protest, was dead, and his clerk, who filled out the protest, and made a copy of the protested note endorsed on it, "testified that he remembered delivering notices of protest to the same persons who were endorsers on the note, that this delivery was made about the date when the note in controversy fell due, and was made on the day on which the note to which they referred was protested, that he could not recollect the exact note referred to in the notice which he remembered to have delivered, but that he was impressed with the belief that the maker of that note was the same as the maker of the note sued on, and he knew the endorsers were the same;" it was held that the proof of notice was sufficient; *Blund v. Com'l & R. R. Bank*, 3 S. & M. 250. The holder, however, must prove notice affirmatively, and that notice was given in due time. This cannot be left to inference and presumption; *American Life Ins. & Trust Co. v. Emerson*, 4 S. & M. 177; and the proof must be clear and satisfactory; *Downs v. Planters' Bank*, 1 S. & M. 261.

76a. *Notice need not be produced.* Notice of protest when in writing may be proven without producing the writing, or accounting for its absence; *Offit v. Vick*, W. 99.

77. *Admission of reception of notice.* An acknowledgment by an endorser or drawer that he had received notice, and his statement that he supposed that he would have to provide for payment, is good proof of notice; *Offit v. Vick*, *supra*. And so the admission of the administrator of the drawer or endorser—the protest having been made after his appointment—is competent evidence to show that he has received legal notice, unless he will appear at the trial and announce his willingness to testify in the case; *Duncan v. Watson*, 2 S. & M. 121; S. C., 6 C. 187.

78. *Effect of subsequent promise, as proof of notice.* As to this see *ante*, 68, 69, 70.

79. *Where notary testifies from his record.* Where the notary, who protested the note, testified that he had no recollection whatever of the protest and the giving of notice, but stated that his notarial record was made out by himself, or his clerk under his directions,

and from it he was sure that he made the protest and gave legal notice; that he gave the notice at a specified hour (which was in time), and that he made that statement from no recollection of having done so in this particular case, but solely from his habit of serving all notices by that hour; it was held that a verdict upholding the validity of the notice would not be disturbed; *Rowan v. Odenheimer*, 5 S. & M. 44.

80. *Certificate of notary under Act of 1833.* The notarial certificate and record of a notary, made in this State under the Act of 1833 (*ante*, 27, 28), is admissible to show that notice was given; and this though the record and certificate were not made out for several months after the protest, and even though it be proven that the notary kept no other record of his acts in the premises; *Booth v. Watson*, 5 S. & M. 295; S. P. *Fleming v. Fulton*, 6 H. 473; *Wood v. American Life Insurance & Trust Co.*, 7 id. 609; *Grimball v. Marshall*, 3 S. & M. 359.

81. *Memorandum of deceased notary.* An entry or memorandum made by one who knew the fact, and had no interest to falsify it, is admissible after his death as evidence of the fact; and upon this principle a memorandum made by a deceased notary on his notarial record, of the protest of a promissory note, stating the time and manner of the service of notice of protest to the endorsers, is admissible in evidence. And in such case it is not necessary that the whole record should be in the notary's handwriting, if it be signed by him; *Birnard v. Planters' Bank*, 4 H. 95; S. P., *Ogden v. Glidewell*, 5 H. 179; *Boddy v. Scurboro*, 5 H. 729.

See EVIDENCE, 34.

82. *Same: Imperfect memorandum.* The record of a deceased notary's protest contained these words: "Notice to J. W. (who was the endorser), G. Port," and it was offered in evidence by the plaintiff in a suit against the endorser, and excluded by the court below: *Held*, that it was competent to go to the jury, on the point of notice, it not appearing that the plaintiff was not prepared to supply other and competent evidence, which might be necessary to bring home to defendant notice of the dishonor of the note; and it was also held that it was incompetent to prove by the clerk of the notary that he understood by the memorandum that the notary deposited notice of protest in the post office on the next day after protest, directed to J. W., at Port Gibson; *Duncan v. Watson*, 2 S. & M. 121.

7. To whom notice should be given, and Miscellaneous.

83. *Holder not bound to notify all the endorsers.* The holder of a protested bill or note is not bound to notify all the parties entitled to notice in order to be made liable. He may notify such as he wishes to look to for payment, and if they desire to look to others bound before them, they must give notice to such parties. And this rule is not affected by the statute requiring all the parties to a

bill or note, makers and endorsers, drawers and acceptors, to be sued in the same action; *McMurrin v. Soria*, 4 H. 154.

84. *How endorser, &c., receiving notice, must proceed.* And an endorser receiving notice must give notice to his prior endorser, whom he seeks to hold liable, on the next day after he receives the notice; *American Life Insurance & Trust Co. v. Emerson*, 4 S. & M. 177. And in giving the notice he may enclose to the prior endorser the notice made out for such prior endorser, by the notary who made the protest, and it is not necessary that the endorser sending such notice should sign it in any way; *Bank of Kentucky v. Coffman*, 41 M. 212.

85. *Rule as to endorser's right to notice.* An endorser is entitled to notice of the dishonor of a bill or note, whenever, upon payment of it by him, he would be entitled to a remedy on it against the drawer or maker. Hence it is no excuse for not giving an endorser notice, that the payee sold him property, which the endorser resold to the maker, and that by agreement of the parties the payee took from the endorser the note, with his endorsement on it, in payment for his purchase from the payee; for upon payment of the note by the endorser to the payee, he would be entitled to recover the note from the maker; *Moore v. Brungard*, 5 H. 557.

86. *Drawer of a bill given as conditional payment, entitled to notice.* A creditor who receives the bill of exchange of his debtor, as a conditional payment of his debt, is bound to give notice to the debtor of the dishonor of the bill at maturity, and if he fail to do so, and do not return the bill, the payment becomes absolute; *Stamm v. Kerr*, 2 G. 199.

87. *Notice to partners.* Notice to one partner is notice to all; and if one be dead, notice to a survivor binds the representatives of a deceased partner; *Dabney v. Stidger*, 4 S. & M. 749.

See PARTNERSHIP, 15, *et seq.*

88. *To joint endorsers.* In this case there were two joint endorsers, who were not partners, and notice of dishonor was served on one only. The majority of the court expressly decline to decide whether the notice was good as to the one served, but Turner, J., dissenting, said it was not good as to either. (citing *Bayly on Bills*, 285; *Bank of Chenango v. Burt*, 4 Cowen, R. 126.); *Patrick v. Beasley*, 6 H. 609.

VII. Damages on Protest.

89. *No damages at common law.* The right to recover damages on the protest of a bill of exchange, does not exist at common law; they are recoverable only in virtue of a statutory provision, and only in cases specified in the act. Our statute gives the right to damages only where there has been a protest of the bill; and hence no damages are recoverable upon non-payment of the bill, though the drawer has no funds in the hands of the drawee, nor any right to expect payment if there has been no protest; *Buck v. Little*, 2 C. 463.

90. *On inland bills.* An inland bill drawn before the act allowing damages on the protest of inland bills was repealed, but falling due and protested after its repeal, is not subject to damages; *Pickett v. Redman*, 2 H. 688.

91. *Same.* Under the Act of 1836, inland bills, when protested, drew damages at 5 per cent.; *Saddler v. Murrah*, 3 H. 195; under the Act of 1857, Rev. Code, 356, art. 6, inland bills draw no damages.

92. *Foreign bills.* Under the Rev. Code of 1857, p. 356, art. 5, bills drawn in this State on a drawee residing out of the State, but in the United States, draw 5 per cent. damages, in case of protest for *non-acceptance*; and where drawn on a person out of the United States, they draw 10 per cent. damages, on protest for *non-acceptance* or *non-payment*.

93. *Declaration must show the bill to be foreign.* Unless the declaration show that the bill was drawn on a person residing out of the State, it will be presumed to be a domestic bill, and will be entitled to draw damages only as such; *Rowland v. Hoover*, 2 H. 769.

94. *The clerk may calculate damages.* Upon judgment by defendant or *nil dicit*, on a bill of exchange, the clerk may calculate the damages without referring the matter to a jury; *Grigsby v. Ford*, 3 H. 184.

See JUDGMENT, 61.

VIII. Notes payable to Bearer.

1. Possession evidence of Title.

95. *Possession prima facie evidence of title.* Possession of a note payable to bearer, is *prima facie* evidence of title to it, in the possessor, and in an action of trover against him, for a conversion of the note, if there be no proof introduced to question the fairness of his title, simple possession alone will entitle him to a verdict. He is not obliged to give any explanation as to how he came by it, unless his title be assailed by proof; *Smith v. Prestridge*, 6 S. & M. 478.

96. *Prima facie evidence that holder gave value for it.* The possession of a note payable to bearer, is *prima facie* evidence that the holder gave value for it, and got it *bona fide*, and the maker, when sued on the note, must defeat this presumption by proof, before he can defeat a recovery on it by interposing a defence existing only against an antecedent party or holder of the note; *Craig v. City of Vicksburg*, 2 G. 216.

97. *But it is only prima facie evidence.* If after a note payable to bearer becomes due, a third party illegally and fraudulently obtain possession of it, payment to him by the maker, after notice of his defective title, is no discharge; *Ainsworth v. Ainsworth*, 2 C. 145.

2. How note payable to bearer Transferred.

98. *Title passes by mere delivery.* The legal title to a promissory note payable to bearer, passes by mere delivery, no formal assignment or endorsement being necessary, it being in itself a promise to pay whomsoever shall become the bearer; *Arnold v. Leonard*, 12 S. & M. 258; *Hatchcock v. Owen*, 44 M.

799; *Titman v. Ailles*, 5 S. & M. 373. S. P., *Fox v. Hilliard*, 6 G. 160; *Cobb v. Duke*, 7 G. 60; and a delivery to an attorney, with instructions to bring suit in the name of the transferee, is sufficient; *Fox v. Hilliard*, *supra*. But when the transferee has become only entitled to the proceeds, and there has been no actual delivery, the legal title does not pass, and suit may be brought in the name of the payee for the use of the transferee; *Hatchcock v. Owen*, 44 M. 799. See *post*, 167.

But if it be endorsed by the payee, or any subsequent holder, the endorser will be liable, as in other cases; *Tillman v. Ailles*, *supra*.

99. *Conflict of laws: Remedy.* Whether a note payable to bearer, made and transferred by delivery, in a State whose laws prohibit the transfer of such a note without endorsement, can be sued on in this State by such transferee; *Quære?* *Hemphill v. Bank of Ala.*, 6 S. & M. 44.

3. Not subject to equities between antecedent parties.

100. *Same.* Bills, bonds, and promissory notes payable to bearer, were negotiable at common law, and are not within the statute making certain contracts assignable, and allowing the maker, as against an assignee, to avail himself of all the defences he has against the assignor. They are, in effect, promises to pay directly to whomsoever may lawfully become the holder, without reference to any consideration existing or passing between the promisors and the persons to whom they originally delivered them; and hence a *bona fide* holder for value, of such a bond, bill, or note, is entitled to recover the amount thereof from the maker, notwithstanding any failure or want of consideration in it, or any other defence which may exist in favor of the maker, against the first promisee; *Craig v. City of Vicksburg*, 2 G. 216; *Stokes v. Winslow*, 2 G. 518; *Mercien v. Cotton*, 5 G. 64; *Winstead v. Davis*, 40 M. 785.

And as possession of such a bill or note is *prima facie* evidence of title, in good faith and for value, the maker cannot set up as a defence against the holder, equities existing between him and an antecedent party, until he has first removed this presumption of fairness and value in the holder's title, by proof; *City of Vicksburg v. Craig*, *supra*.

IX. Notes payable to Banks, or endorsed to them.

101. *When a letter of credit.* A note made by principal and sureties, payable to a bank, for the purpose of being discounted there for the benefit of the principal, and by the sureties intrusted to the principal to procure the discount, is equivalent to a letter of credit given by the sureties to the principal, and the latter may, if the bank refuse to discount the note, sell it to other parties, and it will be binding on the sureties; *Com'l Bk of Natchez v. Claiborne*, 5 H. 301; *Henderson v. Wilson*, 6 H. 65. And such a note may be sued on in the name of the bank, as nominal plaintiff, for the use of the person rightfully holding it

and if an offset of the notes of the bank be pleaded, it may be shown that it never was the property of the bank. And so, if the note was in the first instance delivered by the purchaser of property to the seller, the latter may sue on the note and recover the amount without ever having presented it to the bank for discount; *Graves v. Miss. & Ala. R. R. Co.*, 6 H. 548; *S. P.*, *Trible v. Bank of Grenada*, 2 S. & M. 523.

102. *When endorsed to bank: Right of endorser.* When the payee of a note endorses it to a bank, and on failure of the maker to pay, takes it up, he is remitted to all his original rights as payee, and in a suit by the endorser against the maker, the latter cannot plead as a set-off the issues of the bank held by him before the note was taken up by the plaintiff. The Statute H. & H. 373, which allows the maker the benefit of all set-offs acquired before notice of assignment, does not apply to a case like this, when the endorser takes up a note in virtue of his contract to do so; *Maury v. Jeffers*, 4 S. & M. 87.

103. *Same: When there is a renewal.* And the rule is the same, when the note so endorsed to the bank, was renewed when it fell due, by the same makers and endorsers; for this will be considered but a continuation of the same transaction, involved in the first note, and the endorser taking up in virtue of his endorsement the renewed note, would be entitled to the same rights as if he had taken up the first. The Act of 1840, prohibiting assignments by banks, does not apply to a transaction where the endorser having paid the bank, the note was delivered to him, and the endorser in such case would be entitled to recover from the maker the full amount of the note, without reference to what he paid for it; *Wade v. Thrasher*, 10 S. & M. 358.

X. Notes Payable in Bank.

See **BANKS**, 16a to 19.

103a. *Equities under the statute, in favor of maker against assignee.* The makers and endorsers of a note, may set up payment to the person to whom they delivered the note made by them, without notice of assignment, though the note was made payable and negotiable in a bank in this State, and this, though the note was actually discounted by the bank, if it were not made and delivered for the purpose of being so discounted; *Allen v. Agricultural Bk.*, 3 S. & M. 48; *S. P.*, *McMurren v. Soria*, 4 H. 154; *Parham v. Randolph*, *Id.* 435.

103b. *Demand of payment.* As to demand of payment of notes made payable in bank; See *ante*, 34, 37, 38, 39, 40.

See **PRINCIPAL AND SURETY**, 11.

XI. Blank Notes and Bills.

104. *Effect of signing in blank.* It is now well settled, that a party signing his name to a blank bill or note, either as maker, drawer, or endorser, and delivering it to another, thereby gives that person authority to fill it up in any

manner he pleases, not inconsistent with the character of such paper as the written part of it imports, and that a party taking it without notice that it has been filled up contrary to the agreement between the original parties, is entitled to collect it as written and filled up. And this rule is applicable when the paper signed is wholly blank, or blank in some part only, as date, amount, payee, or time of payment. The principle on which the rule is based is, that the person signing the blank paper, makes the holder his agent to fill up the blanks as he sees proper, and confers the power of contracting, with reference to it, as fully as if an unlimited letter of credit had been given. Such signing and delivery in blank, gives the power to the holder, if anything be necessary to be done to give validity to the paper, to do whatever may be requisite to render it effectual; and if that can be done in several ways, as in case of a blank endorsement of a blank bill, the blank signature gives the holder authority to use his discretion in this respect, so far as innocent parties taking it without notice are concerned; *Davis v. Lee*, 4 C. 505; *Johnson v. Blasdale*, 1 S. & M. 17; *Hemphill v. Bank of Alabama*, 6 S. & M. 44; *Tanning v. Farmers' & Merchants' Bk.*, 8 S. & M. 139; *Torry v. Fisk*, 10 S. & M. 590.

105. *Same: Examples.* Thus if the limit as to the amount of the note or bill be exceeded, the maker will be bound for the whole amount inserted; *Johnson v. Blasdale*, *supra*; and so will the endorser; *Tanning v. Farmers' & Merchants' Bank*, *supra*. And so if the payee be left blank any name may be inserted and the maker will be bound; *Torry v. Fisk*, *supra*.

Thus, also where a note was made by Smith payable to Starke, and it was endorsed by Davis in blank at the request of the maker before its delivery to Starke, with the understanding, however, between Smith, the maker, and Davis, the blank endorser, that Starke, who was the payee, should endorse as first endorser, so as to make him liable before Davis; and whilst in this condition, *i. e.*, endorsed by Davis, alone, it was shown to Lee, who afterwards took it from Starke, with the words "without recourse on me," written over Starke's signature as endorser; Lee, however, having no notice of the understanding between Smith and Davis, that Starke was to endorse the note so as to protect Davis; it was held, that Davis, endorsing the note before Starke's name was put on it, was such a signing in blank, as to bring it within the foregoing rule, and rendered him liable to Lee, notwithstanding the agreement between Smith & Davis; *Smith v. Lee*, *supra*.

106. *Same: When filled up for too much, only the excess is void: Notice: Example.* But if a blank note be filled for a greater amount than was authorized, and the holder knew this, the note will not be utterly void, but it will be bad only for the excess. And if the note in blank as to the amount, be made payable to an administrator, who is about to sell property of his intestate on a

credit, and be signed by a surety and principal, and thus signed, left with the principal, to be filled up by the amount of his purchases at the sale. The shape in which the note is thus signed and made payable, will be notice to the administrator that it was the intention to insert in it the purchases only of the principal, and if the bids of other persons be included, the amount of such bids cannot be collected, although they with the principal's purchases did not exceed the amount which the surety authorized the principal to insert for his own purchases: *Johnson v. Blasdale*, 1 S. & M. 17; *S. P., Goad v. Hart's Adm'r*, 8 S. & M. 787; *Goss v. Whitehead*, 4 G. 213.

107. *Same: Transfer for pre-existing debt.* And the holder of such a blank bill or notice, who takes it without notice as aforesaid, in payment of a pre-existing debt, will be entitled to the protection of the foregoing rule; *Davis v. Lee, supra*.

108. *Same: How the maker is to contest it.* When the signer of a blank note or bill desires to contest his liability thereon, upon the ground that it has been filled up contrary to the agreement between him and the person to whom he delivered it, he must deny the execution of it under oath. By pleading without affidavit, he admits it to be his note; *Hemphill v. Bank of Alabama*, 6 S. & M. 44 (citing *Green v. Robinson*, 3 H. 105). But in *Goss v. Whitehead*, 4 G. 213, it is held the defence may be made under the general issue, where the objection is, that the note was filled up for a larger amount than that authorized.

109. *Same: Affirmance of the act of filling it up.* If the party signing the blank note or bill, which has been filled up contrary to the amount, after it is filled up and negotiated, voluntarily execute a mortgage to secure it, this is a ratification of the act of filling up, and makes it binding; *Fanning v. Farmers' and Merchants' Bank*, 8 S. & M. 139.

XII. Notes payable in Bank Notes.

110. *Note payable in bank notes is a promissory note.* An instrument "payable in the notes of any bank in this State," but in all other respects like a promissory note, is under the statute, H. & H., p. 373, § 12, and lb. 594, a promissory note; *Besancon v. Shirley*, 9 S. & M. 457 (citing *Rankin v. Sanders*, 6 H. 52; *Bonnell v. Covington*, 7 H. 322; *Gordon v. Parker*, 2 S. & M. 485). And if to an action on such a note the defendants plead a tender of the notes of a particular bank on the day of its maturity, the plea must aver a continued readiness to pay, as in actions on other promissory notes; *Besancon v. Shirley, supra*; *Lanier v. Trigg*, 6 S. & M. 641.

111. *Note payable in current bank notes: Effect of.* A promissory note, payable "in the current notes of either of the banks at Natchez, or of the Union Bank," is an undertaking to pay in the current notes of some one of these banks; payment cannot be made in the uncurrent notes of the Union Bank, or

of any one of the banks at Natchez. And a plea to an action on such a note, of tender of the notes of one of the specified banks, must aver that the notes were current; *Bonnell v. Covington*, 7 H. 322.

112. *Same: Amount of recovery.* If any of the notes of the specified banks were current at the maturity of the note, the plaintiff can only recover their specie value at that time; but it was not decided what would be the amount of the recovery in case all the notes of the specified banks had become uncurrent when the note fell due; *Bonnell v. Covington, supra*.

113. *Note payable in the notes of the chartered banks of the State at par.* A note payable "in the notes of the chartered banks of the State of Mississippi at par," is a contract to pay the sum specified in the notes of any chartered bank of the State, as if they were at par, without paying any discount or premium, and is not an agreement to pay in bank notes of the State, which are in fact actually at par. And a plea of tender of the notes of chartered banks of the State need not aver that the notes tendered were at par (*Clayton, J., dissented*); *Smith v. Elder*, 7 S. & M. 507.

114. *Note payable in the currency of the State.* A note payable "in the currency of the State of Mississippi" is payable only in lawful money or legal tender, and not in the notes of the banks of the State. "Currency" implies lawful money; *Mitchell v. Hewett*, 5 S. & M. 361.

115. *Note payable in the issues of a specified bank.* A note for a named amount of dollars, "payable in Brandon money," is a note payable in that number of dollars counted in Brandon money, and if not paid at maturity, the specie value of the bank notes at that time is all that is recoverable; *Gordon v. Parker*, 2 S. & M. 485 (citing *Bonnell v. Covington*, 7 H. 322).

115a. *Same: Tender must be made at maturity.* When a bond or note is payable in the notes of a specified bank, a tender of the notes after the day of maturity will not do. The holder is entitled to have the bank notes on the day of maturity, or their specie value at that time; *Lanier v. Trigg*, 6 S. & M. 641.

115b. *Same: Where the note is for "dollars," and there is a defeasance.* Conceding that if a note for so many dollars, payable in the notes of a specified bank, be not paid at maturity, the amount of the recovery would be only the specie value of the bank notes when it fell due (this is now settled); yet when the note is for so many dollars, not specifying what kind, and there be at the same time executed by the payer a separate instrument, in which he agrees to take in satisfaction of the note certain specified bank notes, the instrument is not to be construed as a part of the note, but as a defeasance; and if the bank notes be not paid at the maturity of the note, the payer is entitled to have the note paid in specie, according to its face; *Saunders v. Richardson*, 2 S. & M. 90. See *post*, 216, 217. For notes payable in cotton, see *post*, 218.

XIII. Accommodation Bills.

116. *Right of drawee to collect from drawer, without acceptance.* Under the law merchant the accommodation drawer of a bill of exchange for the benefit of the payee, is liable to the drawee for the amount thereof, when the bill has, before maturity, been endorsed by the payee and deposited with the drawee as collateral security for the then existing indebtedness of the payee to the drawee; and especially where the drawee in consideration of the deposit has forbore to bring suit on his demand against the payee; *Fellows v. Harris*, 12 S. & M. 462. See *post*, 145; *ante*, 12.

117. *Right of payee to negotiate such a bill.* And where the drawer of such a bill intrusts it to the payee for negotiation, he is bound by the acts of the payee in negotiating the same; and also by the entries on the books of the payee, showing that he had received value for it; *Ib.*

118. *Acceptor not a creditor of drawer till payment.* An acceptor of a bill for the accommodation of the drawer does not thereby become a creditor of the drawer. He becomes such only by the payment of the bill out of his own funds, no funds of the drawer being on hand to meet it. He cannot bring suit against the drawer until payment has been made; *Henderson v. Thornton*, 8 G. 448.

118a. *Proof required in suit by acceptor against drawer.* In an action by the acceptor of a bill for the accommodation of the drawer to recover the amount paid by him to take up the bill, the bill or particulars filed with the declaration must so describe the bill as to identify it, and it must also be produced on the trial or its absence accounted for. And it must also be proven that the bill has been in circulation since it was accepted, and the genuineness of the endorsement on it must be established; *Curry v. Kurtz*, 4 G. 24.

See BILL OF PARTICULARS.

118b. *Right of principal paying accommodation bill on agent.* The principal, in the absence of funds of the drawer, may pay a bill drawn on his agent, and accepted by him for the accommodation of the drawer, and recover the sum so advanced, as if the bill had been drawn on and accepted by him, and without proof of protest and notice. For in that case the bill has not been dishonored, and the principal has only done by himself what the drawer requested him to do by his agent; *Carson v. Alexander*, 5 G. 528.

119. *Waiver of notice.* And in such case, if the drawer ever had a right to notice of protest, he will be held to have waived it, if he being a customer of the principal, receives accounts from him in which he is charged, with the amount so paid to take up the bill on the agent, without objection on that account; *Ib.*

120. *Discount of.* When a debtor draws a bill on his creditor for the purpose of having it accepted, and then put on the market and discounted to raise funds to pay the debt,

the creditor, if he accept the bill, and after it is discounted pay it, will be entitled to charge the debtor with the original debt, and the amount of the bill thus discounted and paid, giving him credit for the proceeds of the discount; *Ib.*

121. *Accommodation acceptor cannot refuse payment for fraud.* An acceptor of a bill for the accommodation of the drawer cannot refuse payment for the fraud of the payee in obtaining the bill; nor is the drawer in such a case entitled to an injunction to prevent the holder from collecting it. In this case the bill had been transferred to an innocent holder for value; *Winn's Adm'r v. Wilkins*, 6 G. 186.

122. *When drawer of accommodation bill not entitled to notice.* Where a bill has been accepted for the accommodation of the drawer, and he has placed no funds in the hands of the acceptor for its payment; and the acceptor has failed before the maturity of the bill, of which fact the drawer has notice, it is unnecessary to present the bill for payment, and give notice of its non-payment to the drawer; *Harvey v. Troupe*, 1 C. 538.

XIV. Acceptance of Bills.

123. *Verbal acceptance.* When the drawee of a sight bill offers and promises to pay it at a future day, this is an acceptance of the bill, if agreed to by the holder; *Hatcher v. Stakworth*, 3 C. 376.

124. *Absolute acceptance in writing cannot be shown, by parol, to be conditional.* When the acceptance of a bill is in writing, and is absolute, it cannot be shown by parol evidence, that it was conditional, and that the acceptor should only be bound to pay it, when the drawer should finish certain work he was doing for the acceptor. A failure of consideration may be shown by parol, but this rule does not extend to the allowance of parol evidence, to show a different contract from the one reduced to writing; *Heaverin v. Donnell*, 7 S. & M. 244. See *ante*, 12.

125. *What is a good presentment for acceptance: And refusal.* There is no form for a presentment for acceptance; anything which amounts to a notification to the drawee, of the holding of the bill, with a request to accept it, is a good presentment, if the bill be present. Hence, if the bill be enclosed in a letter by the holder to the drawee, with the request that he present it for acceptance, and the bill and letter be received by the drawee, it is a good presentment for acceptance; and if the drawee return the bill with a letter stating that it cannot be accepted, it is a good refusal; *Carmichael v. Bank of Pennsylvania*, 4 H. 567.

126. *Not necessary to present for acceptance: But if done and refused, there must be protest.* Although it is not necessary to present a bill payable at a stated time after date to the drawee for acceptance, yet if it be presented and acceptance refused, it is necessary that it be protested for non-acceptance, and notice given to all the parties; and protest a year after the refusal will not do; *Ib.*

XV. Transfer and Negotiation.

1st. Transfer Generally.

127. *Statute of 1822 on assignments; H. C. p. 640, § 9.* This statute provides that all bonds, obligations, bills, single promissory notes, and all other writings for the payment of money or any other thing, shall and may be assigned by endorsement, whether the same be payable to the order or assigns of the payee, &c., or not, and the assignee may sue on the same in his own name, and in all actions commenced by such assignee on such note, &c., "the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-off, made, had or possessed against the same previous to notice of the assignment, *** in the same manner as if the same had been sued and prosecuted by the obligee therein;" and the assignee or endorsee may maintain an action against the endorser or assignor, as in case of inland bills of exchange. Provided, that when any debt shall be lost by the negligence of the assignee, the assignor shall not liable. This statute is re-enacted in Rev. Code of 1857, p. 355, art. 2.

128. *Meaning of the term "transfer."* The term "transfer" when applied to negotiable paper, is a general term implying the passing of the beneficial interest in the paper to the transferee, without indicating the manner in which it is done, and hence, an averment in a declaration that the nominal plaintiff has transferred the note sued on to the use, does not show that the legal title has passed out of the nominal plaintiff; *Montague v. King*, 8 G. 441.

129. *Meaning of "due course of trade."* The term "due course of trade" when applied to the endorsement and transfer of a bill or note, means it was endorsed for value; *Miller v. Mayfield*, 8 G. 688.

130. *Statute on assignment: Construed.* The statute (*ante*, 127) making notes, bonds, &c., negotiable, is similar to the statute of Anne, except that it does not protect in the same manner bona fide endorsees for value, but leaves them on the same footing as assignees of open accounts, except, that they may sue in their own names to collect the notes, &c., endorsed to them; *De France v. Davis*, W. 69.

131. *Notes assignable at common law and by statute.* By the statute, promissory notes are assignable by endorsement whether they be payable to order or not. The endorsement of the payee confers the legal title. By the common law they are transferable by mere delivery, without written endorsement; but this only confers a right to the proceeds, and does not confer the legal title; but an assignment in either mode constitutes the maker the debtor of the assignee; *Oldham v. Ledbetter*, 1 H. 43.

132. *When it ceases to be negotiable.* When a negotiable note by course of trade comes back into the hands of the maker, after it has been negotiated, its negotiable character

ceases, and the maker cannot put it out again so as to bind the endorser; *Claborn v. Planters' Bank*, 2 H. 727. (See *post*, 212, 213.)

It does not appear in the case whether the second negotiation by the maker was after the maturity of the note or not.

But if a party to it, even the maker, after the note has been paid, re-issue it and endorse it for value, the party so endorsing is bound; for in that case it is equivalent to the making of a new note; and hence a declaration which alleges that the defendant with two others made a note to B., and afterwards paid B., and took it up, and then knowing that it was discharged in law, endorsed it to plaintiff for value, shows a good cause of action; *Mabry v. Matheny*, 10 S. & M. 323. And so, if after payment, a stranger to the note endorse and negotiate it, he will be liable on it as endorser, but the maker and other parties will not; *Allein v. Agricultural Bank*, 3 S. & M. 48.

133. *Endorsement: Blanks may be filled up.* A blank endorsement may be filled up, even after the death of the endorser, so as to make it a special endorsement to the holder; *Barnes v. Reynolds*, 4 H. 114.

134. *Same: What is the contract of endorsement.* An endorsement is in the nature of a new and distinct contract, and is an engagement to pay the amount of the note or bill to whomsoever, by subsequent negotiation, shall become the holder; it may be given in evidence under a count for money had and received, and used as a set-off by the holder against an action by a prior endorser against him. And the right of set-off against a prior endorser is not affected by the statute requiring all parties to an endorsed bill or note to be sued in the same action; *Oakey v. Wilcox*, 3 H. 330; S. P., *Rawlings v. Poindester*, 14 S. & M. 66.

But by the common law there is no privity between the drawer and the several endorser of a bill of exchange; but the contract and liability of each is separate and independent from that of the others; and hence if an endorser pay the bill he cannot maintain *indebitatus assumpsit* against any of the parties primarily liable to recover the amount so paid. But if under a statute requiring all the parties to be sued in one action, a judgment be recovered against all, a party secondarily liable will be regarded as surety for those liable before him; and if he pay the judgment he may recover the amount so paid by *indebitatus assumpsit* from any of them to whom he was surety. And the statute of limitations in such case will run from the time of payment, and not from the maturity of the bill or the rendition of the judgment; *Phipps v. Nye*, 5 G. 330. See *post*, 188, 164, 200—211.

135. *All the joint payees must endorse to convey legal title.* An endorsement by one of two joint payees of a note does not convey the entire legal title to the endorsee, so as to enable him to sue on it in his own name; and this is so though the other payee may have released orally his interest to the endorsee. *Bennett v. McGaughey*, 3 H. 192; S. P., *Moore*

v. *Ayres*, 5 S. & M. 310. But the endorsee may sue the endorser in such case on his contract of endorsement; *Moore v. Ayres*, *supra*.

135a. A note payable to husband and wife may be transferred by their joint endorsement; *Work v. Glaskins*, 4 G. 539; and if it be payable to wife alone, their joint endorsement will pass the legal title; *Cobb v. Duke*, 7 G. 60.

136. *Assignment of note transfers a mortgage security for its payment.* The assignee of a note secured by mortgage, takes the benefit of that security; and if the payee who endorsed it takes up the note, he is remitted to his original rights to the mortgage; *Terry v. Woods*, 6 S. & M. 139.

137. *Same: When assignment of the note invalid.* As a general rule an assignment of a bill or note must be in conformity to the law of the place where it is made, and if invalid there, will be invalid everywhere; but this rule does not apply so far as securities for the payment of the note on real estate are concerned. They will be validly assigned if the assignment be according to the *lex rei sitæ*, though the assignment were invalid according to the *lex loci contractus*; and this is true though there be no separate contract for the assignment of the securities; but only such assignment as is incident to the assignment of the note, and though as to the note the assignment be invalid; *Murrell v. Jones*, 40 M. 565.

138. *Right of endorser taking up a bill.* An endorser taking up a bill in virtue of his endorsement is remitted to all his original rights. He does not derive his interest or title from his endorsee, to whom he has paid it; *Maury v. Jeffers*, 4 S. & M. 57. And if he has paid to his endorsee less than the note, the maker has no right to a deduction on that account, unless he was an accommodation endorser, and therefore a mere surety. In that case the maker would probably be entitled to the discount made by the endorser in taking it up; *Wade v. Thrasher*, 10 S. & M. 358. See *post*, 188, 204.

139. *Same: Where the original note has been renewed.* And when the payee has endorsed a note for value, and the note is renewed to the holder by the making of a new note, with the same makers and endorsers, the payee as to the renewed note stands in exactly the same relation that he did to the old, and he still remains an endorser for value, and if he take up the renewed note by paying less than the amount thereof, he is still entitled to recover the whole amount from the maker; *Wade v. Thrasher*, *supra*; S. P., *Union Bank of Tennessee v. Gdvan*, 10 S. & M. 333; for which see *ante*. 63.

140. *Same: Holder's right to recover the whole amount.* And the same rule is applicable to any holder of the bill or note; for the contract of the maker or drawer is to pay the whole amount of it to whomsoever shall be the holder, without reference to the price which the holder may pay for it; *Turner v. Brown*, 3 S. & M. 425.

141. *Possession of bill or note endorsed in*

blank. The possession of a bill or note with the blank endorsement of the payee on it, is *prima facie* evidence of a full power to sell or dispose of it in any way, at the discretion of the holder; and ordinarily a *bona fide* purchaser will not be affected by any violation of duty or excess of authority by an agent holding a bill or note so endorsed, if he have no knowledge of it; *Murrell v. Jones*, 40 M. 565.

142. *Notes payable to bearer.* Notes payable to bearer are assignable by mere delivery; *Arnold v. Leonard*, 12 S. & M. 258; *Tilman v. Ailles*, 5 S. & M. 373; *Fox v. Hilliard*, 6 G. 160; *Cobb v. Duke*, 7 G. 60; *Craig v. City of Vicksburg*, 2 G. 216. But if the payee or other holder endorse it, he will be liable as in other cases; *Tilman v. Ailles*, *supra*. And delivery (where there is no endorsement) is absolutely essential to pass the legal title. Hence, when the plaintiff sued on such a note, and afterwards transferred the attorney's receipt, with the understanding that the suit was to progress in his name, and the transferee was to have a part of the proceeds of the note when collected, it was held there was no transfer of the legal title to the note; *Dease v. Reed*, 2 C. 239.

143. *Endorser's name may be on the face, and maker's may be on the back.* An endorsement by the payee made on any part of the note is good. If he write his name under that of the maker, but with the intent to endorse it, he is liable as endorser and not as maker, and if he be sued as maker, a plea that he signed it as endorser will be good; *Gibson v. Powell*, 6 H. 60. And if a stranger to the note write his name on the back of it, without any prior endorsement by the payee, he will, without explanatory proof, be considered as an endorser, and not as a maker or guarantor; but whether he is one or the other, is subject to be made out by parol proof. He is a joint maker if he put his name on the back of the note at the time it was made, according to a prior promise to become originally and directly liable, or if he participated in the original consideration. If his endorsement was subsequent to the making, and he had nothing to do with the original consideration, he is a guarantor; *Thomas v. Jennings*, 5 S. & M. 627; S. C., 13 S. & M. 617. See *post*, 195, *et seq.*

2. Equities of maker against antecedent parties.

144. *By the commercial law, innocent holders protected: Foreign bills.* By the commercial law the *bona fide* endorsee of a bill for value takes it exempt from all the equities existing between any of the antecedent parties; *Miller v. Mayfield*, 8 G. 688. And a bill of exchange drawn in this State on a drawee residing in Louisiana, and payable there, is not subject to our statute, but is regulated by the general commercial law, which is in force in that State. Hence the payment by the drawer of such bill to acceptor after its maturity, without notice of the assignment, will not be good against a *bona fide* holder for value, taking it before it

tell due; *Bank of Kentucky v. Coffman*, 41 M. 212; *S. P., Fellows v. Harris*, 12 S. & M. 462. And so if a bill be drawn in another State on a citizen of this State, but directed to him at Lexington, Kentucky, it is not within our statute; *Frazier v. Warfield*, 9 S. & M. 220. And so of a note made in this State, but payable in another; *Emanuel v. White*, 5 G. 56. And the drawer having the right to demand production of the bill upon payment; if he pay without its production it is gross negligence and the non-production sufficient to put him on inquiry; *Bank of Kentucky v. Coffman*, *supra*; *See vide post*, 151. Nor can usury be shown as against the assignee of such a bill; *Id.* But if the bill were never accepted, there is no obligation on the part of the drawer to pay it where the drawee resides, and the bill is subject to our statute allowing equities between the antecedent parties; *Wood v. Gibbs*, 6 G. 559.

145. *Holder presumed to be bona fide, and for value: Onus probandi.* The holder of a bill or note duly endorsed, is presumed to be *bona fide*, and to have given value for it; *Winstead v. Davis*, 40 M. 785, and until something is shown to disparage his title, as want or failure or illegality of the consideration, or that it was lost or stolen, or that a previous holder procured it by fraud, he is not bound to show that he took it before maturity, or gave value for it. Payment by the maker, to the payee, without notice of its transfer, is not sufficient to cast upon the holder who took it before maturity, the burden of proving that he gave value for it; *Emanuel v. White*, 5 G. 56. And if the holder took it in payment of an antecedent debt, and released parties collaterally liable on that debt, he will be considered a holder for value; *Id.* And so, if the assignee takes it in payment of an antecedent debt, or as collateral security, and has collected it, and endorsed the proceeds as a credit on the debt, he is a holder for value; *Com'l Bk of Manchester v. Lewis*, 13 S. & M. 226.

As to taking note for antecedent debt, see *Brooks v. Whiston*, *ante*, 116.

146. *Who is holder for value: Antecedent debt.* As to this, see *ante*, 12, 116, 145, and *post*, 233.

147. *By the statute.* But by our anti-commercial statute (see *ante*, 127), the maker is entitled to any defence against the assignee which he had against the assignor, before notice of assignment. The assignee takes the place of the assignor in this respect: and if the assignor has been guilty of any fraud in obtaining the note, it will equally affect the assignee; *Barringer v. Nesbit*, 1 S. & M. 22. And this rule applies, though the note be made payable in a bank located in this State; *McMurren v. Soria*, 4 H. 154; *Parham v. Randolph*, 4 H. 435; *Allen v. Agricultural Bk*, 3 S. & M. 48.

But this statute does not apply to equities in favor of strangers to the bill or note. Hence, a person having a prior equity in a bill or note, cannot successfully set it up

against the holder, for value, of the legal title, without notice of his equity; *Com'l Bk of Manchester v. Lewis*, 13 S. & M. 226. See *post*, 150.

148. *Rule in chancery as to such equities: Case in judgment.* Whilst it is true that the maker of a note can set up, under our statute, the same defence to an action on it by an endorsee who is an innocent holder for value, that he can against the payee, yet where a note which was given for one half of the purchase money of land, has been assigned to an innocent endorsee, who has recovered judgment on it; and the vendee seeks to be relieved therefrom in equity, and it appears that the sale was by independent covenants, to pay and to make title, and that vendee got a good title to one-half of the land, and still owed the vendor one-half the purchase money; and that the sale was free from fraud on the part of the vendor, the vendee being aware there was a defect in the title; and the vendor was now insolvent; it was held that, as the vendee was fully indemnified by getting title to one-half the land, and as the assignee would be without remedy in case he did not collect the judgment, it would be inequitable to allow the vendee to evade payment of the judgment in favor of the assignee; *Green v. McDonald*, 13 S. & M. 445.

See VENDOR AND VENDEE, 155, 156.

149. *General rule as to equities being allowed against holders.* Wherever it can be done consistently with justice and sound policy, the endorsee of a bill ought to be held bound by the equities growing out of the original contract between the parties to it. This rule is relaxed in favor of innocent parties, without notice and without anything to put them on inquiry, but in favor of no others. Hence, if enough appear on the face of the bill to put an endorsee on inquiry as to the nature of the liability of the drawer, he must be held to have notice of any legal condition or qualification of his liability. Therefore, when a bill was drawn payable "to my own order," and with request to the drawee to charge it "to the account of your agency at Natchez," and signed "D. H., Agent," and also endorsed in the same way, it was held that the drawer, when sued by an endorsee on the bill, might show that he only drew as agent for the drawee, and was not to be individually liable on the bill; *Davis v. Henderson*, 3 G. 549.

See PRINCIPAL AND AGENT, 24.

150. *Statute only applies to equities between parties to the bill &c.* A person not a party to a note having a prior equity in it, cannot set it up against the holder of the legal title, being a *bona fide* endorser for value, without notice of the equity. The statute which allows the makers of notes to set up against innocent endorsees equities existing between antecedent parties, does not apply to such a case; *Com'l Bk of Manchester v. Lewis*, 13 S. & M. 226.

151. *Payment by maker, without notice of assignment.* Payment of a note by the maker to the payee, without other notice of its

assignment than would result from a non-production of the note when payment was made, is good as against the assignee. And the taking by the maker from the payee, of a bond conditioned to deliver the note, is not sufficient notice of the assignment; *Allein v. Agricultural B'k*, 3 S. & M. 48. *Sed vide ante*, 144.

152. *Waiver of defence.* If the maker of a note, upon being applied to by a party who states that he wishes to purchase it, and desires to know if the maker has any defence to it, state in answer, that the payee has not as yet made him title to the property for the purchase of which the note was given, but he had no doubt he could do so, yet he was unwilling, until the title was made, to acknowledge the validity of the note, and if he afterwards go to such applicant and say to him that the difficulty about the title had been removed, and that the note would be paid, and thereupon the applicant trade for the note, this will be a waiver of any defence to the note, in favor of such purchaser; *Land's Adm'r v. LaCoste*, 5 H. 471. And so, if in the first instance the maker reply "I consider the note good against me for the amount it calls for, and I expect to make satisfactory arrangements with the holder when it falls due;" *Montgomery v. Dillingham*, 3 S. & M. 647; *S. P. Hamer v. Johnson*, 5 H. 698; *Ayres v. Mitchell*, 3 S. & M. 683.

See ESTOPPEL, 2.

153. *Same.* But if the reply be, that the maker "then knew of no defence to the note," if, in fact, he were then ignorant of it, it would be no waiver of his defence; *McMurrain v. Soria*, 4 H. 154.

154. *Same: When consideration is illegal.* Where, however, the consideration of the note is illegal, and the purchaser knew it, he cannot recover on it, notwithstanding the maker had induced him to purchase it by assuring him he had no defence to it. The rule would be different where the consideration had failed, for the maker has a right to waive that; *Torry v. Grant*, 10 S. & M. 89.

155. Note payable to bearer, not subject to equities. As to this see *ante*, 100.

3. Assignment by Banks under Act of 1840.

156. *Where note payable to an individual.* Where a bond or note on its face is payable to an individual, it is doubtful whether it can be shown at law, that the payee took it as agent of a bank, and that it really belonged to such bank, so as to allow the makers to pay it in the notes of the bank, or to attack an assignment of it as made in contravention of the Act of 1840, prohibiting banks from assigning debts due them; *Lanier v. Trigg*, 6 S. & M. 641.

157. *When endorser of a note in bank takes it up.* When the payee or endorsee of a note endorses it for value to a bank, and afterwards takes it up, he is remitted to his original rights, and may collect it as if it never had been owned by the bank; and the same is true if after the endorsement to the bank the note was renewed in the bank by the same endorser and makers; a re-transfer

to an endorser by a bank is not prohibited by the Act of 1840; *Wade v. Trasher*, 10 S. & M. 358.

See BANKS, 89 to 92.

XVI. Foreign and Domestic Bills.

157a. *What is.* Is a bill drawn in this State by a citizen, upon a citizen of another State, and payable in that State, a foreign or inland bill of exchange; *Quere?* (It is an inland bill; *Muller v. Harkland*, 5 J. R. 375; it is foreign; *Lonsdale v. Brown*, 4 Wash. C. R. 148; 2 Peters, 586); *Offit v. Vick*, W 99.

158. *Same: Damages under statute of 1822: H. C. p. 639, § 4 and 5.* Under this act, which regulates the damages on foreign and domestic bills of exchange, a bill drawn by a person in this State (or dated in this State), on a person residing also in this State, is a domestic bill, though the bill be made payable in another State; it is the residence of the drawer and drawee, and not the place where a bill is made payable which determines whether a bill is foreign or domestic; *Ragsdale v. Franklin*, 3 C. 143. This decision was made with reference to the damages allowed by the statute on foreign and domestic bills. The statute in the Rev. Code, p. 356, art. 5 and 6, is substantially the same. As to damages on foreign and inland bills, see *ante*, 91, 92.

159. *Same: As to whether governed by our anti-commercial statute.* But in the sense of the rule exempting foreign bills from the operation of the statute, allowing equities between antecedent parties to be set up against innocent holders, the residence of the drawee and drawer does not determine whether a bill is foreign or domestic; but the fact that it is payable out of this State makes it a foreign bill. Thus where a bill was drawn in Louisiana on a drawee residing in this State, but directed to him at Lexington, Ky., and was accepted by him, it was held that his liability as acceptor was not within that statute, but was governed by the laws of Kentucky, where the bill was made payable; *Frazier v. Warfield*, 9 S. & M. 220.

160. *Conflict of laws: Contract of acceptor.* The contract and liability of the acceptor of a bill of exchange is governed by the law of the place where it is made payable, and this, though the drawee reside in a different State from the one where it is made payable, and the bill is accepted by him in the State of his residence; *Frazier v. Warfield*, *supra*. And the rule is the same where a note is payable in another State; *Emanuel v. White*, 5 G. 56.

161. *Same: Protest of a bill.* The law of the place where a bill or note is made payable, and where it is protested, regulates the manner of making demand and protest, and designates the officers by whom they are to be made. And, hence, where a bill is made payable in Louisiana, demand and protest may be made by a deputy of a notary public, as that is allowed by the laws of that State; *Chew v. Read*, 1, S. & M. 182.

162. *Place of payment of a bill.* When no place of payment is specified in a bill, and it is directed to a drawee at a named place, it is payable at that place, and this, though the drawee reside in a different State from the one to which the bill is directed; *Frazier v. Warfield*, 9 S. & M. 220.

163. *Averment of residence in declaration.* As to this see ante, 93.

164. *Equities between antecedent parties not allowed in forsign bills, and notes payable in another State.* As to this see ante, 144, and CONFLICT OF LAWS, 9.

XVII. Remedies for Collection.

1. All resident Parties must be sued in joint Action.

164a. *Statutes of May 13th, 1887, H. C., art. 7.* This statute provided that all resident parties to a bill or note should be sued in the same action, which must be brought in the county where the drawer or maker resides, or if he be dead, then where the first endorser resides.

That if a party died before suit commenced a separate action might be brought against his personal representatives.

That no plea to the merits but non-assumpsit should be received, under which all matters of defence may be introduced; and that defendants should not sever in their pleas to the merits.

That the jury in such case might render a verdict in favor of part and against a part of the defendants, as the evidence might require; and that new trials might be granted to a part of the defendants, and refused to a part.

That the plaintiff might discontinue against any one or more of the endorsers or sureties before verdict upon payment of cost.

And that the sheriff in proceeding under an execution in such case, should make the money out of the parties primarily liable for it, and should not proceed against the others, unless an affidavit be filed by some credible person, that the principals have no property in the State out of which plaintiff's money and costs can be made, and in that case the sheriff shall proceed against the one next liable; and if any plaintiff shall cause his execution to be levied on an endorser's or surety's property, when the principal has sufficient property to satisfy it, he shall be deemed a trespasser, and liable for exemplary damages.

164b. *Act of 1857. Rev. Code, p. 355, sec. 3. art. 11. et seq.* This act is the same as the above recited act, except it contains no provision requiring the plea of non-assumpsit only to be filed, or requiring the defendants not to sever in their pleadings; and also provides, that where a party is dead, his representatives may be sued jointly with the survivors or separately.

The latter act differs from the former in this, that it contains no provision making the plaintiff responsible for damages in case he causes a levy of his execution on the endorser

or surety when the principal has sufficient property in the State to pay it; but in lieu of such provision it makes the sheriffs, levying on the endorsers' or sureties' property, liable as a trespasser, and for exemplary damages, if the principal has sufficient property to pay the execution in the county.

164c. *Decisions under these statutes: As to joining parties and discontinuance.* The statute does not apply when the note is made by two or more, but has never been endorsed, for in that case either may be sued in a separate action, though he be a mere surety, and the principal be not sued; *Thompson v. Planters' Bank*, 2 S. & M. 476; *Crump v. Wooten*, 41 M. 611; *Lynch v. Com'r of Sinking Fund*, 4 H. 377. The endorser may be sued alone, if the maker be a non-resident; *Bullitt v. Tharpe*, 5 H. 689; *Duncan v. McNeill*, 2 G. 704. And if suit be commenced against both, it is error to dismiss as to the maker, and take judgment against the endorser; *Boush v. Smith*, 2 S. & M. 512; and the rule is the same if the maker die; since in that event his personal representative should be made as party defendant; but if process cannot be served on the maker, the rule would be different; *Smith v. Crutcher*, 5 C. 455; *Duncan v. McNeill*, supra. The action, however, may be dismissed as to the endorser, and prosecuted to judgment against the maker; *Kirk v. Seawell*, 2 S. & M. 571. And so the action in the first instance, may be commenced against the maker alone, omitting the endorser; for the statute requiring the endorser to be sued, is for his benefit, and not for the maker's, who is in fact injured by the joinder in the increase of costs, and in no way benefited; *McGrath v. Hoopes*, 4 C. 496; overruling *Wells v. Patterson*, 7 H. 32; in which the contrary was held. And so a prior endorser has no right to object, that a subsequent endorser has not been joined in the suit; *Duncan v. McNeill*, 2 G. 704. If, however, the holder sue the maker alone and get judgment, this, it seems, would be a release of the endorser, since if he were afterwards sued, he could plead in abatement, the non-joinder of the maker, and it would be no answer to the plea, that judgment, had already been rendered against the maker, and he could not therefore be sued; *Agricultural Bk v. Harris*, 2 S. & M. 463; *Rodgers v. Hunter*, 8 S. & M. 640. See post, 166.

164d. *Declaration need not aver death or non-residence of omitted party.* The declaration need not aver that the parties to the note, not sued, are dead or non-resident. If objection be made on account of the non-joinder, it must be set up by plea in abatement; *Lillard v. Planters' Bank*, 3 H. 78.

As to pleas in abatement on the ground of non-joinder of parties to a note or bill, see ABATEMENT, 4.

164e. *Effect of judgment in such joint action against drawer and endorsers.* Though the contract of the drawer and endorser be separate and independent, yet if in a joint action under the above statutes a judgment be entered against them, then and

thereby is created, a joint and several liability to pay the judgment in the order in which the defendant's stand on the paper; and if an endorser pay the judgment, he may recover in *indebitatus assumpsit* against a party liable before him; and in such case the statute of limitations will commence running against such a suit from the time of the payment, and not from the date of the judgment; *Phipps v. Nye*, 5 G 330. See *ante*, 134.

164*f*. *Statute does not apply to attachments.* The statute requiring makers and endorsers, &c., to be sued jointly, does not apply to proceedings by attachment, and the creditor may proceed by attachment against any of the parties to the bill or note, who is in the condition which makes him liable to attachment, without proceeding against the others; *Crump v. Wooten*, 41 M. 611. As to levy on property of sureties and endorsers, see *EXECUTION*, 24 to 27, and *PRINCIPAL AND SURETY*, 41 to 46.

2. Plaintiff must have Legal Title, and what confers it.

164*g*. *Legal title necessary for plaintiff.* That the plaintiff in an action on a note or bill must have the legal title, both at the commencement of the suit and at the trial; See *ACTION*, 1.

165. *Endorsement necessary to convey legal title.* The statute H. C. 640, § 9, which makes bills, bonds, notes, &c., assignable by endorsement, whether the same be payable to the order or assigns of the obligee or payee or not, merely makes certain writings negotiable which were not so by the custom of merchants, by putting them, though not payable to order, on the same footing in reference to their negotiability as those payable to order; it makes no change in the mode of the transfer of the legal title of notes and bills. And hence under this statute, as by the law merchant, the transferee of a note not payable to bearer, gets only an equitable interest in it, if it be not endorsed by the payee, but be merely transferred by delivery or deed of assignment; for the transfer of the legal title can only be by endorsement on the note or bill, and not by any other writing; *Bacon v. Cohea*, 12 S. & M. 516; S. P., *Grand Gulf Bank v. Wood*, 12 S. & M. 482. See also *Scott v. Metcalf*, 13 S. & M. 563, where it was held that the transfer of the money due on a note, not made by endorsement on the note, did not confer the legal title. And if there be two payees, both must endorse it; an endorsement by one, and verbal release by the other, will not do; *Moore v. Ayres*, 5 S. & M. 310; *Bennett v. McGaughey*, 3 H. 192. See *ante*, 135. But now by statute the legal title is transferred by any assignment in writing; Rev. Code of 1857, p. 485, art. 42. See *post*, 196.

166. *Same: Right of endorser in such case to sue.* If a note, payable to order, be transferred by delivery without endorsement by the payee, and then endorsed regularly by the transferee, and so on through several endorsements, the last endorsee cannot sue a prior

endorser in the name of the payee for his use, but it seems he can sue such prior endorser in his own name on the contract of endorsement, and can sue the maker in the name of the payee for his use; *Haynes v. Ezell*, 3 C. 242. See *ante*, 160.

167. *Legal title where note is payable to bearer.* The legal title to a note payable to bearer does not pass by any agreement or contract to transfer the note, unless there be a delivery of the note. Hence, when the plaintiff sued on such a note and afterwards transferred the attorney's receipt, with the understanding that the suit was to be continued in his own name, and the transferee was to have part of the money when collected, it was held there was no transfer of the legal title to the note, and that the suit might be continued by the plaintiff; *Dease v. Reed*, 2 C. 239. See *ante*, 9.

168. *No form of endorsement required.* A note was endorsed by the payee in these words, which were addressed to one of the two joint makers, "Sir, will you be so good as to pay the within note to Mr. W. W. Wilkins, and if you cannot pay it, settle it with him as he may wish you to, for me: Held, 1st. That it was doubtful whether this was a restrictive endorsement directing the money to be paid for the use of the endorser, or not. 2d. If it were such restrictive endorsement, still it vested the legal title in the endorsee, Wilkins, who might sue thereon even after the death of the endorser; since if he were a mere trustee, he could collect and would be responsible to the *cestui que trust*; *Sims v. Wilkins*, 5 S. & M. 234. And a blank endorsement confers the legal title without being filled up; *Chewning v. Gatewood*, 5 H. 552; and such endorsement may, therefore, be filled up after the death of the endorser; *Barnes v. Reynolds*, 4 H. 114. See *post*, 194. *et seq.*

168*a*. *Re-endorsement necessary to payee.* A promissory note endorsed specially or in full, cannot be given in evidence in support of an action in the name of the payee. Nor can he strike out the endorsement, he must show a re-endorsement back to him; *Aliter* where the endorsement is in blank, for there possession is evidence of title; *Smith v. Runnells*, W. 144. But this is now overruled as to the special endorsements; *Planters' Bank v. Chewning*, 5 H. 413. It is now held in *McLemore v. Hawkins*, decided at April term, 1872, that where the endorsement is in blank, and coupled with a trust if the trust be executed the endorser may maintain an action on the note without re-endorsement, or striking out the endorsement; see *post*, 190.

169. *When payee dead: Remedy of equitable owner.* Whether, if payee of a note, which has been transferred without endorsement, be dead, the holder is compelled to bring suit in the name of his executor for the holder's use, or may file a bill in equity in his own name; *Quere?* But if the payee be dead, or a dissolved corporation, and there is no representative of such payee holding the legal title, and no means of providing such

representative, the holder may sue in equity as he has no remedy at law, the holder of an equitable title being incapable of suing at law in his own name; *Bacon v. Cohea*, 12 S. & M. 516. And now it is settled that the equitable holder of a note may sue in equity, without regard to whether there is a nominal plaintiff in *esse* in whose name the suit could be brought at law; *Taylor v. Reese*, 44 M. 89.

170. *Action on lost note.* An action at law may be maintained on a lost note since the statute allowing the maker to set up against an innocent holder all the equities existing in his favor against the payee; *Clark v. Reed*, 12 S. & M. 554.

See ACTION. 38.

171. *Note payable to agent.* The legal title of a note payable to R., agent for H., is in H., if the note were really for H.'s benefit; *Id.* See post. 179.

172. *Want of interest in plaintiff may be shown.* The defendant may defeat the action by showing that the plaintiff has no interest in the note; and in the meaning of this rule, the usee is regarded as the real plaintiff; and the rule was applied where the nominal plaintiff was the usee, it being shown that he was a mere trustee; *Nottville v. Stevens*, 2 H. 642; *Anderson v. Patrick*, 7 H. 347; and want of interest may be shown under the general issue; *Id.* But this want of beneficial interest may be shown in the usee only; if plaintiff have the legal title, he may sue, though he have no beneficial interest; *Ackerman v. Cook*, 5 G. 262; *Fuld v. Weir*, 6 C. 56. Contra. *Sims v. Ross*, 8 S. & M. 557.

3. Statute H. C. 852, art. 6, requiring Denial of Note to be under Oath.

See NON EST FACTUM ubique.

173. *Pleading to the merits admits execution of note.* Under the statute, H. C. 852, art. 6, the defendant to an action on a note, by pleading to the merits, without denial of the execution of the note under oath, admits its execution; *Green v. Robinson*, 3 H. 105. It also admits the character in which plaintiff sues as payee, endorsee, &c.; but does not admit he has the legal title as such to the note sued on; *Lake v. Hastings*, 2 C. 490. But the rule has the effect to prevent the defendant from objecting, that an open account sued on as made to the plaintiff, was really made, and is due to plaintiff and another as partners; *Anderson v. Tarpley*, 6 S. & M. 507. And so, if defendant be sued as a partner on a note made in the partnership name by one purporting to be agent, the plea of the general issue, without being sworn to, not only admits the partnership, but also the authority of the agent to execute the note; *Cook v. Martin*, 5 S. & M. 379.

174. *Non-assumpsit sworn to, not sufficient to deny note.* Under this statute, requiring the execution of the note or other instrument sued on, and the identity or the description of the parties to be denied under oath, before the plaintiff is required to prove them, the plea of non-assumpsit sworn to merely, is not sufficient. Either the plea, or the affidavit

attached, should contain a special denial of the signature, or execution of the note, &c.; *Thornton v. Alliston*, 12 S. & M. 124 (citing *Sumpter v. Geron*, 4 H. 263; *Fairchild v. Grand Gulf Bank*, 5 H. 597; *Vicksburg Water Works Co. v. Washington*, 1 S. & M. 536; *Lake v. Munford*, 4 S. & M. 312; *Hemphill v. Bank, of Ala.*, 6 S. & M. 44; *Anderson v. Tarpley*, 6 S. & M. 507; *Pre-witt v. Bennett*, 7 S. & M. 101); *S. P., Peck v. Thompson*, 1 C. 367.

175. *Denial of blank note.* A party who has signed a blank note, desiring to dispute the validity of the note, upon the ground that it has been filled up contrary to his instructions and the authority given by him must deny the execution of the note under oath. By pleading in chief he admits the execution of the note (citing *Green v. Robinson*, 3 H. 105); *Hemphill v. Bank of Alabama*, 6 S. & M. 44. But when the objection is, that the note was filled up for a larger amount than was authorized, the defence may be made under the general issue, for the note being good for the amount authorized, and only void as to the excess, it would be impossible for the maker to deny its execution under oath; *Goss v. Whitehead*, 4 G. 213.

176. *When note has been altered.* When the defence is, that the note has been materially altered since its execution, it may be made under the general issue, since the objection is not, that the defendant did not make the note, but that he had been discharged from it, by the act of the other party; *Henderson v. Wilson*, 6 H. 65; *Oakey v. Wilcox*, 3 H. 330.

4. Miscellaneous Provisions in regard to Remedy.

177. *No demand of the maker necessary before suit.* When a note is payable at a particular place, it is not necessary that a demand should be made there, to entitle the plaintiff to maintain a suit on it against the maker; *Washington v. Planters' Bank*, 1 H. 230.

178. *Same: When note payable after fixed time on demand.* When a note is payable at a particular place, at a fixed time, after date, on demand, it is unnecessary to make a demand of the maker before bringing suit on it. Whether, if the note be payable on demand directly at a particular place, without any fixed time after date being specified, after which demand may be made, a demand is necessary before action brought against the maker; *Quere?* But if the maker of a note payable on demand at a particular place, be there ready to pay the note, on the day of its maturity, and no demand be made, he will be entitled to be exonerated from costs; *Cook v. Martin*, 5 S. & M. 379.

179. *Note payable to administrator and guardian.* A note payable to A. as administrator, may be sued on by A. individually, as the words "administrator," &c., may be treated as *descriptio personæ*; *Carter v. Saunders*, 2 H. 851. And so if a note be made payable to A. as guardian, &c., *prima facie*,

the legal title is in A., and he will be entitled to sue on it, notwithstanding his final settlement and discharge, unless it be shown that he has parted with his title, or that payment to him would be no discharge to the obligor; *Chambless v. Vick*, 5 G. 109. But suit may be maintained on it by the succeeding guardian, if the note be actually the property of the ward, for the law will confer a title on a trustee to the extent necessary for the trust and no more; *Cocke v. Kucks*, 5 G. 105. See *ante*, 171.

181. *Declaration where endorser dies before maturity of the note.* Where an endorser dies before the maturity of the note, the declaration should aver a promise by his executor and not by the endorser himself; *Barnes v. Reynolds*, 4 H. 114.

182. *Averment of notice, or excuse for want of it.* As to the rule in relation to the averment in the declaration as to giving notice, or an excuse for not giving it; See *ante*, 75.

183. *Necessity for bill of particulars.* Under our statute, a note cannot be given in evidence against an endorser under the common counts, unless it be described in a bill of particulars filed with the declaration; *Jennings v. Thomas*, 13 S. & M. 617. But if filed with the declaration, it may be given in evidence against the maker; *Hughes v. Grand Gulf Bk*, 2 S. & M. 115.

See BILL OF PARTICULARS, 2, and *ante*, 118a.

184. *Joint notes are joint and several.* All promissory notes made by two or more, are made joint and several by statute, and the holder may sue the whole jointly, or each separately; and if he sue all jointly, he may discontinue as to one or more, and proceed to judgment against the others; *Lynch v. Com'r of Sinking Fund*, 4 H. 377; *S. P.*, *Thompson v. Planters' Bk*, 2 S. & M. 476 *Crump v. Wooten*, 41 M. 611.

185. *Same: Suit by partner against firm of which he is a member.* And being thus joint and several, and therefore the separate note of each maker, an action may be maintained by a firm on a note payable to it, made by another firm, of which one of the plaintiff's is a partner; but the suit in such case must be brought only against the other members of the firm making the note, leaving out as defendant that member who is also a plaintiff; *Morris v. Hillery*, 7 H. 61.

See PARTIES, 3.

186. *Forfeiture of forthcoming bond against maker.* The forfeiture of a forthcoming bond on a judgment rendered against the maker alone, is no satisfaction of a separate judgment on the same note or bill against the endorser. But it seems it would be different, if the judgment on which the bond was forfeited was against both; *McNutt v. Wilcox*, 3 H. 417.

187. *Conclusiveness of judgment against maker, in favor of endorsee as to other parties.* A judgment obtained by an endorsee against the maker of a note, is not conclusive as to the validity of the note in a con-

troversy between the maker and the payee; *Wright v. Bixler*, W. 256.

188. *Action for money had and received by endorser paying the bill or note.* An endorser paying a note or bill after its dishonor, may maintain an action for money paid to his use against the maker or drawer; but such an action is in the nature of a bill in equity, and therefore the plaintiff can only recover what is equitable and just; that is, the amount he has actually paid. He cannot recover the amount paid by another endorser for the same purpose, but the latter must sue for what he has paid; *Raulings v. Poindexter*, 14 S. & M. 66. See *ante*, 134, 138.

189. *Endorser paying judgment against a prior party: Subrogation.* An endorser of a bill or note may pay a judgment recovered on it against antecedent parties, and thereby acquire the rights of the plaintiff against such parties. And if the judgment so paid, be not rendered against the first endorser, but only against the maker or drawer, the endorser paying it may sue the first endorser, without making affidavit of the insolvency of the maker or drawer; *Pope v. Bowman*, 2 G. 639. See *post*, 201.

190. *Striking out endorsement.* An endorsement may be stricken out at the trial if necessary; *Planters' Bk v. Chewing*, 5 H. 413. See *ante*, 168a.

191. *Suit in Circuit Court on note for \$50.* In declaring on a note for \$50, in the Circuit Court, the plaintiff must declare also for interest, or the court will have no jurisdiction; *Thomas v. Miller*, W. 324.

192. *Right of Bank of Mississippi to sue in certain cases.* The statute which gives the right to the Bank of Mississippi to commence suit by notice merely, against endorses of notes and bills payable at the bank, does not give such right against endorser on notes payable at a branch of the bank; *Bank of Mississippi v. Rush*, W. 265.

193. *Effect of promise to pay endorsee as proof of his title.* A promise by the maker to pay the note to an endorsee dispenses with strict proof of the endorsement, as the promise itself is *prima facie* evidence of ownership; *Davis v. Black*, 5 S. & M. 226.

XVIII. Endorsement and Endorsers.

194. *Form not material.* A note was endorsed by the payee in these words, addressed to one of two joint makers of the note: "Sir, will you be so good as to pay the within note to Mr. W. W. Wilkins; and if you cannot pay it, settle it with him, as he may wish you to do for me;" Held, that the endorsement conferred the legal title, and the endorsee, Wilkins, had a right to sue on it; *Sims v. Wilkins*, 5 S. & M. 234. See *ante*, 168.

195. *Endorsement may be on the face of the note or bill.* An endorsement of a bill or note may be on any part of it, even on the face. If written on the face, and under the signature of the maker, it may be either an endorsement or joint making, according to the circumstances (and as to these see *ante*, 143); *Gibson v. Powell*, 6 H. 60.

196. *It must be on the bill or note, and not on unattached paper.* An endorsement by payee (which means a writing on the bill, or a paper attached), is essential to passing the title when the note is not payable to bearer. An assignment by payee in a deed or other separate instrument will not do; *Bacon v. Cohea*, 12 S. & M. 516; *Grand Gulf Bank v. Wood*, 12 S. & M. 482; *Sott v. Metcalf*, 13 S. & M. 563. But now by statute, Rev. Code of 1857, 485, art. 42, the assignee of any chose in action may sue on it in his own name, if the assignment be in writing. See *ante*, 165.

197. *Blank endorsement sufficient.* An endorsement in blank is sufficient to transfer the legal title, it being unnecessary to fill it up; *Chewning v. Gatewood*, 5 H. 552. But it may be filled up at the trial, even after the death of the endorser; *Barnes v. Reynolds*, 4 H. 114.

198. *Same: Evidence of title, and authority to convey it.* The possession of a bill or note, with the blank endorsement of the payee on it, is *prima facie* evidence of title and ownership, and of full authority to dispose of it in any way, at the discretion of the holder; and ordinarily, a *bona fide* purchaser will not be affected by any violation of duty or excess of authority by an agent, holding a bill so endorsed, if he be without knowledge of it; *Murrell v. Jones*, 40 M. 565.

199. *Contract of endorsement: What it is.* An endorsement in blank is an undertaking by the endorser to pay the note or bill on certain conditions, which the law annexes to the engagement; and this contract results from writing the name of the endorser on the bill or note, and is considered the same as if the conditions were written out in full; and hence it is incompetent to show, by parol proof, that at the time of the endorsement the endorser waived any of these conditions, and agreed to be absolutely liable; *Baskerville v. Harris*, 41 M. 535.

200. *Same.* An endorsement is a new and distinct contract, and is an engagement to pay the bill or note, on conditions implied by law, to whomsoever may become the lawful holder of it; it may be given in evidence under a count for money had and received; or used as a set-off by the holder to an action against him by a prior endorser; *Oakey v. Wilcox*, 3 H. 330; and an endorser paying the bill after maturity may maintain an action against the maker for money paid to his use; *Rawlings v. Poindexter*, 14 S. & M. 66.

But there is no privity between the endorser or between them and the maker, but the contract of each is separate and distinct from that of the others; and hence *indebitatus assumpsit* cannot be maintained by an endorser paying a bill against any of the prior parties to recover the amount so paid; yet after a joint judgment against all on the bill or note, if an endorser pay the judgment he may maintain *indebitatus assumpsit* against any of the prior parties, for as to that judgment he is but a surety for those

primarily liable; *Phipps v. Nye*, 5 G. 330. See *ante*, 134, 164e.

201. *Endorser paying judgment against prior party is subrogated to plaintiff's rights.* An endorser may pay a judgment against a party liable before him, and be subrogated to plaintiff's rights as against the defendants; and if in that judgment the first endorser is not included, this does not prevent the party paying it from suing him without first making affidavit of the maker's insolvency; *Pope v. Bowman*, 2 G. 639. See *ante*, 189.

202. *All the payees must endorse.* If there be two joint payees both must endorse, so as to confer the entire legal title to the endorsee; an endorsement by one and a verbal release of his interest by the other will not do; *Bennet v. McGaughey*, 3 H. 192; *Moore v. Ayres*, 5 S. & M. 310; but in such case the endorsee may sue the payee endorsing the bill, on his contract of endorsement; *Moore v. Ayres*; *supra*.

203. *Endorsement of wife's note; how made.* The joint endorsement of the husband and wife of a note payable to them, and being the separate property of the wife, passes the legal title of the wife; *Work v. Glaskins*, 4 G. 539; and so if the note be payable to the wife alone; *Cobb v. Duke*, 7 G. 60.

204. *Right of endorser taking up bill or note.* An endorser taking up a bill in virtue of his endorsement, is remitted to all his original rights as an endorser, and he does not derive his title from his endorsee, and if he take it up for less than is legally due, he may recover, nevertheless, the whole amount; *Mauzy v. Jeffers*, 4 S. & M. 87. Unless, perhaps, he is an accommodation endorser, and therefore a mere surety; *Wade v. Thrasher*, 10 S. & M. 358. And the rule is the same, where he is an endorser for value and the first note has been renewed to the holder by the same makers and endorsers. The renewal does not make him a mere security of the maker and prior endorsers; *Wade v. Thrasher*, *supra*; S. P., *Union Bk of Tennessee v. Govan*, 10 S. & M. 333, for which see *ante*, 63.

But if the endorser, instead of suing on the bill, bring an action against the maker for money paid out to his use, he can only recover the amount he has paid; *Rawlings v. Poindexter*, 14 S. & M. 66.

205. *Lex loci governs endorsement.* As to this, see *ante*, 137.

206. *Endorsee's right to securities attached to the note.* As to this, see *ante*, 136.

207. *When an endorsement amounts to a guaranty.*

See GUARANTY, 1. and post, 238.

208. *Notice to endorsers.* As to this, see *ante*, sub-division VI., Notice of Dishonor.

209. *How endorser receiving notice must proceed.*

See *ante*, 84.

210. *Right of an endorsee against maker and prior endorsee, when payee has not endorsed the bill.* As to this, see *ante*, 166.

211. *Suit against.* That endorser cannot

be sued without joining all the parties liable before him in same action. See *ante*, 164c.

XIX. Payment and Discharge.

212. *By falling in hands of maker.* When a note on which one of the partners is surety, is bought by the firm, suit cannot afterwards be instituted on it by the firm against the principals; *Stevens v. West*, 1 H. 308; *Contra post*, 213. See *ante*, 132.

213. *Same.* A note made by Lockhart, was endorsed by Chewning & Dawson (the defendants), to Crozier, and by him to H. & S. Dawson, and by them to Chewning, McNeill & Co., and by them to plaintiff. The last endorsement was stricken out. The defendant, Chewning was a member of the firm of Chewning & Dawson, and of the firm of Chewning, McNeill & Co., and defendant Dawson, was a member of the firm of Chewning & Dawson, and of H. & S. Dawson: *Held*, that the case bears no analogy to the case in which the endorsers are discharged by the note falling into the hands of the maker; nor to the case in which subsequent endorsers are discharged, by the note falling into the hands of a prior endorser, in the course of business, and that it does not follow, that because H. & S. Dawson could not have sued the defendants, that their endorser could not; *Planters' Bk v. Chewning & Dawson*, 5 H. 413.

214. *Payment to wrong holder with notice.* If the maker pay a wrongful holder, whom he knows to have no interest in the note, it is no discharge of the maker or satisfaction of the note; *Netterville v. Stevens*, 2 H. 612. Thus, if after; a note becomes due (though it be payable to bearer), a third party illegally and fraudulently obtain possession of it; payment to him by the maker, after notice of the defective title is no discharge; *Ainsworth v. Ainsworth*, 2 C. 145.

215. *Payment to payee without notice of assignment.* The maker and endorsers of a note may set up payment to the person, to whom it was originally delivered as the creditor, though made after he has assigned it, if they had no notice of the assignment; and the rule is the same though the note be made payable and negotiable at a named bank in the State, and was in fact actually discounted by the bank, if the note were not so made payable, expressly in order to be so discounted; *Allein v. Agricultural Bk*, 3 S. & M. 48; *S. P., McMurrin v. Soria*, 4 H. 154; *Parham v. Randolph*; *Id.* 435.

216. *Same: Non-delivery of note no notice of assignment.* And the non-delivery of the note in such case, is no notice of its assignment; nor is the fact, that the maker paying the note, took a bond from the party to whom payment was made, conditioned to have due delivery of the note made, evidence of notice, that it was then assigned; *Id.* But it was said by the court in another case, that the drawee paying a bill accepted for his accommodation, to the acceptor, has a right to have the bill produced, and a failure to

produce it, is sufficient to put the drawer on inquiry; and such payment without the production of the bill is gross negligence, and in the drawer's own wrong; *Coffman v. Bank of Kentucky*, 41 M. 212.

217. *Payment: Where note is payable in bank notes: Or there is a defeasance.* There is a conflict in the authorities as to whether a note for a sum certain, but payable in the note of specified banks, if not paid at maturity, could be afterwards discharged by the payment of the specie value of the bank notes on the day the note fell due; but, however this may be, if the note be payable in "dollars," which means lawful money, and at the same time the payee give to the maker a separate instrument, in which he agrees to take in payment of the note the issues of certain banks, the instrument will not be considered as a part of the promissory note, but as a defeasance; and if the bank notes be not paid or tendered at its maturity, the payee is entitled to have the note paid in specie according to its face; *Saunders v. Richardson*, 2 S. & M. 90. But the doubt above stated is now removed; and it is settled, that when a note is payable in the issues of a bank, that if it be not paid at maturity, the value of such issues at the time of the maturity of the note is all that is collectable; *Gordon v. Parker*, 2 S. & M. 485; *Lanier v. Trigg*, 6 S. & M. 641. And in such case, if the bank issues are not tendered on the day of the maturity of the note, they cannot be tendered afterwards, but only their specie value; *Lanier v. Trigg*, *supra*. See *ante*, 115.

218. *Payable in cotton.* A note for so many dollars, payable in cotton at a stipulated price per pound, becomes absolute for the money, unless the cotton be paid on the day the note falls due; *Hardeman v. Cowan*, 10 S. & M. 486.

219. *Payable in currency of Mississippi.* A note payable in the currency of the State of Mississippi, is payable only in lawful money, and not in the issues of banks, located in the State. Currency implies lawful money; *Mitchell v. Hewitt*, 5 S. & M. 361.

220. *Maker not entitled to discount gained by purchase of the note.* The maker of a note is bound by his contract to pay the amount of the note to the holder, without reference to the price paid by the latter for the note; *Turner v. Brown*, 3 S. & M. 425. But he may inquire into the consideration given by endorser for the bill, so as to set up illegality in it, whereby the endorsee's title would be void; *Holman v. Ringo*, 7 G. 690.

221. *Effect of payment.* When a bill or note has once been paid, it cannot afterwards be negotiated so as to bind any party except the one negotiating it; *Allein v. Agricultural Bk*, 3 S. & M. 48.

222. *Effect of renewal as payment of the old note or bill.* A note with six endorsers was over-due, and the fourth endorser being absent, it was agreed by the maker and the other parties, that he should receive part payment, and a new note should be given for

the balance, and accordingly a new note was executed by the maker and endorsed by all the other parties except the fourth endorser, and the old note was delivered to the sixth endorser, in order that the fourth endorser might be sued on it for the use of any party to the renewed note who might be compelled to pay it. The new note was paid by the fifth endorser, and the old note delivered to him, who brought suit on it: *Held*, that the fourth endorser was not liable. That whilst it is true that the fifth endorser might have maintained the suit if he had given his own note for the original note, yet the taking up of the old note by the substitution of a new note made by the same maker, was a release of all the parties to the old note who had not entered into some new contract to continue their liability; *LaPiere v. Hughes*. 2 C. 69.

223. *Effect of payment for the honor of a party.* If a stranger to the bill take it up for the honor of a party, he gets exactly the rights of the party for whom he acts, and no more, and if that party, though secondarily liable on the face of the bill, yet be in fact the one primarily liable as between the several parties, the stranger taking it up cannot recover on it. Hence, if a bill accepted for the accommodation of the drawer, be taken up by a stranger, at his request and for his honor, this will be a discharge of the acceptor although it was agreed between the drawer and the party paying it for his honor, that the transaction shall not have that effect; *McDowell v. Cook*. 6 S. & M. 420.

224. *Effect of giving note for open account.* If an open account be closed by note, no recovery can afterwards be had on the account; *Stocumb v. Holmes*. 1 H. 139.

See PAYMENT, 2, 14.

XX. Alteration of a Bill or Note.

See ALTERATION OF WRITINGS.

225. *By inserting place of payment.* The insertion in a note of a place of payment without the consent of the maker, releases him; *Oakey v. Wilcox*, 3 H. 330; but if the alteration be immaterial, it does not invalidate the instrument, and if it do not change the legal effect of the instrument, it is immaterial; *Alexander v. Pope*, 10 G. 737.

226. *Alteration made by a stranger.* But if the alteration (though material) be made by a stranger, without the knowledge, privity or consent of the holder, it does not change or affect its legal operation. That is mere spoliation; *Croft v. White*. 7 G. 455.

227. *Made by one of several joint makers.* One of several joint makers has no right or power to alter the note, and if he do so before delivery, or afterwards by the holder's consent, the other makers are released; *Henderson v. Wilson*, 6 H. 65.

228. *Onus of explaining apparent alteration.* When a bill or note appears on its face to have been materially altered, it being commercial paper, the onus of showing that it was legally done, is thrown on the holder; *Com'l & R. R. Bk of Vicksburg v. Lum*, 7

H. 414; *Ellison v. Mobile & Ohio R. R. Co.*, 7 G. 572. Whether this rule is applicable to instruments not negotiable; *Quere?* But where the alteration is only *probable*, and not apparent, from an inspection of the instrument, the holder need not explain, but the maker must show the unlawful alteration; *Ellison v. Mobile & O. R. R. Co.*, *supra*; 8. P., *Alexander v. Pope*. 10 G. 737.

229. *Same: Case in judgment.* The words "with 8 per cent. interest after 12 mos." appearing on the face of a note, and in a different handwriting from the remainder of the note, which remainder was in the handwriting of one of the makers, and these words appearing also to be added at the end of the body of the note, so as to cross some of the letters used in the signature of the maker, constitute an apparent alteration on the face of the note, and puts the burden on the holder to show how the words came there; *Com'l & R. R. Bk of Vicksburg v. Lum*, 7 H. 414.

230. *Defence of alteration may be made under the general issue.* The defence that a note has been materially altered, may be made under the general issue, without its being sworn to, since it involves not a denial of the execution of the note, but sets up a discharge from it by matter occurring subsequent to its execution; *Henderson v. Wilson*, 6 H. 65.

XXI. Miscellaneous.

231. *Power of corporation to make a note.* As to this see CORPORATION, 28, and *Bacon v. Miss. Ins. Co.*, 2 G. 116.

232. *Lex loci solutionis governs promissory notes and bills.* A promissory note made in one State and payable in another is, as to the rights acquired by an endorsee, governed by the law of the place where it is payable; *Miller v. Mayfield*, 8 G. 688; and such a note made here, but payable in Louisiana, is not subject to our statute, which allows the equities of the maker to be set up against an innocent holder for value; *Emanuel v. White*, 5 G. 56. But a bill drawn here on a drawee in another State, if acceptance be refused, is not considered as payable where the drawee resides, and is subject to that statute; *Wood v. Gibbs*. 6 G. 559.

233. *Who is holder for value.* An endorser of a bill or note, who has taken it in payment of a pre-existing debt, or as collateral security for such debt, and has collected it and endorsed the proceeds as a credit on the antecedent debt, is a holder for value; *Commercial Bank of Manchester v. Lewis*, 13 S. & M. 226; *Davis v. Lee*, 4 C. 505. See *ante*, 12, 100, 116, 144, 145.

234. *Surety on note.* The word "surety" appended to the signature of the last signer of a promissory note, is no evidence against the prior signers that he is a new surety for them; *Stevens v. West*, 1 H. 308.

235. *Note for loaned money: Rate of interest expressed.* Under the statute which allows interest at the rate of ten per cent. to

be reserved on *bona fide* contracts for the loan of money, and only eight per cent. on other contracts it is not necessary that the note given by the borrower should express on its face that it was given for loaned money if the rate of interest be expressed. If the maker of such a note rely on usury as a defence, the holder of the note may show by parol proof that it was given for loaned money; *Luckett v. Henderson*, 12 S. & M. 334.

236. *Memorandum endorsed on a note: When part of the contract.* If a memorandum be endorsed on a note at the time of its execution, and be designed by the parties as an integral part of the contract, it becomes so as effectually as if embodied in the note itself. Hence where a bill single was executed by G. & J., who were administrators of K., and at the same time the following endorsement was made on it, viz., "memorandum. The within note is not binding on G. & J. individually, out is an estate debt," and signed by the obligee; it was held that the memorandum was a part of the bill single, and made it not binding on the makers individually; *Key v. Cross*, 1 C. 598.

237. *Commissions for taking up a bill.* A party can only recover commissions for taking up at maturity a bill which another should have paid, where there is an express contract by such other to pay commissions, or where the course of dealings between the parties would prove the existence of such an agreement; and then only where it is shown that the party claiming the commissions actually took up the bill after it had been negotiated. A mere failure to pay a bill at maturity, only subjects the party failing to legal interest; the creditor in such case cannot claim commissions; *Gibson v. Bailey*, 2 C. 237.

238. *Endorsement amounting to a guaranty.* The following endorsement on a promissory note, viz., "I assign the note to H. and endorse prompt payment of the same, (signed) S. D. Martin," is not an endorsement merely, but also a guaranty, and the guarantor is not entitled to notice of non-payment; *Tatum v. Bonner*, 5 C. 760.

See GUARANTY, 1.

239 *Party to a note or bill: When competent as witness to impeach it.* Whether a party to a negotiable instrument which has actually been negotiated and put in circulation before maturity, and is in the hands of an innocent endorsee, is a competent witness to show that it was originally void; *Quere?* If the instrument is not negotiable, he is competent; and so, whether negotiable or not, he is competent to prove that it has been paid or discharged; *Williams v. Miller*, 10 S. & M. 139; S. P., *Gray v. Thomas*, 12 S. & M. 111. The preponderance of authority seems to be in favor of his competency; but, however this may be, the rule excluding him applies only where there has been such negotiation of it as to pass the legal title; and hence, in this case, the payee of a note payable to bearer, in whose name the suit was brought as nominal plaintiff for the use of

another, was held a competent witness to show that the consideration of the note had failed; *Watts v. Smith*, 2 C. 77.

See EVIDENCE, 250 to 253.

240. *Statute of limitations: Power of endorser.* No act of the endorser can vary or affect in any way the liability of the maker, so far as it depends on the statute of limitations; *Bbb v. Peyton*, 11 S. & M. 275.

241. *When statute commences to run against endorser paying a bill.* The statute of limitation commences to run against an endorser who has been sued on a bill and judgment recovered against him, in favor of a prior endorser, from whom he seeks to recover the money so paid, only from the time he has paid the judgment; *Pope v. Bowman*, 5 C. 194. See *ante*, 134.

242 *Ignorant persons bound by rules of law in relation to notes and bills.* Ignorant and illiterate persons are not exempt from the rules of law regulating the protest of commercial paper; *Chance v. Right*, W. 156.

Bill of Particulars.

1. *Must be certain and distinct.* The bill of particulars to be filed with the declaration, must state distinctly the several items of plaintiff's claim against the defendant; *Soria v. Planters' Bank*, 3 H. 46. A general statement in the bill, "that the defendant was, before a particular time mentioned in it, indebted to plaintiff in \$800 for money before that time loaned," is not sufficient; *Ib.*

See BILLS OF EXCHANGE, 118a.

2. *Not necessary, if declaration set out the items sufficiently.* The declaration averred, that the defendant was indebted for five head of horses sold by plaintiff to defendant, viz., two black horses, one yellow bay horse, one sorrel horse, and one bay horse, and that they were reasonably worth \$550: *Held*, that the bill of particulars was not necessary to be filed, as the items of the indebtedness were sufficiently set out in the declaration; *Nevit v. Rabe*, 6 H. 653.

3. *Bill of particulars: When promissory note is sued on.* When an action is on a promissory note, it may be introduced in evidence under the common counts for money had and received, and for money paid, without being referred to or described in a bill of particulars, provided, the note itself be filed with the declaration; and hence, if such note be mis-described in the bill of particulars filed with the declaration, as to date or the payees, it is immaterial; *Hughes v. Grand Gulf Bank*, 2 S. & M. 115. But a note cannot be introduced under the common counts, in an action against the endorser unless it be described in the bill of particulars; *Jennings v. Thomas*, 13 S. & M. 617.

3a. *Need not be filed in actions of debt.* The statute (H. & H. 590, § 6), which requires a bill of particulars to be filed, applies only to actions of *assumpsit*, and not to actions of debt; *Williams v. Williams*, 11 S. & M. 393. (Changed by statute.) See *post*, 5.

4. *Objection to, must be made in court*

below. It cannot be objected to for the first time in the High Court, after trial and verdict in the court below, that no bill of particulars was filed; *Bank of Louisiana v. Ballard*, 7 H. 371.

5. *Bill of particulars under the Pleading Act of 1850 and 1857.* Under the Pleading Act of 1850, no evidence could be given of an open account sued on by plaintiff, unless a copy of it were on file, verified by the oath of the plaintiff; *Branly v. Carter*, 4 C. 282. And under the Rev. Code of 1857, where the action is on open account, it must be filed with the declaration; and if on a written instrument, that must be filed, or a copy, and both are made parts of the record; Rev. Code of 1857, p. 492, art. 90. And if a set-off is relied on, a bill of particulars is required to be filed with the plea, and a copy of any writing intended to be set off. And a failure in any of these cases deprived the party of giving evidence of the matter not so set out or filed; *Ib.* p. 494, art. 101.

6. *Bill of particulars in ejectment.* After issue joined in ejectment, either party may demand of the other a bill of particulars of his title, which is to contain a reference to, and a short abstract of, all deeds, papers, &c., relied on, with a note of the place where they are recorded; and if not recorded, then copies of the writings, with the names of the subscribing witnesses; Rev. Code of 1857, p. 388, art. 12.

7. *In suit to enforce mechanics' lien.* When the bill of particulars, taken in connection with the petition to enforce a mechanics' lien, as fully advise the defendant of the plaintiff's claim, as if a specific statement of every piece of work was set out in the petition, it is a substantial compliance with the statute; *McLaughlin v. Shaughnessey*, 42 M. 520.

Bill of Review.

See CHANCERY, AND PROBATE COURT; subdivision Bill of Review.

Board of Police.

See ROADS, HIGHWAYS AND STREETS; AND COUNTY.

1. *Jurisdiction: Constitutional provision.* Art. 4, section 20, of the Constitution of 1832, granted "full jurisdiction" to the Board of Police "over roads, highways, ferries, and bridges, and all other matters of county police," and also to order all county elections, "to fill vacancies" in county offices.

2. *Same: Meaning of "county police:" court house.* The term "county police" used in the clause of the constitution, conferring jurisdiction on Boards of Police, is of indefinite meaning, and does not itself confer any specific jurisdiction. In order to give it any force, the Legislature must define it by designating the subject matter over which the board is to have control under that term. It does not confer on the board power to

locate the court house and seat of justice of a county; *Monet v. Jones*, 10 S. & M. 237. But the board, in erecting a new court house for their county, are not bound to locate it on the precise lot or parcel of land on which the old one was erected, but may erect it on any lot within the town at which the Legislature has fixed the county seat; *Odineal v. Barry*, 2 C. 9.

3. *Power as to court house: And to accept land for its location.* And the board has power to accept land for the benefit of the county; and it is not immoral or illegal for them to do so, as a condition of locating the court house on a particular lot; *Odineal v. Barry. supra.*

4. *Power to order warrant for debt against the county.* The Board of Police has power to order the issuing of warrants on the county treasurer in favor of creditors of the county, or the assignees of such creditors; *Carroll v. Board of Police of Tishamingo County*, 6 C. 38; but they have no power to issue such warrants; they may order, but the clerk alone can issue the warrant on the county treasurer, who can pay out money only on a warrant so issued; *Board of Police of Attala County v. Grant*, 9 S. & M. 77.

4a. *Statutory jurisdiction.* The jurisdiction conferred by statute on Boards of Police not coming within its constitutional jurisdiction (over matters of county police), is special and limited, and must be exercised strictly according to the statute conferring it. And this principle is held to apply to a power conferred by statute on the Board of Police of a county lying on the Mississippi river, to levy that stream; *Ballard v. Davis*, 2 G. 525.

5. *Judgment of board final.* The judgments of the Board of Police, like those of all other courts, are final and binding until reversed; *Yallabusha Co. v. Carbry*, 3 S. & M. 529; *Ross v. Lane*, *Ib.* 695; *Carroll v. B. of P. of Tishamingo Co.*, 6 C. 38. It is therefore incompetent for the board in answer to an application for a mandamus to compel them to levy a tax to pay a warrant issued in accordance with their judgment, to set up any defence to the justice of the claim, which might have been considered by them in rendering the judgment, ordering the warrant; *Carroll v. B. of P. of Tishamingo Co., supra.* And if their judgment was obtained by fraud, it can only be set aside on proper proceedings for that purpose. And this principle was applied where the judgment of the board was an allowance to one who had contracted to build a court house for the county, and which they subsequently undertook to set aside upon the ground that it was obtained by the fraud of the contractor, there being nothing in fact due; *Ross v. Lane*, 3 S. & M. 695; *S. P., Beaman v. Leake Co.*, 42 M. 237. But an order of the board on the county treasurer to issue his warrant for a loan of money, is not a judicial act, and its validity may be inquired into in any collateral proceeding, and its validity impeached; *Beaman v. Leake Co., supra.*

6. *Appeals from Board of Police.* As to this, see **APPEALS**, sub-division Appeals from Board of Police.

7. *Powers of: To contract for building court house* The Board of Police have power to contract directly, without the intervention of commissioners, for the building of a court house; commissioners when appointed are the mere agents of the board; *Yallabusha Co. v. Carbray*, 3 S. & M. 529.

8. *Same: Employment of counsel.* The Board of Police have power to employ counsel to represent the county, and a suit by them instituted by their attorney, cannot be abated, because the declaration is not signed by the district attorney; *Cocke v. Board of Police of Copiah Co.*, 9 G. 346.

9. *Same: As to the poor.* All claims for supporting the poor are made against the county, and the Board of Police has power to allow or reject such claims, without their first being presented to the overseers of the poor; *Cotton v. Board of Police of Leake Co.*, 5 C. 367.

10. *Same: As to county taxes.* The Board of Police has no power to direct the tax collector to pay the county levies directly to a creditor of the county; the payment must be made to the county treasurer, and drawn from him by warrants; *Ross v. Lane*, 3 S. & M. 695. See *post*, 14a.

11. *Roads: Proceedings in reference to laying out.* The proceedings of the Board of Police marking out and establishing new roads, are *in rem.* and are valid against the owner of the land on which the road is located, without any other notice than such as results constructively from going on the land and marking out the road, which for that purpose is considered as a seizure of the land; *Stewart v. Board of Police of Hinds Co.*, 3 C. 479. And the owner has until the next term of the court succeeding the report of the commissioners to petition for damages, and if he fail to do so within that time, his claim is barred; *Id.*

See **ROADS**, 1, *et seq.*

11a. *Power to borrow money.* The Board of Police has no power to borrow money for its county, unless specially authorized to do so by the Legislature, and when such authority is given, it must be strictly followed; and the party lending the money is bound to take notice of the power of the board, and see that it complies with the law; *Beaman v. Leake Co.*, 42 M. 237.

11b. *Same: Case in judgment.* The Legislature by act dated 2d December, 1862, authorized the various counties to levy a special tax for the relief of the families of soldiers in the Confederate army. The Legislature also passed an act providing for a distribution among the counties, of a fund called the "Military Relief Fund." It also authorized the Board of Police of the several counties, in case the exigency required it, to borrow money for the same purpose, by drawing warrants or executing bonds, and directed that the sums so borrowed, should be paid out of the "Military Relief Fund,"

or the special tax authorized to be levied. Money was borrowed on a warrant, and the warrant held invalid, because it did not specify whether it was to be paid out of the "Military Relief Fund," or the "Special Tax," and because the order directing the warrant, did not show that the exigency had arisen, in which the power to borrow was to be exercised; *Id.*

12. *Special meetings of the board.* Notice of. A special meeting of the Board of Police, held without the president of the board having given the ten days' notice required by the statute H. C. 710, § 5, is void, and their action in such meeting of no validity; *Jones v. Burford*, 4 C. 194. But it is not necessary that the notice should be entered on the minutes of the board, which, however, would be the most regular; but a party claiming a right under their action at such meeting may show the notice by proof *aliunde*; *Williams v. Cammack*, 5 C. 209.

For rules as to special terms of Circuit Court, see **CIRCUIT COURT**, 20.

13. *Suit against the board.* Whether a suit can be brought against the county to enforce the collection of a debt due by it; *Quære?* *Yallabusha Co. v. Carbray*, 3 S. & M. 529. It can neither sue nor be sued; *Anderson v. The State*, 1 C. 459. But now by statute it can be sued for a debt, if the claim be rejected by the Board of Police; See **Rev. Code** of 1857, p. 419, art. 34; S. P., *Beaman v. Leake County*, 42, M. 237.

See **COUNTY**, 2, 3, 4.

14. *Note payable to president of board and his successors in office.* Where a note is made payable to the president of the Board of Police and his successors in office, suit may be instituted on it in the name of the successor; *Haynes v. Covington*, 13 S. & M. 408.

14a. *Pauper tax.* The act (**Rev. Code**, p. 310, art. 2) authorizing the Board of Police of the several counties to raise revenue for the support of the poor, and the act (**Rev. Code**, p. 417, art. 16) authorizing the board to raise revenue for general county purposes, are distinct and independent statutes, and the tax contemplated by the former may still be levied and collected, notwithstanding the power conferred by the latter may have been exhausted; *Coulson v. Harris*, 43, M. 728.

14b. *The levy of special tax.* The Board of Police, levying a tax for special purposes, need not, under the **Rev. Code**, p. 418, art. 22, specify the purposes for which the levy is made; such specification, however, would be better; *Id.*

See **TAXES AND TAXATION**, 14, 16, 17, 20.

Bona Fide Purchases.

See **VENDOR AND VENDER**, sub-division Bona Fide Purchaser. **CHANCERY**, sub-division, Bona Fide Purchaser.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 12, 100, 116, 141, 145, 233.

And **SALES**, 17 to 21.

Bond.

1. *Sealed notes entitled to days of grace.* Sealed instruments for the payment of money are made negotiable by statute, and are entitled to days of grace; *Skinner v. Collier*, 4 H. 398.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 16.

2. *Voluntary bond.* A voluntary bond is not binding on the obligor. The seal, though it imports a consideration, is not *per se* a consideration; *State v. Bartlett*, 1 G. 624. But the consideration can be impeached only by special plea; *Candiff v. Thighen*, 1 G. 180; *McLaurin v. Parker*, 2 C. 509.

3. *Same: instances.* A bond not required by law, executed by a public officer, is voluntary and void, but an official bond is not void, because not executed in strict accordance with the statute; *State v. Bartlett*, 1 G. 624.

4. *Omission of necessary word in.* The omission of a necessary word from the condition of a bond, if its meaning be clearly implied from the context, will not vitiate it; *De Soto Co. v. Dickson*, 5 G. 150.

5. *Obligors in a bond all principals, unless the contrary appear on its face.* All the obligors in a bond are considered in law as principals, unless the suretyship of some appear from the face of the bond; and it is not competent in a court of law to show the suretyship of any, by extrinsic evidence; *Willis v. Ives*, 1 S. & M. 307. And the statute allowing the consideration of bonds to be impeached at law by special plea, does not change this rule; and hence, a joint obligor not appearing on the face of the bond to be a surety, cannot, at law, make the defence that he is a surety, and has been discharged as such by delay given to the principal without his consent; *Ib.*

6. *Assignment of bond need not be under seal.* Under the statute making bonds, bills, &c., assignable, the assignment of a bond need not be under seal; *Montgomery v. Dillingham*, 3 S. & M. 647.

7. *Proof of payment.* The payment of a bond may be shown by parol; *Tinmin v. Garrett*, 4 S. & M. 207.

8. *Effect of as payment.* The giving of a bond for a simple contract debt is *per se* a discharge of the latter, unless the bond be taken expressly as collateral security. And, hence, where the defendant was sued on a note for \$1,600, and pleaded payment, and under the plea, offered in evidence a penal bond given by him to the plaintiff for \$3,200, dated the same day and due at the same time as the note, and conditioned to deliver forty bales of cotton to pay the \$1,600 claimed, and this evidence was rejected, the court deciding that the note was not merged in the bond; it was held that this was a question of fact for the jury, and that the evidence ought to have been admitted, and that if the jury believed the bond was given for the same debt as the note, they ought to find that the note was paid, if there were no proof to show that

it was given as collateral security; *Myers v. Oglesby*, 6 H. 46.

See **PAYMENT**, 14.

9. *Plea to action on penal bond of general performance: Onus probandi.* If to an action on a penal bond to recover damages for a breach of its condition, the defendant plead general performance, and issue be joined thereon, the burden of proof to show a breach is on the plaintiff. The rule is otherwise where special performance is pleaded; *Holliday v. Cooper*, 1 S. & M. 633.

See **EVIDENCE**, 342, 343.

10. *Plea of non-damnificatus.* The plea of *non damnificatus* is a good plea to an action on a bond of indemnity given by one partner purchasing the entire interest of the other, and conditioned to save the latter harmless, and indemnifying him from all losses and from all liability for the partnership debts; *Hough v. Perkins*, 2 H. 724.

11. *Condition becoming illegal after bond made.* If the condition of a bond be to do a thing, the doing of which has since its execution, and before the condition is broken, become illegal, the obligor is discharged. Hence, where one signed a bail bond as surety, conditioned to surrender the debtor in satisfaction of the debt, and before the condition was broken, imprisonment for debt is made illegal it was held that the bail was discharged; *Brown v. Dillahunty*, 4 S. & M. 713.

See **CONTRACT**, 37.

12. *Tax collector's bond.* *Prima facie* a tax collector's bond, executed fourteen months after his election, is invalid, and no remedy can be had on it, unless the special circumstances authorizing the taking of it at that time be shown; *De Soto v. Dickson*, 5 G. 150.

13. *Injunction bond.* An injunction bond which is conditioned for the payment to complainant "of all such damages as shall be awarded against him," binds the obligors to pay such damages only as shall be properly awarded against the complainant, and not the general damages which the obligee may sustain by the injunction, and a declaration on such a bond must aver that damages have been awarded against the complainant; *Anderson v. Falconer*, 5 G. 257.

13a. *As to attachment bond,* see **ATTACHMENT**, sub-division Bond.

See further on injunction bonds, **CHANCERY**, sub-division Injunction.

See also **OFFICE, OFFICER and OFFICIAL BONDS**.

Bond of Indemnity to Sheriff.

1. *What may be indemnified against.* An agreement to indemnify a sheriff for an act to be done by him in plain violation of his duty is invalid, but if the act against the consequences of which the indemnity is given, be lawful or not, according as a disputed right to money or goods, in reference to which it is done, shall be in one party or another, then the contract of indemnity is valid. Hence, where there was a sale of property of one

defendant under several executions against him, and one of the creditors claiming that the money thus raised ought to go to his execution in preference to the others, agreed to indemnify the sheriff for paying the money over to him on his execution, the contract of indemnity was held to be valid; *Shotwell v. Hamblin*, 1 C. 156.

See EXECUTION, 22.

2. *Same: Taken before levy* The statute (H. C. 900) only provides for the sheriff's taking of an indemnifying bond after levy of the execution; but by the common law such a bond would be good if taken before a levy, since an engagement to indemnify the sheriff in the execution of a lawful, or apparently lawful, act is good; and a bond given to him in cases where a levy is required on goods, the right of which is disputed, to indemnify him against the consequences of a levy, or a failure to levy on them, is clearly lawful; *Forniquet v. Tegarden*, 2 C. 96. And if neither party will indemnify him, in such a case he may apply to the court for protection; *Ib.*

3. *Object of statute allowing indemnifying bond.* The object of the statute in allowing the sheriff to require from the plaintiff an indemnifying bond, in any case, is to transfer the liability to which the sheriff subjects himself by the seizure and sale of property under execution, to the obligors on the bond, and to substitute them exactly in the place of the sheriff; and to make their liability just what his would have been—neither more nor less—if no such bond had been executed; *Moore v. Allen*, 3 C. 363.

4. *Sheriff must proceed on unsatisfied executions, without reference to defence of defendant.* It is the duty of the sheriff to levy an execution in his hands on the property of the defendant. The sheriff cannot take notice of any release or discharge in bankruptcy or otherwise, which the defendant may claim. These defences, if they exist, must be set up by judicial process, and the sheriff who is a mere ministerial officer is not to judge of them. Hence he is not liable for levying an execution on the property of a bankrupt after his discharge, nor are the obligors, in a bond of indemnity given to protect the sheriff in making such levy, responsible; *Ib.*

Bond for Title.

See VENDOR AND VENDEE, sub-division Executory Agreement for the Sale of Land, 6, *et seq.*, and 172 to 192.

Boundaries.

1. *How proven.* Private boundaries may be proven by reputation, but they must be proven with reasonable certainty; *Nixon v. Porter*, 5 G. 697.

See SURVEYING, 12.

2. *Same: Case in judgment.* A deed conveyed 20 arpents of land, and one of its boundaries was "on the west by the lands of" the

seller. It was shown by parol that the seller then owned 25 arpents in the tract; that he resided at the time of the sale on that part (the western) of the tract, which would embrace 5 arpents taken on that side; that he resided there after the sale for many years; that he had a line run after the sale, with the knowledge of the purchaser, dividing the 5 arpents from the 20 which he had sold: Held, that this proof was competent to show boundary, and was sufficient to establish that the words in the deed, "bounded on the west by lands of the seller," referred to the reserved 5 arpents, it being also shown that the seller had never claimed any other land lying west of the tract; *McCaleb v. Pradat*, 3 C. 257.

See SURVEYING; AND TRESPASS, 12.

Branch Bank of Alabama at Mobile.

As to its rights to sue, see *Branch Bank of Alabama at Mobile v. Rhew*, 8 G. 110.

Cancellation.

1. *Effect of.* Where two bills are drawn (but not in sets) for the same purpose, and the drawer demand a rescission and cancellation of the contract, and thereupon the payer surrender one of them, it will be presumed that he agreed to the cancellation of both; *Wood v. Gibbs*, 6 G. 559.

2. *Same as to deed.* The cancellation or return of a deed once validly executed and delivered does not revert the title in the grantor; *Burton v. Wells*, 1 G. 688.

See WILLS, 47, 48; DEED, 98; VENDOR AND VENDEE, 56.

Canton, City of

1. *Power to license retailing.* The grant to the corporation of Canton in its charter "to tax or entirely suppress all petty groceries," does not confer the power to grant license for retailing; *Leonard v. City of Canton*, 6 G. 189.

Cattle, Damage Trespass.

As to this see TRESPASS, 15.

Caveat Emptor.

See VENDOR AND VENDEE; WARRANTY; and EXECUTOR AND ADMINISTRATOR, sub-division Sales of Personality.

Certificate of Acknowledgment of Deeds.

See DEEDS, 41 to 44d, and REGISTRATION, 11, 12, 13.

1. *To be construed liberally.* Certificates of acknowledgments of deeds are to be liberally construed and to be maintained if substantially right, and need not be in the precise form required by the statute; they

are sufficient if they contain the substance of the form. Therefore, under our statute, which requires the subscribing witness on proving a deed for registration, to swear "that he subscribed his name to it as a witness in the presence of the grantor, and that he saw the other subscribing witnesses sign the same in the presence of the grantor, and in the presence of each other, on the day and year therein named," etc.; it was held that a certificate of the proof of execution was sufficient when it stated that the witness swore "that the deed was signed, sealed and delivered in his presence, and in the presence of R. E., the other subscribing witness thereto;" for the statement that the witness and R. E. were subscribing witnesses, is a statement that they attested it according to law, i. e., in the presence of the grantor and in the presence of each other; *Morse v. Clayton*, 13 S. & M. 373.

See DEED, 44a, 44b, 44c.

2. *Same.* The certificate need not describe the official character of the officer taking it, if his official character appear from descriptions and additions to his signature; and this may be done by abbreviations, if their import be generally known; and the letters "J. P." appended to the signature, sufficiently designate that the officer is a justice of the peace. *Russ v. Wingate*, 1 G. 440.

3. *Meaning of "executed" in the certificate.* The term "executed," when applied to a deed, means not only signing and sealing, but delivery, and in a certificate of acknowledgment to a deed, this term may be used as a synonym for the other three, even though the grantor be a married woman; *Smith v. Williams*, 9 G. 48; confirmed in *Perkins v. Swank*, 43 M. 349.

4. *By deputy probate clerks.* By statute (H. & H. 471) probate clerks are authorized to appoint deputies, who, when duly appointed and qualified, are authorized "to do all the several acts and duties enjoined upon their principals." This provision authorizes such deputy to take and certify the acknowledgment to a deed, and it is no objection to the certificate that it is made in the name of the deputy as such, if the official seal be annexed, though it would be more regular if the deputy had made the certificate in the name of his principal; *McCraven's Heirs v. McGuire*, 1 C. 100.

5. *Power of justice of the peace: When lands conveyed lie in another county.* Previous to the Act of 1836 (H. C. 704, art. 15), a justice of the peace could not take the acknowledgment of a deed to land unless the land was wholly or in part situated in the county in which the justice held his office; *Hughes v. Wilkinson's Lessee*, 8 G. 482. But in 1836 an act was passed giving notaries public the power to take and certify the acknowledgment to deeds conveying property situated anywhere in the State, and in 1836 (H. C. 704, art. 15), it was enacted that "all the powers heretofore belonging to notaries public, shall *ex officio*, be and vest in justices of the peace, in their respective counties:"

Held, that under these statutes a justice of the peace was authorized to take and certify the acknowledgment of a deed conveying land situated outside of his county; *Dennis-toun v. Potts*, 4 C. 13.

See DEED, 42.

6. *By justice of the peace, made under his seal, i. e., a scroll.* The certificate of a justice of the peace to the acknowledgment of a deed made under his hand and seal, though the seal be a scroll merely, is good, notwithstanding the land conveyed lies outside of his county; *Id.*

7. *Power of attorney to sell land.* A power of attorney to sell land may be acknowledged, certified and recorded in the same way as deeds, and such power, acknowledged before a justice of the peace, who then (before 1836) had no power to take the acknowledgment, though not admissible in evidence as a legally recorded instrument, is yet, after the lapse of thirty years, in which no claim has been set up to the land by the principal, admissible as a circumstance to show that the agent executing a deed had power to do so; *Hughes v. Wilkinson's Lessee*, 8 G. 482.

8. *Acknowledgment of unrecorded deed.* Whether a certificate of the acknowledgment of an unrecorded deed be admissible in evidence to prove its execution; *Quere?* *Morris v. Henderson*, 8 G. 492. It is not admissible; *Davis v. Rhodes*, 10 G. 152; *Lock v. Jayne*, ib. 157.

9. *Acknowledgment presumptive evidence of delivery.* The acknowledgment and registration of a deed is presumptive, but not conclusive evidence of its delivery; *Bullitt, Miller & Co., v. Taylor*, 5 G. 708.

10. *Certificate by mayor of a foreign city.* Under the statute of this State which declares that "where the parties or witnesses to a deed reside in a foreign state, kingdom, nation or colony, the acknowledgment or proof may be made before any court of law, or mayor, &c., and when certified by such court or mayor, &c., in the manner in which such acts are usually authenticated by him or them, shall be sufficient;" an acknowledgment of a deed purporting to be taken before the mayor of Liverpool, in England, and to be his official certificate, and bearing the corporate seal of that city, but which is not signed by that officer but by the city clerk, "by order of the mayor," is sufficient; for it will be presumed that the certificate is in due form, according to the law of England, the certificate itself being *prima facie* evidence of that, until the contrary appears; *Session v. Reynolds*, 7 S. & M. 130.

11. *Officer certifying is incompetent to impeach his certificate.* An officer taking and certifying an acknowledgment to a deed, is an incompetent witness to show that his certificate is false; *Stone v. Montgomery*, 6 G. 83.

Certificate of Entry of Public Land.

See LAND LAWS OF UNITED STATES, 30, 35; and REGISTRATION, 11.

Certiorari.

1. *How issued, and effect of.* By the common law, the writ of *certiorari* was issued from a superior to an inferior court, to remove the record into the former, so that the trial might be had in the superior court; and the like proceedings were then had, as if the cause had been instituted in that court. In several States of the Union the writ has been employed for a like purpose after judgment, but the court decline to decide whether on a writ of *certiorari* after judgment a trial *de novo* can be had without a statutory provision for that purpose; *Yallabusha Co. v. Carbury*, 3 S. & M. 529.

2. *Not a writ of right.* *Certiorari* is not a writ of right to be issued, as of course without any showing that the law has been violated or injustice done. In a civil case it should not be issued where an appeal is given, if the objection to the action of the court below is not want of jurisdiction. But it does not follow that it will be granted because the time for taking an appeal has elapsed; *Delahuff v. Reed*, W. 74.

3. *When granted.* Whenever the right of an individual is infringed by the act of a person clothed with legal authority, who exercised that authority illegally, he may have redress by *certiorari*, unless he can resort to a writ of error; *Ib.* (citing 16 J. R. 459.)

4. *To justice of the peace.* A *certiorari* to a justice of the peace court is in the nature of an appeal; *Hurd v. Tombes*, 7 H. 229. And the trial in such cases in the Circuit Court is *de novo* without the formality of pleadings; *Wright v. Simmons*, 1 S. & M. 389. And if the writ be improperly awarded, it may be dismissed on motion; *Leech v. Irving*, 2 H. 887. But a second writ will not be allowed after first has been dismissed; *Williams v. Williams*, 5 G. 143.

5. *Probate judge has no power to grant.* A probate judge has no power to issue a writ of *certiorari*; *Barlow v. Esterling*, W. 302.

8. *Circuit Court on change of venue.* A Circuit Court, to which the venue in a criminal case has been changed, may award a *certiorari* to complete the record sent from the court in which the indictment was found, if the record be defective; and this, too, after verdict, if objection be then made to the sufficiency of the record; *Loper's Case*, 3 H. 429.

9. *Certiorari to Boards of Police.* Appeals may be taken from the Boards of Police by *certiorari*; *Deberry v. Holly Springs*, 6 G. 385.

See JUSTICE OF THE PEACE, 9 to 14.

10. *Waiver of objections to.* When a cause has been removed from a justice of the peace to the Circuit Court by *certiorari*, and a declaration filed in the latter court, and the defendant has appeared and pleaded to the merits, it is too late to move to dismiss, the appearance and plea being a waiver of all objections to the propriety of granting the writ; *Fitzpatrick v. Ray*, 4 S. & M. 645.

Champerty and Maintenance.

1. *What constitutes champerty: Knowledge of adverse holding.* There is no statute in this State on the subject of champerty. The English statute of 32, Henry VIII., ch. 9, on this subject is not in force here. In order, therefore, to avoid a contract on the ground of champerty, the common law offence must be complete; and to constitute this, there must be not only an adverse possession of the land at the time it is sold, but the vendee must also know of it; and this is especially so when at the time of the sale the land was wild and uncultivated and a forest; *Sessions v. Reynolds*, 7 S. & M. 130. And there must also be a knowledge on the part of the vendor of the adverse possession; *Alexander v. Polk*, 10 G. 737.

2. *Nature of adverse possession necessary to constitute champerty.* The constructive possession vested by law in the true owner of wild and unoccupied lands, is not such adverse possession as is requisite to constitute champerty; *Hanna v. Renfro*, 3 G. 125. The possession, however, of one holding under a deed will be presumed to be co-extensive with the boundaries of the land conveyed in the deed, if there be no one holding a part adversely to him; *Bledsoe v. Little*, 4 H. 13.

3. *Presumption of knowledge arising from adverse possession.* It being a presumption of law that the possession of land is in subordination, and not adverse, to the true owner, it is incumbent on the person holding adversely to the owner to show the adverse character of his possession; and in order to do this he must show that the owner either had actual knowledge of his adverse holding, or that his occupancy and user were so open, notorious, and inconsistent with, as well as injurious to the rights of the true owner, as from these facts to raise a presumption of such knowledge on the part of the true owner. And upon this point it is settled that where the whole tract is occupied and enclosed by a party asserting an adverse claim, the presumption is violent that the owner has knowledge of the adverse claim; but where, on a boundary line between the adverse possessor and the true owner, the possession of the former has been but of a small quantity—a narrow strip along the line, which may as well be attributed to accident as to design—a knowledge of the adverse claim by the true owner will not be presumed; *Alexander v. Polk*, 10 G. 737.

4. *Effect of champertous deed.* A champertous deed is void; *Bledsoe v. Little*, 4 H. 13. And conveys no title to the grantee; *Ellis v. Doe*, 11 S. & M. 422. As between the grantor and grantee it is a nullity as to the adverse possessor, and constitutes no obstacles to his subsequent purchase from the grantor; and such purchase will vest in the possessor all the title which existed in the grantor when he made the champertous deed, undiminished by that deed; *Betsey (an Indian) v. Torrance*, 5 G. 132.

5. *Champerty as to personalty.* A sale or assignment of personalty held adversely is champertous, and confers no right or title as against the adverse possessor; *Rives v. Weaver*, 7 G. 374; S. P., *Davis v. Herndon*, 10 G. 484.

6. *Sale of debt to be used as a set-off not champertous.* The sale of a chose in action, on condition that the buyer could use it as a set-off in a suit which he expected the debtor to bring against him, is not illegal; *Powell v. Jones*, 12 S. & M. 506.

7. *Champerty and maintenance in reference to suits.* To bring an agreement within the rule prohibiting the maintenance of suits, it must appear: 1st. That the agreement was made before the suit was commenced, and was the moving cause for it. 2d. That it was agreed by the party undertaking it that it should be carried on at his expense. And hence an agreement between the plaintiff and his attorney, that the latter shall have one-half he may collect of the plaintiff's claim, is not champertous; *Moody v. Harper*, 9 G. 599.

8. *Same.* The maintaining and assisting a party to prosecute or defend a suit tends to keep alive strife and contention, and perverts the law into an engine of oppression, and is against public policy and will not be tolerated; *Rives v. Weaver*, 7 G. 374. And a court of equity will not entertain a suit which, though instituted in the name of a party having the right, is prosecuted for the benefit of a champertous purchaser; *Id.*

9. *Judicial sales.* It seems that judicial sales are not within the rules against champerty and maintenance; *Hanna v. Renfro*, 3 G. 125 (citing 1 *Dana*, 216; 2 *ib.* 323; 3 *Watts*, 114).

9a. *Trustee's sales.* Whether a trustee having power of sale to pay debts, can sell a chattel in the adverse possession of another; *Quere?* But it would seem that he cannot; *Handley v. Buckner*, 6 S. & M. 70.

10. *Tenant in common.* Whether a tenant in common, after being ousted, can lawfully convey his teste to another; *Quere?* *Harman v. James*, 7 S. & M. 111.

11. *Sales, devises, &c., between relatives.* The rules in relation to champerty and maintenance do not apply to conveyances or devises between father and son, husband and wife, brothers, &c.; *Morris v. Henderson*, 8 G. 492.

12. *Plaintiff in ejectment cannot object.* The plaintiff in ejectment, who has no title, cannot object that the defendant's title is void for champerty; *Doe ex dem. Reynolds v. Ingersoll*, 11 S. & M. 29.

13. *Maintenance is a question for the jury.* Maintenance is a question of fact for the jury; the court cannot therefore exclude a deed from them upon the ground that the proof shows it to be affected by maintenance; *Welborn v. Anderson*, 8 G. 155.

14. *Assignment of right to sue for a wrong.* A right of action to sue for a wrongful conversion of property is not assignable. Such an assignment would be but the transfer of a right to sue for a wrong, and is against

public policy and void. Nor is the rule different when the assignment is a mere release or quit claim of the assignor's right; *Davis v. Herndon*, 10 G. 484.

Chancery.

This title will be found at the end of the Digest.

Character.

See CRIMINAL LAW. SLANDER.

Charges to Jury.

See INSTRUCTIONS.

Chattels.

See PERSONAL ESTATE.

Chickasaw Indians and Treaties.

1. *Treaty of 1816.* Goods introduced for sale by white men under the 7th article of the treaty with the Chickasaws in 1816, providing, "that any white person who shall bring goods and sell them in the nation, shall forfeit the whole of his or her goods," are not forfeited when they are merely introduced into the nation to be sold and offered for sale, but not actually sold. To make a forfeiture there must be an actual sale; *Mingo v. Goodman*, 1 H. 552.

2. *Act of Legislature of 1830, abolishing tribal customs: Right of Chickasaw wife to her separate estate.* The act of the Legislature of the State passed in 1830, abolishing the tribal customs of the Chickasaws, and extending the laws of the State over their territory, provided that all marriages and matrimonial contracts theretofore entered into by virtue of any custom or usage of the tribe, and by them deemed valid, shall be deemed as valid as if they had been solemnized according to the laws of the State. By the custom of the tribe, the husband acquired no right to the property of the wife which she held at the time of the marriage; and no community of interest was produced by the marriage, in the original property of the husband and wife, nor in their subsequent acquisitions; and the wife's property is not therefore liable for the husband's debts; *Fisher v. Allen*, 2 H. 611.

3. *Treaty of 1834: Reservations to Indians.* The 6th article of the treaty between the U. S. and the Chickasaw Indians made in 1834, provides that "reservations of a section each, shall be granted to persons male and female, not being heads of families, who are of the age of 21 years and upwards, a list of whom, within a reasonable time shall be made out, by the seven persons herein before mentioned and filed with the agent, upon whose certificate of its believed accuracy, the register and receiver shall cause said reservation to be located on lands fit for cultivation, but not to interfere with the settlement rights of others." Under this article the following points have been ruled:

1. That the term "reservation" in the treaty is an absolute grant from the date of the treaty, and it needs only the location of the lands to give the reservation identity and to make the title in the reservee absolute and complete; and no further act or grant from the United States is necessary; and if after such location the United States grant the land by patent to another, the grant and patent are absolutely void at law; *Wray v. Doe*, 10 S. & M. 452; *Niles v. Anderson*, 5 H. 365; *S. P., Coleman v. Doe*, 4 S. & M. 40.

That the Indian having shown the reservation and location, it is unnecessary that he should go further and prove that a list of the reservees, including himself, was furnished by the seven chiefs (referred to in the article), and filed with the agent, nor to produce the agent's certificate of its believed accuracy, and show it was furnished to the register and receiver prior to the location; the location in itself appearing on the books of the land office, was evidence that all the prerequisites to its being made had been complied with; *Newman v. Harris*, 4 H. 522; *Wray v. Doe*, 10 S. & M. 452; *Harden v. Ho-yo-po-nubby's Lessee*, 5 C. 567.

3. It was not competent for a subsequent patentee from the United States of the same land to impeach the Indian's title by showing that the certificate of the United States agent required by the treaty to be appended to the list of Indian reserves made out by the seven chiefs, was not in fact made, or was improperly made; that the Indians had done all in their power to secure their reservations by having their names put on the list, and they were not to be prejudiced by the failure of the agent to do his duty; *Wray v. Doe*, *supra* (citing *Coleman v. Doe*, 4 S. & M. 40).

4. That the instructions of the War Department of the United States to the effect that "no location under any of the articles of the treaty shall be considered as final, or as conferring any right whatever, until the same shall be approved by the President," were in violation of the treaty, and but an attempt to add new terms to it by one of the parties without the consent of the other, and they were therefore of no avail to deprive the reservees of any rights secured to them by the treaty; *Wray v. Doe*, *supra*.

5. That a copy of the records from the land office, showing the reservation and location of the Indians, properly certified to, was sufficient evidence of the location and reservation within the meaning of point No. 1, as above set out, and that the following was sufficient:

"COPY."

Reservation under 6th Article of Chickasaw Treaty.

Roll No	Res'rve	Sect	Town	Range	Date of Location
	Ho-yo-po-nubby	16	9	5E	June 29, 1838.

Wray v. Doe, *Supra*; *Hardin v. Ho-yo-po-nubby's Lessee*, *supra*.

6. That the treaty does not require the list of reserves to be filed before the location is made. The certificate of the agent to his believed accuracy of the list made out by the seven chiefs may be made and filed, without a filing of the list; *Harden v. Ho-yo-po-nubby's Lessee*, *supra*.

4. *Treaty of 1834: Sales made by Indians of their reservations.* The fourth article of this treaty provides in substance, that while many of the Indians are competent to manage their own affairs, yet others were not, and might be imposed on; therefore, none of the reservations of land allowed under the treaty should be sold, leased, or disposed of, without the certificate of two of seven Indians named in the treaty, (five of whom signed the treaty on behalf of the Chickasaws), to the effect "that the Indian making the sale, &c., was capable of managing his affairs, which fact was also to be certified to by the United States agent, who should also further certify that a fair consideration had been paid for the land;" and that after these stipulations are complied with "the deed of conveyance shall be valid: *Provided*, the President of the United States, or such person as he shall appoint, shall approve the same, and endorse it on the deed."

On this the following points have been ruled: 1st. It seems that these certificates are not conditions precedent to a sale; and that a conveyance made by an Indian reservee without these formalities, will pass an imperfect equity, at least, to the extent of enabling the vendee to maintain a bill in equity against a subsequent vendee, with notice of his right, and who obtained the certificates of the parties by fraud; *Niles v. Anderson*, 5 H. 365. 2. That one of the seven Indians designated in the treaty to certify to the capacity of the others making sales could sell his reservation without having the certificate of any one of the other six to his capacity to manage his affairs. That as he had been selected to certify to the competency of the others, it must be presumed that his competency to act for himself was admitted; *Pointer v. Trotter*, 10 S. & M. 537. 3. That a deed by an Indian, having all the other prerequisites, except the approval of the President or his appointee, is incomplete and insufficient to pass the legal title, so as to enable the grantee to maintain ejectment; *Harmon v. Partier*, 12 S. & M. 425.

4a. That this restraint upon alienation was a restraint only on the Indian's power to make a sale or lease directly, and was no obstacle to his making any other contracts, which persons *sui juris* might make; and when such contracts were made, all the legal consequences attached to them the same as if made by other persons, including the liability to be sued thereon, and to have his property seized and sold under the judgment; and, therefore, a sale of an Indian's reservation, under a proper judgment against him, was legal and divested him of his title; *Saffarans v. Terry*, 12 S. & M. 690.

5. *Treaty of 1834: Reservations to orphans*

under 8th article. Sale of. Under the 8th article of the treaty, certain reservations were made to Indian orphans, and the power granted to the President of the United States to sell these reservations for the benefit of the reservees, upon the recommendation of a majority of the seven persons before referred to. This recommendation was made, and the President ordered a sale at auction, by quarter sections, and at a minimum price of \$5 per acre. A sale was made and a patent issued, which showed that the land was sold for \$3 per acre, and in a larger quantity than a quarter section. It was held that whilst the patent was evidence that the prerequisites for the sale had been complied with, except where it showed an omission of them, that still it appeared that the land had been sold for a less price, and in larger quantities, than prescribed in the order of the President, and the sale was therefore void, notwithstanding the subsequent approval of the President; for his orders in relation to the sale were, until changed, as much binding on him as on any other officer; *Harris v. McKissack*, 5 G. 464.

6. *Statute of limitations.* The interest of a Chickasaw Indian in land situated in this State is subject to the bar created by an adverse possession for the time prescribed by the statute of limitations; *N. O. J. & G. N. R. R. Co. v. Moyer*, 10 G. 374.

Choctaw Indians and Treaties.

See DANCING RABBIT TREATY.

Chose in Action.

See ASSIGNMENT; BILLS OF EXCHANGE AND PROMISSORY NOTES; BOND.

Circuit Clerk.

- I. Powers and rights..... 1
- II. Duties and responsibilities..... 2

I. Powers and Rights.

1. *As to collection of money and fees.* A circuit clerk has no power to receive the plaintiff's money on judgments rendered in the court of which he is clerk; *Lewis v. Johnson*, W. 260; nor has he the power to receive the fees due to the other officers; and if he do so, he will not be liable on his official bond for not paying them over; *Matthews v. Montgomery*, 3 C. 150.

2. *His power to take affidavits.* The circuit clerk has no general power to take affidavits, but only under the statute (H. C. 433, § 158), where such affidavit is the foundation of some official act to be done by him; hence, the clerk has no power to administer an affidavit to a complaint filed in his office, under the Pleading Act of 1850, which provides that where the complaint is sworn to, the answer shall be also sworn to; *Ayres v. Taylor*, 3 C. 200; but now, under art. 222, p. 516, of the Rev. Code of 1857, he has

general power to administer oaths, and take and certify affidavits.

3. *Power to make entry on the minutes of the court in vacation.* The statement of a circuit clerk entered on the minutes of the court in vacation, that the opinion of the judge sustaining a motion for a new, which had been taken under advisement by him "was handed in and entered on the minutes of the court by consent of parties," is no part of his official duty, and therefore, no evidence of such consent; *Coopwood v. Prewett*, 1 G. 216.

4. *Clerk pro tem.* If the clerk be absent in term time, the court may appoint a clerk *pro tempore absentiae*, with full power to discharge all the duties of the clerk, but his power ceases when the clerk returns; *Lowry v. Tullis*, 3 G. 147.

5. *The right to fees in State cases.* The circuit clerks are not entitled to tax against the State their costs in criminal cases where the defendants are acquitted, or being convicted, are unable to pay the costs; for their services in such cases they are entitled to receive from the county treasury fifty dollars per annum, if the costs amount to so much; *Burt v. Harwood*, 10 G. 756. The statute; Rev. Code of 1857, art. 60, ch. 64, allowing costs and expenses in criminal prosecutions to be paid out of the State Treasury, relates only to such costs as may accrue outside of the Circuit Court; *Ib.*

6. *Power to sign process with another's hand.* Process from the Circuit Court signed in the clerk's name by another is good, if done with his consent and duly sealed; *Gamble v. Trahern*, 3 H. 32.

7. *No power to certify to acknowledgment of service of process.* The circuit clerk has no power to certify to an acknowledgment by the defendant of service of the citation; *Cox v. Waddington*, 3 H. 57.

II. Duties and Responsibilities.

8. *General rule as to his duties: Liability for not taking legal writ of error bond.* The circuit clerk's official duties embrace every act which the law requires him to perform in virtue of his office. The issuance of a writ of error is an official act, and so the taking of a *supersedeas* bond conditioned according to law, and with two or more good sureties upon the issuance of the writ of error with *supersedeas*; and hence, if on issuing such writ and *supersedeas* he do not take such bond and security as the law requires, it is a breach of his official bond, for which he may be sued by the person injured; *McNutt v. Livingston*, 7 S. & M. 641; and in granting such writ and *supersedeas*, and taking the bond, he performs a ministerial and not a judicial act; *Ib.*

9. *Sams.* And in deciding upon the sufficiency of a declaration on the official bond of the clerk, for his failure to take bond and security as the law directs; the question whether the sheriff has a right, upon receiving the *supersedeas*, to discharge a levy made pre-

vions to that time, is not a legitimate subject for determination; the failure to take the bond and two good sureties according to law, is the breach of the bond; *Ib.*

9. *His bond covers all official acts: Case in judgment.* The circuit clerk is required by law to give a bond, conditioned for the faithful performance of the duties of his office; whatever, therefore, is a duty required by law, is covered by the condition of his bond, and a failure to discharge it makes him liable on the bond to the party injured, in damages commensurate with the injury. And it makes no difference in this respect, that the statute requiring a particular duty to be performed is merely directory, since, whilst the omission to discharge that particular duty may not vitiate his acts as to third parties, he is, nevertheless, liable to the party injured, for his failure to discharge a duty imposed by law; *Brown v. Lester*, 13 S. & M. 392. Where therefore the clerk failed to put a case on the issue docket, which properly belonged there, and by reason of that omission, the plaintiff failed to get judgment at that Issue term, whereby, through the subsequent insolvency of the debtor, he lost his debt; it was held, that this failure was a breach of the bond, for which the clerk and his sureties were liable; *Ib.*

10. *For failure to enrol judgment.* The circuit clerk is liable to a plaintiff, for a failure to enrol his judgment according to law, and his liability is not only for the statutory penalty of \$500, affixed for such failure, but also for the damages occasioned by his neglect; *Planters' Bk of Tennessee v. Conger*, 12 S. & M. 527; but his sureties on his bond, are liable only for the damages, not for the penalty; *Foot v. Vanzandt*, 5 G. 40.

11. *Liability for cost of advertising judgments sold for cost: Case in judgment.* A circuit clerk made a motion and on it procured the condemnation of several judgments to be sold to pay the costs due on the judgments respectively, and in which costs he was interested; and he made out the precept directing the sale and delivered it to the sheriff, who advertised the sale in a newspaper and made sale of them—some bringing enough to pay the costs and others not enough. The publisher of the paper sued the clerk for the advertising fee; and it was held, he was liable, as the work was done partly for his benefit and wholly at his instance; but that he had a right to claim from the sheriff the cost of the advertising, before any distribution among the officers, of the proceeds of the sale was made; *Buckingham v. Smith*, 1 C. 521.

12. *Liable for acts of his deputy.* The circuit clerk is liable to parties injured by the official acts of his deputy; and the deputy is responsible to him; *McNutt v. Livingston*, 7 S. & M. 641.

13. *Bill of cost for ex-officio services must be itemized.* When the clerk of the Circuit or Probate Court makes out a claim against the county for ex-officio services, he must itemize the account so as to show what services

were performed; *Williams v. Lowndes Co.*, 5 C. 621.

14. *Who is proper usee in action on bond.* An action on the official bond of the circuit clerk must be in the name of the governor, to whom it is made payable, for the use of the party injured; and where the breach complained of is in relation to a suit in the name of a nominal plaintiff for the benefit of a usee, that usee should also be usee in the action on the bond; *Brown v. Lester*, 13 S. & M. 392.

Circuit Court.

1. *Jurisdiction: On an appeal from a justice of the peace.* In cases taken by appeal to the Circuit Court from a justice of the peace, the Circuit Court has no other jurisdiction than the justice had from which the appeal was taken; *Crapoo v. Grand Gulf*, 9 S. & M. 205; *Glass v. Moss*, 1 H. 519; *Stier v. Surget*, 10 S. & M. 154. Nevertheless the Circuit Court may consolidate two or more appeals taken from a justice of the peace, where the parties and the sureties on the appeal bonds are the same, and render judgment for the plaintiff for the whole amount due in all the cases, though the aggregate of the principal exceed fifty dollars; *Ammon v. Whitehead*, 2 G. 99.

2. *Same.* And in the trial of such an appeal it is governed by the same rules as are applicable to a justice of the peace, and the trial will therefore be on its merits without regard to form; *Stier v. Surget*, 10 S. & M. 154; and the rule is the same where the cause is removed from the Justices' Court by *certiorari*; *Hurd v. Tombes*, 7 H. 229; *S. P. Hurd v. Germany*, 7 H. 675; *Porter v. Deterly*, 1 S. & M. 163. And hence if on such trial a balance is found for defendant, judgment will be then entered against the plaintiff for the amount without *sci. fa.* as is required when the case originates in the Circuit Court; *Hurd v. Tombes, supra*. And all the evidence which would have been competent before the justice of the peace, is competent on the trial in the Circuit Court, and therefore the parties may be witnesses in the Circuit Court; *Russell v. Moore*, 8 S. & M. 700.

3. *No jurisdiction under \$50.* The Circuit Court has no jurisdiction over a cause where less than \$50 of principal is claimed; *Crapoo v. Grand Gulf*, 9 S. & M. 205.

And if a judgment be rendered for plaintiff in such a case, and it be attempted to be sustained by showing that it was on appeal from a Justice's Court, the record must show the appeal and the judgment of the justice; *Ib.*

But if more than \$50 is claimed, and the verdict be rendered for less, the plaintiff will not be non suited, unless it appear that he brought suit for a greater sum than \$50, on purpose to evade the law requiring suits for less than \$50 to be brought before a justice of the peace; 8 G. 458. (*Griffin v. Lower.*)

3a. *Jurisdiction under Constitution of 1870.* All causes pending in the Circuit Court at the adoption of the Constitution (of 1870), in which the principal amount did not exceed \$150 (except appeals) were by act of July

19th. 1870, transferred to the Justice's Court of the Center beat, and thereafter the Circuit Court had no jurisdiction to render judgment in such a case; *Randall v. Kline*, 44 M. 313.

4. *Has jurisdiction to recover penalty for failure to make roads.* The Circuit Court has jurisdiction to entertain an action in favor of the Board of Police to recover a penalty for a failure to work on the roads where the amount due by the defendant exceeds \$50; *Cocke v. Board of Police of Copiah Co.*, 9 G. 340.

5. *Power to grant mandamus.* The Circuit Court has jurisdiction to grant mandamus against the Board of Police, when there is no other legal remedy; *Madison Co. v. Alexander*, W. 523.

6. *Power to make rules of practice.* The Circuit Court has power to make rules regulating the time of pleadings and bringing causes to trial, and hence may refuse to allow a judgment by default to be entered against a defendant who has failed to plead, until the day fixed by the rule of court in which pleas are to be filed; *Com'l Bk of Manchester v. Galloway*, 6 H. 515.

7. *Jurisdiction over mechanics' liens.* It is not a valid objection to the statute of 1840, providing for the enforcement of mechanics' liens by petition in the Circuit Court, that it confers equity jurisdiction on a court of law. A court of equity, it is true, is the more appropriate tribunal to enforce liens, but its jurisdiction is not exclusive, for courts of law have jurisdiction to enforce liens; *Richardson v. Warwick*, 7 H. 131.

8. *Jurisdiction as to equities of parties.* A court of law will protect the rights of the equitable assignee of a judgment by declining to enter satisfaction of the judgment in fraud of his rights; *Tombigby R. R. Co. v. Bell*, 7 H. 216.

8a. *Same.* But a court of law has no jurisdiction to adjust the equities between several parties having property liable to the same judgment. The judgment creditor may collect the whole of it from the property of one, if he see proper, and the party thus paying it must go into equity for contribution; *Vanhouten v. Reiley*, 6 S. & M. 440.

9. *Same.* The Circuit Court should not entertain a motion to have an entry of satisfaction of a judgment made as to part of the defendants. The remedy for those claiming to be released is in chancery; and hence the overruling of such motion is no bar to their subsequent bill in equity to obtain the same relief; *Long v. Shackelford*, 3 C. 559.

10. *As to parol evidence to show a mistake in a deed, &c.* Parol evidence to show a mistake in a deed and to correct that mistake, is not admissible in a court of law. The remedy is in chancery. Hence, where the vendee upon being sued for the purchase money showed as a defence, that the vendor had no title to the land which he had sold him by bond for title; it was held incompetent for the vendor in answer to this, to show that there was a mistake in the description of the

land in the title bond, and that vendee was actually in possession under his purchase, of the land intended to be sold, and that as to this he had a good title; *Peques v. Mosby*, 7 S. & M. 340.

11. *Suretyship of joint obligor in a bond cannot be shown at law.* The suretyship of one or more joint obligors in a bond, cannot be shown by parol in a court of law. They are to be regarded as principals, and the contrary cannot be shown except in equity; *Willis v. Ives*, 1 S. & M. 307.

See BOND, 5.

12. *In case of fraud.* Where fraud amounts to a total failure of consideration, it is properly cognizable at law; *Brewer v. Harris*, 2 S. & M. 84.

That partial failure of consideration may be set up at law, see CONSIDERATION, 36.

13. *Equitable jurisdiction by the constitution: Mortgages.* The jurisdiction vested in the Circuit Court by the constitution and statutes, to foreclose mortgages, is as ample as that of the Superior Court of Chancery; and it includes the power to regulate all proceedings until they are finally disposed of, and the Superior Court of Chancery has no power to correct or revise its proceedings in this respect; *Tooley v. Gridley*, 3 S. & M. 493.

14. *Same: Divorce.* And the rule is the same with reference to its jurisdiction conferred by the constitution and statutes in relation to divorce; and it embraces, as an incident to the jurisdiction over divorce, the power to grant temporary or permanent alimony; and to settle the wife's allowance out of any property which she might have owned at the time of the marriage, and which by the marriage became vested in the husband; notwithstanding the value of these might exceed \$500, which was the limit of the equity jurisdiction of the Circuit Court in ordinary cases; *Lawson v. Shotwell*, 5 C. 630.

15. *Power over issue sent to it from Probate Court to be tried by a jury.* Where an issue is sent from the Probate Court to the Circuit Court to be there tried by a jury, the Circuit Court can enter no judgment on the verdict found on the issue; its sole duty is to certify back to the Probate Court the finding, and the latter court is to grant or refuse a new trial. But a judgment on the verdict in the Circuit Court will be a nullity, and a writ of error from it will give the High Court no jurisdiction; *Wallace v. Wingate*, 6 S. & M. 151.

16. *What necessary to acquire jurisdiction over the person.* Service or acknowledgment of service of the declaration is not sufficient to give the court jurisdiction over the defendant. Process served or appearance entered is essential; *Hemphill v. Hemphill*, 5 G. 68; but overruled in *Byrne, Vance & Co. v. Jeffries*, 9 G. 533.

See APPEARANCE, 8. PROCESS, 31.

17. *Two districts for circuit courts in same county.* The Legislature may divide a county into two districts and direct a circuit court to be holden in each, and that the

grand jury for each court shall be taken from the district in which it is held; *Alfred's Case*, 8 G. 296.

18. *Service of process in.* A general return of "executed" on original process in the Circuit Court will not do; *Merritt v. White*, 8 G. 438.

See on this subject, *PROCESS*, 9 to 24.

19. *When declaration filed.* To enable the plaintiff to demand judgment by default at the first term, the declaration must be filed when the writ issues; *Ib.*

See on this subject, *PLEADINGS*, 11 to 14.

20. *Special terms.* Special terms of the Circuit Court being provided for by law, the High Court will presume, even in a capital case, when the indictment on its face appears to be found at a special term, and the clerk so certifies, that the special term was duly and legally called; *Byrd's Case*, 1 H. 247.

21. *Same: No order or notice necessary.* The calling of a special term is entirely within the discretion of the judge. No formal order is necessary, and the twenty days' notice provided for in the statute is for the information of the public, and not at all necessary to the legality of the term—the provision in the statute on that subject being merely directory; *Friar's Case*, 3 H. 422. The rule is the reverse in reference to special meetings of the Board of Police.

See *BOARD OF POLICE*, 12.

22. *Same: What causes triable at.* No civil cause is triable at a special term of the court which would not have been triable regularly at the preceding regular term of the court; *Com'l Bk of Manchester v. Galloway*, 6 H. 515; *S. P., Hutto v. Brooks*, 4 G. 575.

23. *Imparance term.* Under the imparance law of 1840, the return term of the writ and the return term of the action, is the first term after the service of the writ on all the defendants, or the term at which all the parties have entered their appearance; *Thornton v. Fitzhugh*, 10 S. & M. 438.

24. *Same: Failure of imparance term.* When the imparance or return term of an action is not held, the cause will, nevertheless, stand for trial at the next term, just the same as if the imparance term had been held according to law; *Ib.*

25. *Jurisdiction over transitory causes: Venue.* The Circuit Court of any particular county has no jurisdiction over a transitory cause of action, unless the defendants, or some one of them, be found in the county and served with process there, and if the original summons be returned not found as to the defendants in that county, and the suit be dismissed as to them, this will oust the jurisdiction of the court as to the defendants served with process outside of that county; *Wally v Bowie*, 41 M. 553; *S. P., Andrews v. Powell*, 1b. 729.

See *VENUE*, 1. *JURISDICTION*, 9.

26. *Same: Testatum writ.* And if the writ in such action be returned not found in the county in which the suit was instituted, and an alias simply issued to another county,

and there served, this will not warrant a judgment by default against the defendants so served. If the defendant was in fact in the county where the suit is instituted, at the time it was commenced, but afterwards removed, then, on return of *non est inventus*, the court may issue a *testatum* writ to another county, and on service of that the court will have jurisdiction, for it will be presumed that when a *testatum* writ is issued, that it was shown to the court that the defendant was in the county when the suit was commenced; *Ib.*

See *CHANCERY*, sub-division *Jurisdiction*. *PLEADINGS, PRACTICE, VENUE, ACTION*, 38.

27. *Jurisdiction to try slaves for capital offences.* The Circuit Court has jurisdiction to try a slave for a capital offence, without the slave having been examined first before two justices of the peace and five slaveholders, in pursuance of Rev. Code, p. 250; *Josephine's Case*, 10 G. 613.

Circuit Judge.

1. *Power to grant motion for a new trial.* The power of a circuit judge to sustain, in vacation, a motion for a new trial which he has taken under advisement, expires in four months from the adjournment of the term; *Coopwood v. Prewet*, 1 G. 206. It also expires with his term of office. And he cannot do a judicial act after his term expires, even by consent of parties, and hence his action, sustaining the motion after his term has expired, is void; *Ib.*

2. *When governor may appoint.* The governor may make a temporary appointment to fill a vacancy in the office of circuit judge, even when the unexpired term exceeds one year; *Sam's Case*, 2 G. 480.

3. *Transfer by Legislature to another district.* The Legislature may so re organize the circuit court districts as to transfer a judge to another district than the one in which he was elected; *Miazza's Case*, 7 G. 613.

See *JUDGE: COURT*.

Citizenship.

1. *That persons of African descent are not citizens.* See *SLAVERY*; and *Heirn v. Bridault*, 8 G. 209; *Mitchell v. Wells*, 1b. 235.

2. *Proof of: Case in judgment.* Proof that a free white person has been residing in the State and keeping a boarding house for twelve months, is sufficient to show that he is a citizen of the State, in the absence of all proof tending to show that he was a mere sojourner or transient person; *Trotter v. Dobbs*, 9 G. 198, and if it appear that a party to a suit married in this State, kept a boarding house and hired slaves, it is sufficient to show, in the absence of contrary proof, that he is a free white person and a citizen; *Ib.*

Civil Rights.

1. *As to civil rights of Africans.* See *SLAVERY*.

2. *Effect of sentence to penitentiary on civil rights.* A sentence to confinement in

the State penitentiary, on conviction for crime, suspends the right of the convict to sue during the term of his imprisonment, and this disability is not removed by an escape before the expiration of the term; *Beck v. Beck*, 7 G. 72.

Clerical Error.

1. *As to effect of clerical error in caption of commission to take depositions.* See DEPOSITIONS, 10, 16, 34; and *Henderson v. Car-gill*, 2 G. 367.

2. *Indulgence shown to.* Great indulgence is shown to clerical misprisions, where they have been acquiesced in for a long time, and in such cases the words intended but omitted, will be supplied. Hence, after a litigation of twelve years, in which a judgment was attacked on other grounds, the judgment debtor will not be permitted to say there was no judgment against him, because in the entry of it the words "it was considered by the court that the plaintiff recover," were omitted; *Davis v. Hoopes*, 4 G. 173.

2a. *Mistake in name of defendant in affidavit for attachment.* A misrecital of the defendant's Christian name in one part of an affidavit for an attachment, is a mere clerical error, and is no ground for quashing the attachment; *Davidson v. Martin*, 4 G. 530.

3. *Omission of word in an execution.* And the omission of the word "bank" after the words "the president, directors and company of the Planters'," description of the name of the plaintiff in an execution, is a mere clerical error, and does not vitiate the *fi. fa.*; *Barker v. Planters' Bank*, 5 H. 566.

4. *Omission in forthcoming bond.* A forthcoming, in all other respects regular, is not void for the omission of the words "said property" after the word "deliver", in that part of the condition of the bond which stipulates for a delivery of the property levied on. The law will supply these words by intendment, so as to make it a valid covenant to deliver the property mentioned in the previous part of the bond; *Clow v. Tharpe*, 3 S. & M. 64.

See PLEADING, 23, and CONDITIONS, 8; DISTRESS, 9; FORTHCOMING BOND, 24, 12; GUARDIAN AND WARD, 58b; HIGH COURT, 40.

Colonization of Freedmen.

See SLAVERY; and *Lusk v. Lewis*, 3 G. 297.

Color of Title.

What is. A void or defective deed is color of title; *Hanna v. Renfro*, 3 G. 125; *Welborn v. Anderson*, 8 id. 155. So is a deed from a person who never had title; *Welborn v. Anderson*, *supra*.

As to effect of, see LIMITATION OF ACTIONS, 38, 39, 40, 41, 42, and ADVERSE POSSESSION, 16, 17, 18, 19, 20.

Comity.

See INTERNATIONAL LAW, 4, *et seq.*; CONSTITUTIONAL LAW, 109; and *Shaw v. Brown*, 6 G. 246; *Heim v. Bridault*, 8 id. 209; *Mitchell v. Wells*, id. 235.

Commissioners of Public Buildings.

1. *Majority must act.* Less than a majority of the whole number of commissioners appointed by an act of the Legislature, for the purpose of selling and making titles to lands belonging to a county as a fund for the erection of public buildings, cannot execute a deed, so as to vest the legal title in the grantee; *Petrie v. Wofford*, 1 G. 698.

2. *Extent of their authority.* And when such commissioners are appointed by the Board of Police, "for the purpose of building a jail," they can exercise no powers except those incident to that business; they cannot, therefore, make a valid title to land sold by other commissioners on behalf of the county; *Id.*

3. *Are mere agents of the Board of Police.* Such commissioners are mere agents of the Board of Police when they are appointed, and the board may contract directly, without appointing them; *Fallabusha Co. v. Carby*, 3 S. & M. 529.

Commissions.

As to commissions of executor and administrator, see that title, 96 to 108; and of guardians, see GUARDIAN AND WARD, 50 to 57.

For advancing money, see CONTRACT, 105; and *Houston v. Crutcher*, 2 G. 51.

Commissioners of Sinking Fund.

1. *Who are commissioners, and their power.* The act creating the sinking fund appoints the president and cashier of the Planters' Bank, and the auditor of public accounts, commissioners to manage it. The trust devolves on the persons holding these offices and their successors in office; they are authorized to loan the sinking fund, and can sue at law for the recovery of the fund loaned; and such suits are brought in their individual names, averring, however, that they hold the offices to which the trust attaches, and that they are commissioners of the sinking fund; *Commissioners of Sinking Fund v. Walker*, 6 H. 143; *Montgomery v. Commissioners of Sinking Fund*, 7 H. 13; *Matthews v. Mosby*, 13 S. & M. 422. They are public trustees, and the act of a majority of them is binding, but the act of one alone is not; though it seems in cases of private trusts and joint agencies all must join; *Hill v. Josselyn*, 13 S. & M. 597.

2. *Property of the State.* The sinking fund is the property of the State, specifically set apart for the redemption of the bonds of the State, issued for the Planters' Bank; *Commissioners of Sinking Fund v. Walker*, *supra*; *Cohea v. Commissioners of Sinking Fund*, 7 S. & M. 437; *State v. Dick-*

inson, 12 S. & M. 579; *Young v. Hughes*, 1b. 93; and a person indebted to the sinking fund is indebted to the State, within the meaning of the statute which prohibits the auditor from issuing his warrant in favor of any person indebted to the State until the debt to the State is paid; *State v. Dickinson*, *supra*.

3. *Payment to in Planters' Bank bonds*. A vice chancellor was indebted to the sinking fund, and the auditor refused to issue a warrant for his salary, and the Legislature thereupon passed a resolution, authorizing the auditor to issue his warrant for the salary, upon the vice chancellor giving his note with good security, payable at 12 months, in 'Planters' Bank, bonds and coupons; and the note was given accordingly. After the maturity of the note, the vice chancellor offered to pay it in the bonds of the Planters' Bank, which were issued by the bank, and for which the State was not liable, which the auditor refused to take, claiming that the payment should be made in the bonds of the State issued for the Planters' Bank, and for the redemption of which the sinking fund was created: *Held*, that the offer of the vice chancellor was not sufficient, and that payment could be made only in the bonds of the State as claimed by the auditor; *State v. Dickinson*, 12 S. & M. 579.

4. *Cashier of a branch of Planter's Bank not a commissioner*. The cashier of the branch of the Planters' Bank at Jackson, has no power to receive payment of a debt due to the sinking fund; *Dian v. Young*, 13 S. & M. 118.

5. *Judgment in favor of commissioner of sinking fund*. A judgment in favor of the commissioner of the sinking fund belongs to the State and is not subject to the provisions of the Enrolment and Limitation Acts of 1844, which limit the lien of judgments theretofore rendered to two years; *Josselyn v. Stone*, 6 C. 753.

6. *State commissioner substituted for commissioner of sinking fund: And his power*. After the passage of the Act of 1844, creating a State commissioner to take charge of the sinking fund, a judgment was rendered in the name of the commissioners of the sinking fund in a suit instituted before the passage of that act. The State commissioner afterwards sued out a *sc. fa.* to revive the judgment in his name: *Held*, that the judgment was not void, for being rendered in the name of the commissioners after their trust had expired; but at most was only erroneous, and the revival in the name of the State commissioner was proper; *Matthews v. Mosby*, 13 S. & M. 422. And it seems that the judgment was regular, the commissioners having begun the suit, and there being nothing in the act which prohibited them from prosecuting it to judgment; *Ib.*

7. *Salary of State commissioner: How payable*. The salary of the State commissioner appointed to take charge of the sinking and seminary funds is payable by the warrant of the auditor on those funds in the hands of the treasurer; *Swann v. Josselyn*, 14 S. & M. 106.

Common Carriers.

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I. Who are Common Carriers.

1. *Steamboat owners*. The owners of steam boats plying on navigable rivers or the seas and engaged in carrying freight and passengers for hire, are common carriers; *Gilmore v. Carman*, 1 S. & M. 279; *Heirn v. McCaughan*, 3 G. 17.

2. *Railroad express companies*. Railway companies, and express companies engaged in carrying freight on railways, are common carriers; *Southern Express Co. v. Thornton*, 41 Miss. 216; *Southern Express Co. v. Moon*, 10 G. 822; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660; *Same v. Albritton*, 9 G. 242; *Miss. Cen. R. R. v. Kennedy*, 41 M. 671; *N. O. J. & G. N. R. R. Co. v. Moore*, 40 M. 39.

3. *Ferrymen*. The keeper of a public ferry is a common carrier; *Powell v. Mills*, 8 G. 691; *Richards v. Fuqua*, 6 C. 792.

4. *Proprietors of stage coaches*. Proprietors of stage coaches run for carrying the United States mail and passengers, are *prima facie* not liable as common carriers, for goods transported by them, except the baggage of passengers, but they are liable as such for goods which it is shown they usually transport; *Powell v. Mills*, 1 G. 231.

5. *Wagoners*. Where a planter, employing his wagons in hauling his cotton crop to market, and habitually lading them on their return trips with goods to be transported for hire, receives such goods on his return trip, and executes a receipt therefor, undertaking to deliver them to the consignee in good order and without delay, at the customary rate of charges, he will be responsible as a common carrier; *Harrison v. Roy*, 10 G. 396.

II. Liabilities and Duties as to Freight.

6. *Is an insurer*. A common carrier, when there is no express contract limiting his liability, is bound as an insurer of goods delivered to him for transportation, against all loss occasioned by any other cause than the act of God, or the public enemy, or the conduct of the shipper; *Southern Express Co. v. Moon*, 10 G. 822; *Gilmore v. Carman*, 1 S. & M. 279; *Neal v. Sanderson*, 2 S. & M. 572.

7. *Same: Where loss occurs from inherent defects in good*. But a common carrier is not responsible for damages resulting (to the goods transported by him) in consequence of a natural and inherent infirmity in the goods. But this principle is applicable to cases only where the property damaged is, from its nature, liable, without the carrier's fault, to rapid decay, as fruits and vegetables, or subject to diminution or destruction, as by evaporation, leakage, or spontaneous combustion; nor is he liable when the goods are damaged in consequence of being improperly packed by the owner; *Powell v. Mills*, 8 G. 691.

8. *Acts of God and public enemies.* But he is not an insurer against loss by the act of God or the public enemies, unless he expressly agree to be such; and hence, if he be a carrier by water, the omission to insert in the bill of lading the usual exception of responsibility for loss by "damages of the seas," does not make him an insurer against losses by act of God, or (which is the same thing) inevitable accident; *Neal v. Saunderson*, 2 S. & M. 572.

9. *Meaning of "inevitable accident."* The phrase "inevitable accident," as applied to responsibility of common carriers, means the same as "act of God;" and hence an offer by the common carrier to prove that a loss occurred by inevitable accident, and without the negligence or misconduct of the carrier, should not be rejected; *Neal v. Saunderson*, *supra*; but neither phrase means simply loss without negligence of the carrier, but that it was unavoidable by any human agency whatever. Thus, where the loss was occasioned by fire, not arising from his negligence or want of care, he will be responsible unless it was occasioned by lightning; *Gilmore v. Carman*, 1 S. & M. 279.

10. *Contract limiting common law liability.* A common carrier may by express contract, limit his common law liability; *Whitesides v. Thurlkill*, 12 S. & M. 599. But this is doubted and expressly left an open question in *Mobile & Ohio R. R. Co. v. Franks*, 41 M. 494; and *Southern Express Co. v. Moon*, 10 G. 822. And it was said in this last case that if such contract under any circumstances be binding, it was essential to its validity that the assent of the shipper should be express and upon a sufficient consideration, and be freely and fairly given, with a full knowledge of the contract and the rights thereby waived, and that it should not be obtained by fraud and the circumvention of artfully printed receipts thrust upon the shipper in the hurry and press of railroad travel, or under other circumstances not favorable to a full understanding of the force and effects of the contract. And it was further said that the exception would be strictly construed as against the carrier, and that it would never be extended so as to relieve him from responsibility for a loss occasioned by his negligence. And, moreover, that the onus was on him to show that the loss was within the exception. As to power of the Legislature to prohibit chartered railway companies from making such contracts; see *CORPORATION*, 27; and *Mobile & Ohio R. R. Co. v. Franks*, *supra*.

11. *Same: Exception—"Dangers of the river."* A loss of goods on a steamboat by fire, arising without the negligence of the carrier (but not by lightning) is not within the exception in the bill of lading of "dangers of the river;" *Gilmore v. Carman*, 1 S. & M. 279. But that exception so far modifies the common law responsibility of a common carrier, as to exempt him from responsibility for the loss of the goods occasioned by the colliding of his boat with another vessel, if such collision occurred without fault

on his part, or on the part of his employees managing the boats, but he would be liable if the collision was occasioned by his negligence, or might have been avoided by reasonable skill and diligence; *Whitesides v. Thurlkill*, 12 S. & M. 599.

12. *Is bound to carry on his common law liability.* A common carrier is bound by law, for a reasonable reward, to receive and carry goods offered him for transportation, subject to all the responsibilities legally incident to his employment. He has no right to refuse to receive and transport goods offered for transportation, because the shipper will not consent to a special contract of shipment, which limits his common law responsibility; and if he do so, he will be liable to an action for damages; *Southern Express Co. v. Moon*, 10 G. 822.

13. *Must deliver goods in reasonable time.* Where there is no express contract as to the time of the delivery of the goods at the point of destination, they must be delivered in a reasonable time; and when the contract is to transport on a navigable stream, the reasonableness of the time of delivery must be determined under all the circumstances, with a view to the state of the river, the season of the year, the weather and other circumstances affecting the navigation; *Bennett v. Byram*, 9 G. 17.

14. *Same: Low water: Duty and right of carrier in such case.* A low stage of water in the river, which renders it impossible for the common carrier to proceed to the port of delivery, so long as it exists, is a reasonable excuse for the delay in the delivery thereby occasioned; but it does not avoid the contract, nor release the carrier from his obligation to deliver in a reasonable time after the obstruction is removed, according to his original undertaking. He may in such case land the goods, and store them during the obstruction, at his own expense and risk; but he must, as before stated, resume the transportation in a reasonable time after the low water ceases. If, however, the consignee accept the goods at the intermediate port where they are stored, this relieves the carrier from further liability, and entitles him to freight *pro rata* for the distance he has transported them; *Id.*

16. *Special instances: Ferrymen: Duty to have sufficient boats.* A ferryman is bound to keep a ferry boat, suitable and safe in all respects, both to receive and transport all such property and vehicles, as are usually conveyed across public ferries, and if without fault on the part of the person in charge of such property, it be lost, owing to the insufficiency of the boat or other means which it was the ferryman's duty to provide, either for the reception or transportation of the property, he will be liable. Hence, when owing to a failure to have what is called an apron at the end of his boat, a loaded wagon, on entering the boat, struck it with such force as to turn the boat loose from its fastening, whereby the wagon and team and the driver (who was a slave), were precipitated into

the river and lost; it was held he was liable for the damage; *Richards v. Fuqua*, 6 C. 792.

17. *Same: Duty to take care of teams on his boats.* And a public ferryman is bound to make such provision for the safe transportation of property received by him on his boat, as from its nature is requisite and necessary, and he cannot devolve any portion of this duty on the owner without his consent; *Powell v. Mills* 8 G. 691.

18. *Same: Case in judgment.* After the property has been received on the boat for transportation it is *prima facie* in charge of the ferryman as a common carrier; and his responsibility as such is not diminished by the fact that the property is accompanied by the owner, unless it affirmatively appear that the owner did not entrust it to the ferryman, but retained the exclusive control and management of it himself. Hence, when the ferryman received a stage coach and the team in his boat for transportation—they being driven into the boat by the driver—who, thereupon, vacated his seat upon the stage box, hitched the lines, and went to the front of the horses and commenced giving them water, which he dipped from the river, and whilst thus engaged one of the horses became restive, and soon afterward, and before the boat reached the opposite shore, the team ran out of the boat into the river, the driver being carried with them in his efforts to stop them; it was held that the coach and horses were in the possession of the ferryman, who was responsible for the damages; *Ib.*

19. *Same: Express company: Connecting lines: Loss of money.* If one express company receive money to be transported to a certain point, and then transfer the package to another company to be by it transported to its destination, this creates an obligation on the part of the last company to the owner of the money to carry out the contract made with him by the first company. The shipper in such case has his election to proceed against either company. And in such case if the money be lost, the possession by the last company of the envelope in which the money was enclosed and delivered to the first company is strong proof that the last company received the money, and it will not be error for the court to instruct the jury that such possession, when proven, is a fact from which they may infer the last company received the money. And if the last company appoint an agent to investigate the loss, this is a circumstance also which the jury may consider in determining the question whether that company received the money, and the court may so instruct the jury; *Southern Express Co. v. Thornton*, 41 M. 216.

20. *Liability for slave as freight.* When a slave is lost from the insufficiency of the boat on which he is transported, the carrier is liable as in case of other chattels; but when the question is, as to whether the carrier has taken due care of the slave, then, because the slave has intelligence and locomotion, the carrier will be responsible only as a carrier

of passengers; *Richards v. Fuqua*, 6 C. 792.

III. Liabilities and Duties as to Passengers.

21. *Must stop and take on passengers according to public notice.* A common carrier is liable to an action of tort, as for breach of a public duty, when he fails to stop and take on a passenger at a place which he has designated in a public notice as a stopping place for the reception of passengers; and such liability may be enforced by any person injured by the failure to stop, and who trusted and acted on the faith of such notice without any consideration moving from him to the carrier. Thus, if public notice be given by a steamboat owner that he will stop his vessel at a particular place, on a particular voyage, to take on passengers, and a person relying on that repairs to the place with a view of getting on board as a passenger, and the boat fails to stop, the carrier is liable for the damage; *Heirn v. McCaughan*, 3 G. 17.

22. *Excuse in such case.* And it is no excuse for the carrier's failure to stop in such case, that he was under an obligation as carrier of the United States Mail, to proceed without further delay in order to deliver the mail in time; he being under inconsistent obligations is no excuse for a failure to perform either. *Ib.*

23. *Liability for exemplary damages.* If, in such case, his failure to stop was wilful or capricious, he will be liable to exemplary damages. *Ib.*

See RAILWAYS, 50 to 57.

24. *Must put off passengers at proper place.* And he must stop and put off the passengers at the proper place, and if he fails to do so he will be liable for exemplary damages; *N. O., J. & G. R. R. Co., v. Hurst*, 7 G. 660.

See RAILWAYS, 42 to 45.

25. *Liability of Railways as to passengers.*

See RAILWAYS, 43 to 49.

26. *Liability for baggage of passengers.* Common carriers are not liable, as for loss of a passenger's baggage, for any article though placed with his baggage, which is not transported to supply any want of the traveler as such, on his journey, and not made known to the carrier or his agent as not baggage, nor paid for as freight, but which was put aboard of the conveyance by the passenger as baggage simply, and so treated by himself on the journey. A reasonable amount of baggage by common usage is deemed to be included in the fare of the passenger; but this privilege must not be abused by including as baggage articles not within the scope of the terms or intent of the parties. The baggage includes what is reasonably necessary and convenient for the use of the passenger; and such as is usually carried by travellers, and embraces, besides wearing apparel, money for defraying the expenses of the journey, a few books for reading, a lady's jewelry, a watch, fishing tackle, a gun and a pair of pistols; but it does not include merchandise or

watches, or clothing not belonging to the passenger, but carried by him for others not passengers: *Miss. Cen. R. R. Co. v. Kennedy*, 41 M. 671; *N. O. J. & G. N. R. R. Co. v. Moore*, 40 id. 39.

And the amount of recovery in such case is the value of the baggage, and not what it cost the passenger to replace it; nor does it embrace attorney's fees in the suit to enforce the liability; *N. O. J., &c., v. Moore, supra*; nor can the traveller recover his expenses incurred in searching for the lost baggage; *M. C. R. R. Co. v. Kennedy, supra*.

IV. Actions Against.

27. *Nature of.* An action against a common carrier, for a breach of duty in failing to stop at a particular place and take on a passenger, according to previous public notice, is founded on tort; and so of an action for damages occasioned by his failure to put off the passenger at the proper place; *Heirn v. McCaughan*, 3 G. 17; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660.

28. *Construction of.* And in such a case, unless it very clearly appear that the action is founded on a special contract, it will be construed to be founded in tort; *Id.*

29. *Action for loss of baggage.* An action for a loss of baggage against a common carrier, unless the contrary clearly appear, is considered as founded on a contract; *Miss. Cent. R. R. Co. v. Kennedy*, 41 M. 671; *N. O. J. & G. N. R. R. Co. v. Moore*, 40 id. 39.

30. *As to punitive damages against common carriers*

See DAMAGES, 15, 16, 18, 20, 21.

Common Law.

See CIRCUIT COURT.

1. *Its force here: Liable to repeal.* The common law of England, though recognized in the constitution of this State as a part of the law of the land, is subject to be altered and repealed at the will of the Legislature; *Norman's Case*, 1 S. & M. 562. It forms the basis of our jurisprudence, and remains in force until repealed, or modified by statute; *Hemingway v. Scates*, 42 M. 1. So far as it is applicable to our circumstances and is not changed by statute, it is the law of the State, and courts will construe strictly statutes passed in derogation thereof, assuming that the Legislature did not intend to change it, further than it has expressed an intention to do so; *Holman v. Bennett*, 44 M. 322.

2. *Extent of its force in this State.* But the rules of the common law are not all in force in this State, but only such as are adapted to our institutions and circumstances, and are not repealed by the Legislature, or varied by usage, which supersedes them; hence, that rule which requires the owner of cattle, horses, &c., to keep them in an enclosure, is not in force in this State, not being adapted to a State whose population is not dense, and in which there are large tracts of unenclosed land, suitable for pasturage, upon which the people have always been accustomed to depasture their cattle;

Vicksburg & Jackson R. R. Co. v. Patton 2 G. 156.

3. *Not in force where repugnant to our constitution.* Principles of the common law unsuited to our condition, or repugnant to the spirit of our government, are not in force here; *Green v. Weller*, 3 G. 650. And so if they be inapplicable to our system of jurisprudence; *Crane v. French*, 9 G. 503.

Common of Pasture.

See TRESPASS, 33; and *Vicksburg and Jackson R. R. Co. v. Patton*, 2 G. 156.

Compensation.

As to the compensation that the owner is entitled to for the appropriation of his property to public uses, see CONSTITUTIONAL LAW, 24, *et seq.*; and *Isom v. Miss. Cent. R. R. Co.*, 7 G. 300; *Brown v. Beatty*, 5 G. 227; *Penrice v. Wallis* 8 G. 172; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374.

Compromise.

1. *Offer to pay by way of.* An offer to pay, if indulgence be granted, and if not, that the debtor will insist on his legal rights, is a mere offer of compromise, and is no waiver of any defence which the debtor has, unless accepted; *Read v. McLemore*, 5 G. 110.

See EVIDENCE, 17. CONSIDERATION, 7.

Conditions.

See MUTUAL AND DEPENDENT AND INDEPENDENT COVENANTS.

1. *Conditions to Spanish grants.* But little importance was attached by the Spanish Government to the performance by the grantee of the conditions imposed by the government in making grants of land in this State, and a subsequent confirmation of the grant by Congress is either an admission that the conditions have been complied with, or a waiver of their performance; *Winn v. Cole*, W. 119.

2. *Grantor or his heirs only can take advantage of non-performance.* The grantor and his heirs alone can take advantage of the non-performance by the grantee of conditions subsequent annexed to the grant; *Ib.*

3. *Distinction between conditions precedent and subsequent.* There are no technical or appropriate words which always determine whether a devise be on condition precedent or on condition subsequent; but it is a question of intention on the part of the testator. If the language show that the act on which the estate depends must be performed before the estate can vest, the condition is of course precedent, and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent; and to determine this question, reference is had not only to the particular clause making the devise, but to the whole will, and the circum-

stances surrounding the testator; *Burnett v. Strong*, 4 C. 116.

4. *Same: Case in judgment.* The testator provided in his will that his brother "shall have a plantation and slaves formerly owned by the devisee, and now in his possession, on his paying all that he owes" the testator, "and also on his paying a debt" the testator "owes a bank on account of the property." He then directed that his brother "shall have" whatever might be realized out of certain suits and judgments. It was shown by extrinsic proof that the testator had bought this property at a sale under execution against his brother, and that the use and possession of it were the principal means the devisee had of paying the debts he was required by the will to pay. No other disposition was made of this property in any other part of the will: *Held*, that notwithstanding, the use of the words "shall have, &c., on his paying," &c., indicated an intent that the property should not vest till payment; yet taking the whole will together, and the circumstances surrounding the testator and the devisee at the time the will was made, it was the evident intention of the testator that the property should vest at once, and that the debts the devisee was to pay were a mere charge on the estate devised to him; *Id.*

5. *Courts liberal as to conditions in cases of wills.* The courts have shown no disposition to apply the strict rules applicable to conditions precedent in covenants and other contracts, to wills, and have looked rather to the circumstances of the bequest, and the nature and object of the condition, rather than to the strict words, so as to give to the devisee the benefit of the testator's bounty; *Id.*

6. *Condition subsequent: Bequest over.* When the will gives a present estate to the devisee, to be defeated on his failure to perform certain acts therein required of him, such performance is a condition subsequent; nor is this changed by the fact that the estate is limited alternately to another on failure of the original legatee or devisee to perform the condition; *Cheairs v. Smith*, 8 G. 646.

7. *Case of condition precedent: Uncertain condition.* The testatrix, by the second clause of her will, devised "the whole of her estate, both real and personal, to her executors, for the use of her children, P. and F.," and "subject to such charges as she should make thereon, giving the executors the power to sell any of the property in their discretion; and she directed that her estate should be "kept together until her debts were all paid." The fourth clause in the will is as follows: "And as my son P. seems to be of a dissipated and extravagant disposition, it is my will that my executors do not allow him anything more than for necessary clothing, food, and doctors' bills while under the age of twenty-one years; and, furthermore, if my son P. will go to some college, and by application will acquire a good practical education, and by good conduct and steady habits until the age of twenty-four, it is my will that my

estate be equally divided between my children; but if my son continue in his wild, extravagant, dissipated habits, my daughter F. is to inherit all my estate, allowing to my son \$300 per annum."

By the fifth clause she directed that in the event of her daughter's marriage, her portion of the estate should be secured to her and her children, so that they might not come to want; and if she died without issue, her brother P. should inherit her estate; and if P. should marry, and die without lawful issue, "that such property as he may receive from my (her) estate be equally divided between his widow and her daughter F.;" and finally the testatrix declared as follows: "My last wish is that though this, my last will and testament, be not written in strict legal phraseology, it may not be the cause of any litigation whatever, but be construed, as intended, to keep my children from want by securing their property, so they cannot squander it;" *Held*,

1st. That the provision in relation to P.'s acquiring an education and reforming his habits, was a condition precedent to be performed within the time prescribed, before any interest in the property would vest in him.

2d. That the provision was not void for uncertainty, and it was not impracticable to ascertain whether he had complied with it or not.

3d. That the period in which P. was to comply, by acquiring the education and reforming his habits, was up to his arrival at the age of twenty-four years and if he failed up to that time to perform it, the whole of the estate vested in his sister F., subject to a charge in P.'s favor of \$300 per annum; *West v. Moore*, 8 G. 114.

8. *Same: Effect of incomplete sentence.* The incomplete sentence in the foregoing—printed in italics—did not vitiate the condition, as the testator's intention was plain; *Id.*

9. *Bequest a charge and a condition subsequent: Case in judgment.* A. devised certain slaves to B., upon condition that a specified sum of money should be paid to certain children annually, and upon their arrival at majority, that a certain other sum be paid them. B. having accepted the devise, it was held that his estate was, upon condition subsequent, but that the bequest to the children was a charge upon the slaves, and a lien existed on them for its payment; *Beck v. Montgomery*, 7 H. 39.

10. *Grant on condition subsequent.* Conditions subsequent are not favored in law, and are construed strictly, because they tend to defeat estates, and the courts will not construe a grant as being on condition subsequent, unless the condition be in express terms, or arises by necessary implication; *Gadberry v. Sheppard*, 5 C. 203.

11. *Repugnant to grant.* It is a cardinal rule of construction, that conditions are not to be sustained when they are repugnant to the estate granted, or infringe upon the essential enjoyment and independent rights of

property, or tend manifestly to public inconvenience; *Id.*

12. *Same: Case in judgment.* The Legislature passed an act locating the county seat of Yazoo county, and appointing commissioners who were authorized to accept grants of land for the purpose of establishing a permanent seat of justice for the county, which was to be called Benton, and in the act it was declared that the title to the land so granted should be valid to the commissioners for and on behalf of the county, to all intents and purposes, and full power was given them to divide the land into lots, and dispose of the lots for the benefit of the county. The plaintiff conveyed the land in controversy to these commissioners by deed, "as commissioners to locate a seat of justice for Yazoo county, the same being for the use and benefit of the town of Benton, to have and to hold the premises aforesaid unto the said commissioners, for the use aforesaid, their heirs and assigns forever." The commissioners accepted the grant, and located the court house on it, and sold most of it in town lots, and afterwards the Legislature passed another act, removing the county seat from Benton to Yazoo City: *Held*, that the provision in the deed, taken in connection with the act of the Legislature first above named, might possibly cause a forfeiture of the land yet undisposed of by the commissioners, upon the removal of the county seat, but as to such as was sold, the title was good in the grantees, and that plaintiffs could not recover, for the reason that the construction contended for by them would defeat the object of the grant, by depriving the commissioners of the power to make good titles, and thereby depriving them of the power to raise means to build the court house, which was the object of the grant; *Id.*

13. *Performance of condition precedent necessary.* A party claiming the benefit of a contract containing conditions precedent on his part, must plead and prove performance of the conditions as required by the contract; *Fultz v. House*, 6 S. & M. 414.

14. *Impossible conditions.* See CONDITION, 7, 8.

Conditional Sale.

1. *What property subject to.* Personal as well as real property is the subject of a conditional sale; *Mount v. Harris*, 1 S. & M. 185.

2. *Condition as to title on payment: Liability for vendee's debts: Case in judgment.* Property sold upon condition that the title shall not vest in the vendee until payment of the purchase money, remains the property of the seller until the condition is complied with, and though possession be delivered to the vendee, it is not liable for his debts after the condition has failed and the contract has been rescinded; *Mount v. Harris*, 1 S. & M. 185. But if it remain in possession of the vendee for three years, without any registration of vendor's title, then, by the third section of the statute of frauds (H. & H. 371), it will be liable for the vendee's debts; *Lewis v. Gülder*, 3 S. & M. 560.

3. *Same.* Where the bill of sale by the vendor recited that the vendor "trades" to vendee a slave for \$900, which vendee is to pay by a day stipulated, "or return the negro," and at the same time the vendee executed a note to vendor, promising to pay the \$900 by the day fixed, "or return the negro;" it was held that the sale was conditional and not absolute, and the property and right of the slave remained in the vendor till payment; *Mount v. Harris*, 1 S. & M. 185.

4. *Same: Not converted into mortgage by voluntary promise of vendee to allow redemption.* A transaction by which an absolute bill of sale is made of a chattel, and an order given by vendor for its immediate delivery to the vendee, who gives his note for the balance of the purchase money, payable when delivery is made, is not converted into a mortgage, by the vendee's voluntary giving to the vendor, after the close of the transaction, an instrument in writing, allowing him to redeem by a repayment of the purchase money by a given time. This instrument at most made it only a conditional sale; *Harmon v. Short*, 8 S. & M. 433.

4a. *Same.* W. sold a slave to B. for \$350; and B. agreed that W. might redeem by paying \$400 by a day specified. After this day had elapsed, B. gave W. \$150 more and took a bill of sale from W. and his wife, and at the same time told W. if he could sell the slave for more money, he should have the benefit of it. On the same day W. found a purchaser of the slave at an advance of \$25, who paid B. the purchase money, and B. surrendered his bill of sale. Between this and the first sale to B., a judgment was rendered against W., and an execution from it afterwards levied on the slave: *Held*, that the first sale was absolute—the privilege of redemption being a mere gratuity; and that if the right to redeem were a matter of contract, the judgment was a lien merely on the right of W. to redeem, which was lost by the failure to exercise it within the time specified; *Goodman v. Burford*, 10 S. & M. 385.

5. *Same: Where defeasance is cotemporaneous with and part of the contract of sale.* But where an absolute bill of sale is made, and at the same time the vendee execute a writing, which makes the entire transaction either a mortgage or a conditional sale, courts are inclined to construe it a mortgage, if it can consistently be done. Hence, where a bill of sale of slaves was executed by a debtor to his creditor, absolute on its face, the consideration being the amount of the indebtedness of vendor to the vendee, and at the same time the latter executed an instrument to the vendor, in which two years were allowed the vendor "to redeem" the slaves upon his paying the "like sum" to vendee; and in which it was also provided, that the vendee was not bound to redeliver the slaves unless payment were made within the two years; but on the contrary, on failure of payment, the vendee was to have the slaves as his absolute property; it was held that the transaction was a mortgage and not a conditional sale, and that

on a bill to redeem the vendee was liable for hire; *Barnes v. Holcomb*, 12 S. & M. 306.

6. *Same: Effect of word "redeem" in defeasance.* In construing such a transaction the use of the word "redeem" in the defeasance, instead of the word "repurchase," is a circumstance to show that the transaction is a mortgage; *Ib.*

7. *Distinction between mortgage and conditional sale: Test of mortgage.* The distinction between a mortgage and a conditional sale is, that when the relation of debtor and creditor still remains as to the money to be used in the re-purchase or redemption, the transaction is a mortgage; otherwise it is a conditional sale; *Hoopes v. Bailey*, 6 C. 325; *Magee v. Catching*, 4 G. 672.

If the sale be made absolutely and in payment of a pre-existing debt, and the purchaser at the same time give the seller the privilege of repurchasing at the same price by a stated period, this will not be a mortgage, as the transaction shows that it was not a security for a debt, but the payment of it; *Mason v. Moody*, 4 C. 184.

See MORTGAGE, 14.

8. *Same: Case in judgment.* A debtor caused land, of which he was the equitable owner, to be conveyed by his trustee holding the legal title, to the creditor, upon an agreement that the land was to be the property of the creditor until the debtor should redeem or refund the money; but the agreement was that the debt should be absolutely extinguished by the conveyance: *Held*, that this was a conditional sale, and not a mortgage, and that the right to repurchase must be exercised within the time limited, or it would be lost; *Hoopes v. Bailey*, *supra*.

9. *Same: Case in judgment.* C., under an agreement with M. and his creditor, purchased M.'s property at a trust sale thereof, for M.'s benefit, and executed his own note to the creditor for M.'s debt, and in satisfaction of it; M. went into possession of the slaves under an agreement that he would work them and pay the note of C.; but M. soon afterwards desiring to remove to Texas delivered the slaves to C., who thereupon executed an instrument in writing, in which he recited the purchase, and that he had given his note therefor, for \$6360, and agreeing whenever M. should pay said sum to him or his executors, that he would "transfer" his right and title to him, and also enjoining it upon his legal representatives in case of his death to do the same upon payment to them. Fifteen years afterwards M. filed his bill to redeem: *Held*, that the transaction was a conditional sale and not a mortgage, and that as no time was limited for the re-purchase, the law was, that it should be done within six years, the period prescribed by the statute of limitations for barring suits for the recovery of slaves held adversely; *Magee v. Catching*, *supra*.

10. *Whether a gift or conditional sale: Case in judgment.* An administrator made a deed of gift of slaves to the minor distributees of the estate, expressing it to be for the consideration of love and affection; but on

the condition that the gift was not to vest, unless the guardians of the donees would release him from liability as administrator, on account of the donees' interest in the estate; a guardian was appointed for the donees, and he refused to make the release, but took a mortgage from the administrator on the slaves to secure that debt to the donees. There never was any delivery under the deed of gift: *Held*, that the deed was a conditional sale, and that the release of the grantor in the deed was a condition precedent to the vesting of the property in the grantees, and that the deed could not be treated as a gift, as there was no delivery under it; *Lusk v. McNamee*, 2 C. 58.

Confederate Money.

See CONFEDERATE STATES.

1. *Contracts based on Confederate money are valid.* See CONFEDERATE STATES, 1.

2. *Contracts payable in Confederate currency: Presumption as to.* All contracts made between the 1st of May, 1862, and 1st of May, 1865, are by statute, in this State, presumed to be payable in Confederate money, and it is the duty of the courts here to give effect to the statute; *Herrod v. Davis*, 43 M. 102; *Cowan v. McCutchen*, *Ib.* 207; *Mezeix v. McGraw*, 44 M. 100; and it will be error to render judgment by default for the amount of such a contract; a writ of inquiry should be awarded, so that the value of the Confederate States money at the time and place of the contract should be ascertained; *Cowan v. McCutchen*, *supra*.

3. *How valued.* The test of its value is at the date of the creation of the debt, and not at the time it fell due, and the value should be measured by legal tender United States treasury notes and not by gold; *Gray v. Harris* 43 M. 421.

4. *Right of agent to receive Confederate money.* An agent intrusted with notes payable in United States currency for collection, has no right to receive payment in Confederate States treasury notes, and if he do, he will be liable for the damages thereby occasioned; *Mangum v. Ball*, 43 M. 288.

Confederate States.

1. *Legality of contracts founded on Confederate States treasury notes.* Whether the original issue of Confederate treasury notes was illegal and void; *Quære?* But conceding that it was, this original taint of illegality in their issuance would not make any subsequent dealing of the people in them void; but any transaction between private parties based on them would be good and valid, if such transaction were not made with the intent to aid the Confederate States in their struggle for independence. The rule on this subject is, that where the contract grows immediately out of, and is connected with an illegal or immoral act, it is invalid, but if the promise be unconnected with the illegal act and founded on a new consideration, it is not tainted by the illegal act, though it be in

reference to the subject matter of the illegal act, and that be known to the promisee, and although he was the contriver of the illegal act; *Green v. Sizer*, 40 M. 530; S. P., *McMath v. Johnson*, 41 M. 439; *Beauchamp v. Comfort*, 42 M. 94; *Frazer v. Robinson*, *Id.* 121.

2. *Status of Confederate States: Their power and authority.* Whatever may have been the constitutional and legal status of the Confederate States, it is true they were a belligerent power, exercising sovereignty, and the functions of government, and the people within the limits in which they exercised their authority, were bound to submit to them and the laws they imposed and a conformity to these laws by the people in their private dealings and contracts with one another, is to be held as good and valid, after the overthrow of the Confederate States; the war having been waged by the United States against the political status of the Confederate States, and not against the private rights and property of the individual citizen; *Id.*

3. *Confederate States, belligerents: And their people enemies, not traitors.* During the late war between the States, all the people South of the Confederate lines, whatever their personal views may have been, were held and treated by the United States as enemies, and their property liable to seizure and confiscation, and the territory taken by the Federal forces as they advanced, was considered as conquered territory. The occupation by the Federal forces of Confederate territory did not *eo instanti* change the relation of the inhabitants from that of enemies to that of subjects of the United States. This could only be done by an occupation which had continued long enough to be considered as permanent.

A recent occupation, which turned out in the end to be permanent, would not on account of the subsequent permanency have the effect, while it was still recent, of changing the relation. On the fall of New Orleans in May, 1862, the relation was not changed by the lapse of six days, from the date of the occupation, though the occupation afterwards ripened into a permanent possession; *Murrell v. Jones*, 40 Miss. 565 (citing *Mr. Alexander's Cotton Case*; *The Venice*, 2 Wallace, 258; *The Circassian*, *Id.* 135).

4. *Same.* And until this relation was changed by an occupation actually continued for a sufficient length of time, to make it permanent, the people were not entitled to the protection of the laws of the United States, nor subject to them; but the laws in force when the occupation took place, remained (including even those which were of a hostile character to the United States). Hence, a contract made in Confederate money, during such occupancy, whilst it was yet but temporary, not having ripened into permanency, would be as valid, as if made when the Confederate States had undisputed sway; *Id.*

5. *Laws of conquered remain in force, until changed by conqueror.* Moreover, the rule of the law of war, which allows the ancient laws to remain in force among a conquered people until the same are changed by

the conqueror, would uphold such a contract when made after conquest, and before any change in the laws was made, and especially would this be so, when the military authorities of the conqueror, expressly permitted their operation so far as they relate to any particular contract; *Id.*

6. *Same: Butler's order, in New Orleans, about Confederate States money.* General B. F. Butler, after the occupation of New Orleans by the Federal forces, by express order, allowed the circulation of Confederate treasury notes, until the 27th May, 1862. As the representative of the conquering power, he had the right to do this, and his order had the force of law, and the effect to make legal, transactions in that currency during the time limited for its circulation; and the courts of this State will give effect to contracts so made in New Orleans, notwithstanding the decisions of the courts of Louisiana, that they are void, when made before the fall of New Orleans into the hands of the Federals; *Id.*

7. *Validity of legislation by States composing the Confederate States.* The States composing the Confederate States were, before secession, *States de jure*, and when they seceded, they claimed to be sovereign, and to have the unqualified allegiance of their citizens. This claim they maintained by force of arms for years, exercising during all that time, within their limits, all the powers and rights of government, and keeping expelled therefrom the authority of the United States' Government. The war which ensued was a civil war, and the parties to it belligerents. During the war, the United States had lost the power of protecting citizens within the Confederate States limits, and the correlative duty of obedience on the part of the people was thereby dissolved. The people of the Confederate States were recognized and treated by the United States as enemies, without reference to their individual opinions, and they were subject to the power and authority of the hostile State and Confederate government. The people of the Confederate States were not left in anarchy by secession and war, but the governments therein erected had control and power over them, and the acts of such governments were valid and binding on the people, so long as they existed. And after those governments were overthrown, the laws passed by them to regulate the private affairs and rights of property of the people remained in full force, so far as they were not inconsistent with the Constitution of the United States. Hence, all the laws passed by the several Legislatures of the States which composed the Confederate States, remained in full force, after the establishment of the authority of the United States over them, so far as they were not inconsistent with the Federal Constitution; *Hill v. Boyland*, 40 M. 618; S. P., *Buchanan v. Smith*, 43 M. 90; *Mister v. McLean*, *Id.* 268.

8. *Same.* Nor does it change this result, to concede that the Ordinances of Secession were void; for if they were null and void they could not have the effect to abolish the States

which under that view still remained members of the Federal Union, and capable as such of exercising all the powers of legislation, which the States of the Union were authorized to exercise. Nor does it militate against the validity of such legislation that the members of the State Legislatures enacting these laws, had not taken an oath to support the Constitution of the United States, as provided for in that instrument; for that provision is merely directory, and does not have the effect to annul the official acts of the officers of the States who failed to observe it. And, moreover, it is a well settled principle of the common law, that the acts of a *de facto* officer in possession of an office, and under color of title actually exercising its powers, are good and valid as to third persons and the public, however wrongful may be his possession; and this same rule is recognized by the statute, Rev. Code of 1857, p. 138, art. 194; *Ib.*

9. *Same.* And the validity of these laws, during the time that the Confederacy existed, is maintainable upon another ground, if it be conceded that the government was not lawful. In that view, the Confederate States, having expelled by force the United States Government from the country, would be regarded as conquerors of the territory for the time being; and it is a well settled rule of international law, that the temporary conquest by one belligerent, of a part of the territory of another, gives to the conqueror for the time being, the right to govern and make laws for the territory so conquered; and rights growing under such laws, will on the restoration of the territory to its rightful owners be respected, though the laws themselves will no longer have force; *Ib.*

10. *Same: Force of Confederate legislation which is hostile to the Union.* And the legislation of the Confederate States, though hostile to the Union, and in violation of its alleged paramount right of sovereignty, being the act of a government having force and power to enforce its decrees, and require obedience to its laws is valid, so long as the authority of the United States is expelled; and it gives legal validity to all acts done in pursuance of it, whilst it was in force. Hence, an administrator is entitled to a credit for Confederate State Treasury notes which he collected and paid out in taxes to the Confederate States; and also, such money paid out in the purchase of Confederate State bonds, in pursuance of a law of the State allowing it; *Trotter v. Trotter*, 40 M. 704.

11. *Proclamation of the President to emancipate slaves.* The abolition of slavery in this State dates from the Constitution of 1865, and not from the 1st day of January, 1863, the time when President Lincoln's proclamation abolishing slavery went into effect. That proclamation had no power to emancipate slaves outside of the Federal lines; *McMath v. Johnson*, 41 M. 439.

12. *Effect of Ordinance of Secession on State laws then in existence.* The Ordinance of Secession, and the war which followed,

and the occupation of the territory of this State by the Federal forces, did not destroy the existence of the State as a sovereign State, *de jure et de facto*. The laws existing when the ordinance was passed, continued in force, except when changed by the Legislature of the State, and a violation of these laws, at any time intervening the passage of the ordinance on the 9th of January, 1861, and the restoration of civil government in the Fall of 1865, is punishable just the same as if secession had never taken place; *Harlan's Case*, 41 M. 566.

13. *Power of President of the United States to establish courts, &c., on the overthrow of the Confederate States.* On this subject, see CONSTITUTIONAL LAW, 111 to 114; and *Scott v. Bilgerry*, 40 M. 119.

14. *As to status of Confederate States.* See further, INTERNATIONAL LAW, 10 to 17.

15. *Contract for substitute in Confederate States Army.* A promissory note given in consideration that the payee would serve as a substitute in the Confederate army, in the late war, is contrary to the public policy of the United States, and illegal and void; *Pickens v. Eskridge*, 42 M. 114.

Conflict of Laws.

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I. Force of Foreign Laws and Comity.

1. *Foreign law has force only by Comity.* The laws of a State have not, *ex proprio vigore*, any extra-territorial operation; their force and effect in another State depend entirely upon the comity of nations, of the extent of which each State is the judge, when rights claimed under a foreign law are sought to be enforced in its courts; *Mitchell v. Wells*, 8 G. 235.

2. *Extent of this comity.* No State is bound by this comity of nations to enforce or hold valid in its courts of justice, any contract made or act done in a foreign State, which is injurious to its rights, or violates its laws, or contravenes its policy, or offends the morals of its people, or which would exhibit to her citizens an example pernicious and detestable. *Mitchell v. Wells*, *supra*. S. P., *Hinds v. Brazeale*, 2 H 837; *Ivey v. Lalland*, 42 M. 444. Nor will it enforce a contract made elsewhere by its own subjects in fraud of its own laws; *Hinds v. Brazeale*, *supra*. Nor will it allow the *lex solutionis*, where the contract is made in it to be performed elsewhere to validate the contract, if made in fraud of its laws; *Brown v. Nevitt*, 5 C. 801.

3. *Same: As applied to foreign wills disposing of personality.* Every State has the right to regulate and control all property, real and personal, within its limits, and to fix the rules for its transfer both *inter vivos* and by testament, and each State may, as to

property (real or personal) within its limits, adopt or reject, in its discretion, the law of the domicile of the testator in case of a foreign will; and whether it adopt or reject the *lex domicilii*, dispositions of property in its own limits, made as it directs, are valid and binding everywhere; *Wells v. Wells*, 6 G. 638.

II. Proof of Foreign Law.

4. *They must be proven.* Courts do not take judicial notice of foreign laws, but they must be proven to the court as a fact; *Martin, Aiken & Co. v. Martin, Pleasants & Co.*, 1 S. & M. 176; *Henry v. Halsey*, 5 S. & M. 573; *Swett v. Dodge*, 4 S. & M. 667; *Hemphill v. Bank of Alabama*, 6 S. & M. 44; *Stewart v. Swanzy*, 1 C. 502. And if a contract be made here in violation of our law (as in case of usury,) but payable in another State, the court will not presume that because it violates our law, it also violates the foreign law; *Martin, Aiken & Co. v. Martin, Pleasants & Co., &c., supra*. Now by statute (Rev. Code of 1857, p. 516, art. 26) the courts are required to take judicial notice of the laws of the United States, and of States of the Union and Territories of the United States, and of the District of Columbia.

5. *Foreign laws: How proven.* In general, foreign laws are required to be verified by the sanction of an oath, but where the law is written it may be proven by an exemplification under the great seal of the State, or by a copy proved to be true by a witness who has examined and compared it with the original, or by the certificate of an officer properly authorized by law to give a copy, the certificate also being properly authenticated. But foreign unwritten laws, usages and customs must ordinarily be proven by parol; *Stewart v. Swanzy*, 1 C. 502.

6. *Printed statute of other States.* By statute, Rev. Code of 1857, p. 216, art. 225, books containing the statutes of a State or Territory of the Union, and purporting to be printed by authority, are evidence of such statutes.

III. Lex loci contractus, et solutionis.

7. *When lex loci contractus governs.* Where a contract is to be performed in the same State in which it is made, the law of that State governs; *Brown v. Freeland*, 5 G. 181; *Carroll v. Renich*, 7 S. & M. 798. And if the contract be void where made, it will be void everywhere. A contract based on Confederate money is void by the decisions of the courts in Louisiana, and will be so held here when the contract is made there; *Ivey v. Lalland*, 42 M. 444. As to its validity and construction it is governed by the law of the place where it is made. There is some dispute where a question arises as to the disability of a married woman, whether we are to look to the law of the matrimonial domicile, or of the actual domicile of the wife, when she made the contract, or the law of the place where the contract was made; but the weight of authority is in favor of the matrimonial domicile; *Partee v. Silliman*, 44 M. 272.

8. *When lex solutionis governs.* When a contract is made in one State to be performed in another, it is as to its nature, construction and validity, to be governed by the law of the place of performance; *Brown v. Freeland, supra*; *Dalton v. Murphy*, 1 G. 59. And this is also true of the form of the contract, where form is essential to its validity; *Dalton v. Murphy, supra*; *Martin, Aiken & Co. v. Martin, Pleasants & Co.*, 1 S. & M. 176.

9. *Same: Examples.* Thus, where a note is made here payable in Louisiana, it is governed by the law of that State, which rejects equities in favor of the maker as against innocent holders for value; *Emanuel v. White*, 5 G. 56; *Miller v. Mayfield*, 8 id. 688. And so of a bill of exchange drawn in this State, but payable in Louisiana; *Fellows v. Harris*, 12 S. & M. 462. But if the bill be not accepted, it imposes no obligation on the drawer to pay it at the place where it is made payable, and is consequently payable here, and is governed by our law, and subject in the hands of an innocent holder to equities in favor of the maker against antecedent parties; *Wood v. Gibbs*, 6 G. 559.

10. *Same: Examples as to usury.* And so if a note be made here, but payable in another State, bear a greater rate of interest than is allowed here, it will not be usurious, if in accordance with the law of the State where it is payable; *Martin, Aiken & Co. v. Martin, Pleasants & Co.*, 1 S. & M. 176; *Henry v. Halsey*, 5 S. & M. 573; *Brown v. Nevitt*, 5 C. 801. But the note must not be made payable elsewhere with intent to evade the usury laws of this State; *Brown v. Nevitt, supra*. Nor does this rule apply where usury inheres in and is a part of the original contract made here, and constitutes a part of the principal sum. It seems it applies only to the rate of interest to be collected on the face of the principal. For in such cases the courts here will not enforce a contract made in violation of our laws, merely because it was to be performed elsewhere; *Brown v. Nevitt, supra*.

11. *Same: Usury: When lex loci contractus governs.* But this rule which prescribes the law of the place of performance as the rule to govern the contract, is based upon the presumed intention of the parties, that such should be the case. And when it appears that the law of the place of the contract was intended by the parties to govern, it will do so. And the parties will not be presumed to contract with reference to a law which the contract violates. Therefore if the interest reserved be usurious by the *lex solutionis* but legal by the *lex loci contractus* they will be presumed to contract with reference to the last law, and the rate will not be usurious; *Brown v. Freeland*, 5 G. 181.

12. *Same: Examples.* But this last rule is not applied in any other case. Thus, where a married woman domiciled in this State, being in Alabama, made a deed in trust conveying her slaves in this State, and authorizing them to be held under the deed here, it was held that the trust deed was void, because not executed according to the laws here, al-

though it was made in strict accordance with the laws of Alabama where it was made; *Dalton v. Murphy*, 1 G. 59.

13. *Marriage contract.* A marriage contract made in the State of Tennessee, where the parties were then domiciled, and where the marriage was consummated, is governed by the laws of that State, and must be construed accordingly. But it would seem that the rule would be otherwise if it were made with a view to its execution elsewhere; *Curroll v. Renich*, 7 S. & M. 798.

14. *Foreign deed in trust.* A deed in trust made in the State of Tennessee, conveying slaves in that State, the *cestui que trust* also residing there, is governed by the laws of that State including the law for its registration, although the trustee resided in this State, if no duty be imposed on him by the deed requiring a removal of the slaves hither, unless it be clearly shown that the conveyance was intended to take effect here, and not in Tennessee; and a subsequent removal of the slaves to the State does not *per se*, amount to such proof; *Wyse v. Dandridge* 6 G. 672.

15. *Foreign trust deeds need not be recorded here.* And the rights of the *cestui que trust* under such a deed will be protected in this State against the creditors of the grantor, without registration here, but not against the *bona fide* purchasers from the trustee acquiring a legal title, although the deed were registered in Tennessee; *Id.*

See REGISTRATION, 3, 4, 5.

16. *Sale in one State of land lying in another.* When land lying in Louisiana is sold in this State, and the notes for the purchase money taken payable here, in a suit on these notes against vendee, who resisted collection on the ground of a failure of title; it was held that the title to the land was to be adjudicated by the *lex rei sitæ*, and if by that law it was bad, then the defence of failure of consideration was to be regulated by the law of this State; *Glenn v. Thistle*, 1 C. 42.

IV. Assignments of Commercial Paper, and Title to Personality.

17. *Title of personality and promissory notes governed by lex rei sitæ.* Title acquired to personal property according to the *lex rei sitæ* will be deemed valid, and recognized everywhere. Promissory notes are regarded rather as personal property than choses in action; and hence if by the law of the place where a promissory note is, and a transfer of it is made, the legal title passes by such transfer to the assignee, he can sue on that title in this State. Thus, a foreign executor having possession of a promissory note, belonging to his testator, and made by a citizen of this State, may, if allowed by the law of his domicile, make a valid legal assignment of the note so as to authorize the assignee to sue here, notwithstanding the executor himself could not sue here, by reason of his not having taken out letters in this state; *Owen v. Moody*, 7 C. 79.

18. *Same.* But whether a promissory note, negotiable by the laws of this State, but made and transferred in a State by whose laws it is not negotiable, would be treated in this State as a negotiable note, so as to allow the transferee and holder, under an assignment in the State where the note was made, to sue on it here in his own name; *Quære?* *Hemphill v. Bank of Alabama*, 6 S. & M. 44. But though by the law of the place an assignment of a chose in action would vest the legal title in the assignee, yet if by our law he would only get an equitable title, the assignee cannot sue on it in his own name here in a court of law; *Tully v. Herrin*, 44 M. 626; *Kirkland v. Lowe*, 4 G. 423.

19. *Same: Assignment of note or bond secured by mortgage on realty here.* A bond made in this State, and payable here, must be construed, and its payment enforced, according to the law of this State; but whether an assignment of such bond in another State valid according to the law of that State, but not in accordance with the law of this State, is valid here or not; *Quære?* But it seems it would be valid. If such bond be also secured by mortgage on realty in this State, an assignment of it in a foreign State, which is invalid according to its laws, will, nevertheless, be good in this State, if valid according to our laws, at least to the extent of giving the assignee his right according to our law, to enforce the debt against the mortgaged property; *City of Natchez v. Minor*, 9 S. & M. 544; *Murrell v. Jones*, 40 M. 565.

20. *Same: As to priority of payment.* It seems where a note made payable in Louisiana and secured by mortgage on real and personal property situated in this State, is assigned in Louisiana, that the right of the assignee, so far as it grows out of the contract of assignment, as to equality or priority of satisfaction out of the mortgaged estate, with other notes made by the mortgagor to the mortgagee, and secured in the same mortgage on the same property, will be governed by the law of Louisiana, where the assignment was made; but whether this be so or not, still the provisions of that law are important as indicating the intention of the parties to the assignment. Hence, where there were several notes, being instalments of the same debt, secured by mortgage on real and personal property in this State (there being no preference or priority in payment secured by the mortgage), and the notes being payable in Louisiana, the mortgagor assigned the first falling due, which by the law of Louisiana gave the assignee a right to priority in satisfaction, our law being that no such priority arose from the assignment *per se*, but only where it was the intention of the parties that such priority should be conferred; it was held that in ascertaining the intention of the parties as to giving priority on the assignment, we could look to and consider the law of Louisiana in force when the assignment was made; *Bank of England v. Taylor*, 1 C. 173.

V. Foreign Wills and Successions.

See PROBATE COURT, 39, and WILLS, 97, et seq. BASTARDY, 2.

21. *Statute: Probate of copy of foreign will.* By statute (H. & H. 388), a will probated in another State or country, proven according to its laws, and which devises property in this State, may be admitted to probate and record here, and a copy from that record so made in this State is admissible in evidence in the courts of this State as copies of wills originally probated and recorded here; *Montgomery v. Milliken*, 5 S. & M. 151. But this does not apply to a copy of a domestic will probated in a foreign State where it was made and the testator died, but being domiciled here; in such case as to property situated here, the original will must be probated here according to our laws, in the first instance; *Sturdevant v. Neill*, 5 C. 157; *Morris v. Morris*, 1b. 847.

22. *Foreign will cannot be first probated here: Exceptions.* But generally a foreign will cannot be probated here in the first instance, and if so probated the probate may be set aside at any time, without reference to the statute prescribing five years in which to contest wills; *Bailey v. Osborne*, 4 G. 128. The courts of this State have, however, jurisdiction to probate in the first instance the will of a testator domiciled in another State at the time of his death, if there be at that time property belonging to the testator situated in this State; *Still v. Corporation of Woodville*, 9 G. 646.

23. *Probate of domestic will in a foreign jurisdiction.* And upon the same principle, the probate in a foreign jurisdiction of the will of a testator who died there, but had his domicile in this State at the time of his death, though not effectual to dispose of his property situated here (*Sturdevant v. Neill*, 5 C. 157; *Morris v. Morris*, 1b. 847), is yet valid to dispose of the testator's property in such foreign State where he died, and the title of the devisee will be protected in this State under the foreign probate, if the property be subsequently removed hither; *Wells v. Wells*, 6 G. 638.

24. *Foreign will and probate, as to realty here.* An authenticated copy of a foreign will having on its face the requisites of a will to pass realty according to the laws of the State, and shown to have been duly proven and recorded in the State where the testator was domiciled, may be admitted to probate in this State, and will be effectual to devise realty here; *Crusoe v. Butter*, 7 G. 150. The title to realty passes only according to the *lex rei sitæ*, and a foreign will of realty has no effect to pass title until probated here; *Ib.*

25. *Foreign will, how construed.* But whilst this is so, yet the nature, meaning, and interpretation of a foreign will of immovables is to be determined by the *lex domicilii testatoris* and not by the *lex rei sitæ*; *Crusoe v. Butter*, *supra*.

26. *Same: As to capacity of testator.* So much of a will as relates to realty situated in

a jurisdiction foreign to the domicile of the testator is to be governed by the law of the place where the land is situated; thus, if by the law of the domicile the testator is incapable of devising by his will, land acquired by him after the date of the will, such incapacity will not prevent such devise taking effect as to land situated in another State by whose laws it is valid; *Doe v. Wynne*, 1 C. 251. But as to all property situated in the domicile of the testator, it is to be construed everywhere by that law; *Sale v. Saunders*, 2 C. 24; and this includes personality and promissory notes as well as realty; *Owen v. Moody*, 7 C. 79; and all personality wherever situated, for it has no *situs*, but is supposed to accompany the testator wherever he is domiciled; *Garland v. Rowan*, 2 S. & M. 617. But as a qualification of the force of the *lex domicilii*, it must be observed that it has no force outside of the State, and that other States may adopt or reject it, as to property within their limits, according to their discretion; *Wells v. Wells*, 6 G. 638.

27. *Foreign will has no effect without probate here.* A will is no evidence of title till probated in the jurisdiction where the property disposed of was situated at the testator's death; *Wells v. Wells*, *supra*.

28. *Same: Foreign executor.* But whilst it is necessary to probate and record here a foreign will disposing of property situated here at the testator's death; it is not necessary that an executor nominated in such foreign will should take out letters testamentary here, if he has qualified as such according to the law of his domicile, to enable him to execute a power specially conferred by the will to sell realty situated in this State; *Crusoe v. Butter*, 7 G. 150.

29. *Successions.* It is now a well settled principle of international law, that the distribution of a deceased person's personal estate wherever it may be situated, is to be governed by the law of the domicile of the decedent. Personality has no *situs*, and is supposed to follow the person of the owner wherever he may be domiciled; *Garland v. Rowan*, 2 S. & M. 617; *Riley v. Moseley*, 44 M. 37; and this rule includes slaves as well as other personality, except, perhaps, where, in the decedent's domicile slavery is prohibited; *sed Quære? Ib.* But creditors are marshalled and priorities settled according to the *lex situs*; *Riley v. Moseley*, *supra*.

30. *Same.* And the rule applies to all rights of succession to the widow and husband as well as heirs; *Garland v. Rowan*, 2 S. & M. 617; but as to husband and wife the rule was held not to apply in *Duncan v. Dick*, W. 28. See DOWER, 32, 33, 33a.

31. *Same.* But it is further held, that the rule only applies to property of the decedent which he owned as his absolute right, and which therefore after his death goes to such person as the law fixes as his heir or successor; and it does not extend so as to affect vested rights in property held by the decedent, fixed by contract regulating the ownership of the property after his death.

Such property after the decedent's death will go as the contract determines; *Lyon v. Knott*, 4 C. 548.

32. *Same*. Nor is the rule of universal application; it is never applied when the law of the domicile is repugnant to the laws and policy of the State in which it is sought to be enforced; or where its enforcement would be injurious to the citizens of the State. The *lex domicilia* has no extra-territorial force except by comity, and the law of comity has no force except what each State is willing to allow it; and no State is bound by comity to another State to give that other State's laws, force and operation within its own jurisdiction, when such laws are injurious to its citizens or contrary to its policy; *Mahormer v. Hooe*, 9 S. & M. 247. And in order to secure its rejection in any particular State, it is not necessary that there should be any special interdiction prohibiting its operation within that State, but the courts of the State in which it is sought to be enforced will refuse to enforce it, if upon consideration of its constitution and laws and their object and spirit, the foreign law is repugnant to the policy thereby indicated; *Mahormer v. Hooe*, *supra*, S. P., *Wells v. Wells*, 6 G. 638.

33. *Same: Statute of 1857*. But the rule of comity so far as the distribution of intestate's property is concerned, has been repealed in this State, by the statute of 1857, which enacts that, "All personal property situated in this State shall descend and be distributed according to the laws of this State, regulating the descent and distribution of such property regardless of all marital rights which may have accrued in other States, and notwithstanding the domicile of the deceased may have been in another State; and whether the heirs and persons entitled to distribution, be in this State or not; and the widow of such deceased person shall take her share in the personal estate, according to the laws of the State;" Rev. Code, p. 452, art. 110.

34. *Same: Construction of the statute*. But the statute only applies to cases of intestacy, and hence where the husband made a will and died, the wife's renunciation of the will in the forum of his domicile was held not to produce intestacy as to her in this State, and to give her the rights of a widow domiciled here, who had renounced, but only such rights as renunciation gave her by the law of the domicile; *Slaughter v. Garland*, 40 M. 172.

See HUSBAND AND WIFE, 179.

34a. *As to binding effect of construction of a foreign will in the jurisdiction in which it was made*,

See RES ADJUDICATOR, 36.

34b. *As to conflict of laws in relation to marital rights*,

See HUSBAND AND WIFE, 174, *et seq.*

VI. Foreign Insolvent Laws.

35. *Effect on creditors in another State*. Insolvent proceedings in one of the United States, does not discharge the insolvent from a debt due to a creditor residing in another

State, if he has not assented to them; *Beer v. Hooper*, 3 G. 246.

36. *Effect of, in assigning debts due insolvent in this State*. An assignment under the insolvent laws of Louisiana, is insufficient to transfer to the syndic, a debt due to the insolvent by a citizen of this State, as against the claim of a subsequent attaching creditor of the insolvent; *Beer v. Hooper*, *supra*. But as between the syndic and the debtor residing here, the assignment will be recognized here, so as to vest the right of the insolvent in the syndic, and to authorize the latter to collect the debt; *Kirkland v. Lowe*, 4 G. 423.

37. *Same: As to legal title*. But such an assignment will not have the effect to vest the legal title to an open account due the insolvent, in the syndic, so as to authorize the syndic to sue on it in his own name in this State. As to who holds the legal title of a case in action so as to authorize him to sue, that is governed by the *lex fori*; *Ib.*; S. P., *Tully v. Herrin*, 44 M. 626. See *ante*, 17, *et seq.*

VII. Miscellaneous.

38. *Interest: Trustee*. A trustee receiving money in a foreign State for a *cestui que trust* residing here and using it, must account for interest according to the law of such foreign State; *Neill v. Neill*, 2 G. 36.

39. *Registration of foreign deed*. A foreign deed in trust, need not be recorded here, though the property afterwards be removed here; *Wyse v. Dandridge*, 6 G. 672; *Hundley v. Mount*, 8 S. & M. 387; *Palmer v. Cross*, 1 S. & M. 48; *Prewett v. Dobbs*, 13 S. & M. 431. *Presley v. Rodgers*, 2 C. 520; *Parker v. Stacy*, 3 C. 471.

40. *Wife's separate estate acquired in foreign State*. The wife's *jus disponendi* over her separate estate acquired by her when domiciled in a foreign State, is governed by the laws of that State, and is neither enlarged nor restricted by our statutes upon her subsequent removal hither with the property; *Block v. Cross*, 7 G. 549.

41. *Same: Law of domicile governs*. The law of the domicile of the marriage fixes the rights of the husband and wife to property acquired there, and rights so acquired and vested will be recognized and enforced everywhere; and where there is a change of the domicile, the acquisitions made in the new domicile will likewise be regulated by the law of that domicile; *Lyon v. Knott*, 4 C. 548.

See HUSBAND AND WIFE, 174 to 179.

42. *As to legitimacy or the contrary: The law of domicile of origin governs*. Where by the laws of a State where a bastard is born, and in which his parents subsequently intermarry, such subsequent intermarriage, accompanied by a subsequent acknowledgment of him by them, does not legitimate the bastard, that status will adhere to him everywhere, notwithstanding the removal of the parents with the bastard to this State, and their acknowledgment of him here, where there is a statute conferring legitimacy on bastards

by such subsequent marriage and acknowledgment; *Smith v. Kelly*, 1 C. 167.

43. Courts follow the construction of statutes placed on them where enacted. The courts of one State, in construing the statutes of another State, will follow the construction put on it by the courts of the State where they were enacted; *Botanico Med. College v. Atchinson*, 41 M. 188. But when the High Court of the State had put a construction upon a will made in Tennessee, and the Supreme Court of that State afterwards put a different construction on the will, it was held that the latter decision could not be pleaded as conclusive, unless the title to the property had been perfected by the devisee getting possession of it in accordance with the decision; *Bridgeforth v. Gray*, 10 G. 136.

44. Foreign statutes of limitations. The statute of limitation of one State cannot be technically pleaded in another; but where such a statute not only bars the remedy, but confers title, the title so acquired will be recognized and protected everywhere; *Fears v. Sykes*, 6 G. 633.

45. As to effect of foreign judgment construing a will,

See RES ADJUDICATA, 36.

Consideration.

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I. What is a Sufficient Consideration.

1. Benefit to promisor: Loss to promisee: Instances. Any benefit resulting to the promisor by the act of the promisee, however inadequate in value as compared with the promise the benefit may be, is a sufficient consideration. So, any loss, trouble, or inconvenience sustained by the promisee, will be a good consideration, though it be trifling, if it be not utterly worthless in law; and this is so, though the promisor obtain no benefit from the performance of the stipulated act by the promisee. Hence, the dismissal of a suit against the promisor, however ill founded, or the withdrawal of objections to the account of the promisor, rendered as administrator of an estate, though the promisee had no right to make them, is a sufficient consideration for a promise by the promisor to release the promisee from a debt due to the promisor; *Byrne v. Cummings*, 41 M. 192. And hence, also, if a debtor whose property is about to be sold at a forced sale, contracts with another to purchase it for his benefit, the agreement, if consummated, will be upheld without any further consideration, than the fact that the debtor trusting to it, neglects to make a more advantageous sale; *Magee v. Catching*, 4 G. 672. But it is not alone sufficient that the consideration of a promise should be beneficial to the promisor, or prejudicial to the promisee, it must also arise out of a legal act; *Lindsey v. Sellers*, 4 C. 119.

See ACCORD AND SATISFACTION, 4; and post, 24.

1a. Same: Removal and surrender of situation. The defendant agreed to convey an undivided one-half interest in certain lands on which a college building was erected, and to a bill filed for a specific performance of the agreement, he insisted as a defence, that the agreement was without consideration; but it was shown that \$6,000 had been subscribed at another place to build a college for the complainant, and that he had a salary there of \$600 a year as a preacher, and that in consequence of defendant's proposition to him to erect the college on the land in controversy, he had abandoned the other college and his pastoral charge, and had also agreed to devote his time as agent for the proposed college, in raising subscriptions, and procuring patronage for it, and that he had actually raised several hundred dollars of subscriptions; it was held that these acts constituted a sufficient consideration for the agreement to convey; *Whitworth v. Harris*, 40 M. 483.

2. Voluntary act of promisee: One promise consideration for another. One lawful promise is a good and sufficient consideration for another. Each promise being reciprocally the consideration of the other, and ordinarily in such cases there must be a binding promise on each side; but if a promise be made to one in consideration that he do a certain thing, which, however, he does not undertake to do, yet voluntarily does it before the promise is withdrawn, the voluntary performance is a good consideration for the promise. Thus, if the defendant agree to accept and pay for goods to be delivered by the plaintiff at a certain time and place, and the plaintiff, without ever binding himself to make the delivery, yet do make it, according to the terms of the defendant's agreement, the defendant will be bound by his promise to accept and pay for them; *Crawford v. Avery*, 6 G. 205.

3. Promise to pay debt of another. As a general rule, a promise to pay the debt of another, without any new consideration moving to the promisor, if made after the debt was created or the credit given, is void for want of consideration; but the rule is otherwise, if the original credit was given at the request of the promisor, on the faith of his promise to make the guaranty; for in such case the subsequent guaranty will relate back to the original request and promise, and become a part of the original transaction; *Standley v. Miles*, 7 G. 434; *Wren v. Pearce*, 4 S. & M. 91. If the guaranty be executed contemporaneously with the original credit, that is sufficient; *Wren v. Pearce. supra*.

See BILLS OF EXCHANGE, &c., 11. GUARANTY, 9, 10, 11.

4. Forbearance of suit. A valid promise to forbear suit for a definite time, is a good consideration for a contract. It will support a promise by an administrator to pay the debt of his intestate; *Turner v. Brown*, 3 S. & M. 425. An agreement to stay execution for a definite period, is also a good consideration

for an agreement to release errors in the judgment; *Barnes v. Moody*, 5 H. 636. But if the demand is illegal, forbearance of suit is not sufficient to support a promise to pay it; nor will it estop the party from setting up the illegality; *Lindsey v. Sellers*, 4 C. 169. Nor will such forbearance to sue on a demand invalid for any other cause, be a good consideration for a promise by the alleged debtor to pay it; the original demand being void, forbearance to sue on it, can give no validity to a new promise to pay; *Newell v. Fisher*, 11 S. & M. 431.

5. *Same: Case in judgment.* A father having been induced whilst intoxicated to execute his note for an indebtedness of his adult son (which he had refused to do when sober); after the maturity of the note thus given by him, and when sober, promised the holder that he would pay it, if the payee would indulge him till next autumn: *Held.* that the note having been given by the maker in a state of intoxication, and without any consideration whatever, was void, and could not be rendered valid by the subsequent promise and forbearance; *Newell v. Fisher, supra.*

6. *Same: A distinction.* But the above rule does not apply so as to prevent a promise made by a third person to pay the debt of another in consideration of forbearance to sue *that person*, from being good, it not being necessary to the validity of forbearance to sue, as a consideration, that the forbearance should be in favor of the promisor; it is good if in favor of any valid debtor; *Waul v. Kirkman*, 13 S. & M. 599.

7. *Compromise of conflicting rights.* A compromise of a disputed matter is a sufficient consideration for a contract, and will bind both parties to the settlement when made without fraud; *Long v. Shackleford*, 3 C. 559. So a compromise of conflicting and doubtful claims, or the giving up a suit to try a question concerning which the law is then doubtful and unsettled, is a sufficient consideration to pay a stipulated sum; *Field v. Weir*, 6 C. 56.

See GUARANTY, 13.

8. *Surrender to distributee of ancestor's debt.* The surrender to a distributee of a debt against his ancestor's estate, is a sufficient consideration for a note executed by him to the creditor, and if he makes the defence of failure of consideration, he must show that the debt so surrendered was invalid; *Calhoun v. Calhoun*, 8 G. 668.

9. *Discount of note by bank: Certificate of deposit.* It is not essential that a bank discounting a note should pay the proceeds to the maker; if he elect he may take a certificate of deposit of the amount from the bank, and this will be a good consideration to support the note; *Miss. R. R. Co. v. Scott*, 7 H. 79.

10. *Renewal of note, including interest as principal.* If the debtor give new notes falling due in *futuro* as collateral security for a debt then due by him, and embraces as principal in the new notes the interest which would be due on the old notes, thus increasing the

fund which would draw interest, this is a sufficient consideration for an agreement to forbear suit on the old notes till the new notes fell due; *Lyon v. Sanders*, 1 C. 530.

See PRINCIPAL AND SURETY, 13, 14.

11. *Prepayment of interest a valid consideration.* The prepayment of interest not due, is a valid consideration for a promise to forbear suit; *Dubuisson v. Folkes*, 1 G. 432.

12. *Subscription to railway co.: Purchase of shares in a corporation.* The right thereby secured to participate in the franchise of a railway company, is a sufficient consideration to support a subscription for stock in it; *Thigpen v. Miss. Cent. R. R. Co.*, 3 G. 348. And a sale of shares in an incorporated medical college is a good consideration for a promise to pay for them; *Botanico Med. College v. Atchinson*, 41 M. 188.

13. *Voluntary reciprocal subscriptions.* Where there are reciprocal subscriptions for a general object, as subscriptions to the endowment fund of a literary institution, the subscriptions are mutually valuable considerations for each other, and they may be enforced in law; *Cook v. Whitfield*, 41 M. 541.

14. *Procurement by one co-surety of partial payment by principal.* The procurement by one surety of a partial payment to be made by an insolvent principal, is a sufficient consideration for a promise made by the other surety to release the former from contribution for the balance; *Warren v. Whitesides*, 5 G. 17.

II. Insufficient and Illegal Consideration.

1. Insufficient.

15. *Benevolence.* A court of equity will not enforce specific performance of a contract founded on mere benevolence without any valuable consideration; *Kerr v. Calvil*, W. 115.

As to effect of moral consideration, see HUSBAND AND WIFE, 1, 2.

16. *Parol agreement to sell land.* A parol agreement for the sale of land, is not a sufficient consideration to support a contract. For this reason, where a debtor, without the creditor's signing the same, executed a deed in trust on land belonging to his creditor in which it was recited, that upon payment of the debt the creditor was to convey the land to him; it was held that the deed was void, and that an agreement of a third party to pay the debt thus attempted to be secured, in consideration that the debtor should convey to him the land embraced in the deed, was also void; *Callett v. Bacon*, 4 G. 269.

17. *Promise to pay a debt already paid.* If a debt be once paid, though so as to realize nothing to the creditor, a subsequent promise by the debtor to pay it again, is void. Hence, if the purchaser of goods endorse to the seller in absolute payment of the price, a note on a third person, his subsequent promise to pay the price of the goods made after the dishonor of the note, is void for want of consideration to support it; *Wright v. Clark*, 5 G. 116.

18. *Pre existing debt of another* A note given for the pre-existing debt of another is without consideration, unless it be given in extinguishment or satisfaction of the debt; but if taken as conditional payment only, and it be transferred by the payee, this makes it an absolute payment, and is therefore binding in the hands of the transferee; *Wren v. Hoffman*, 41 M. 616.

19. *By administrator for debt of intestate.* So if a note be given by an administrator for the debt of his intestate, it is without consideration, unless he have assets; but it would be good if he afterwards claimed and received credit on his accounts for the debt thus paid; *Turner v. Brown*, 3 S. & M. 425.

See EXECUTOR AND ADMINISTRATOR. 166.

20. *Correction of mistake; Performance of legal duty.* Every man is bound in law to correct his own errors and mistakes, and he cannot make the correction of them a basis and consideration of a promise by the other party. A promise therefore made to procure such correction, which is but the performance of a legal duty, is void and without consideration; *Crowder v. Dick*, 2 C. 39. And if a ward escape from his guardian and go to live with another, but return to the guardian upon his promise to charge him nothing for board, this promise is void, it being the legal duty of the ward to submit to the guardian's will in this respect, without such promise; *Keith v. Miles*, 10 G. 442.

See GUARANTY, 13.

2. Illegal Consideration.

See CONTRACTS. 20 to 42a.

21. *Illegal consideration: Sale of improvements on public land.* It is not alone sufficient that the consideration of a promise be beneficial to the promisor, or prejudicial to the promisee, but it must arise out of a legal act. Hence, a note given for improvements on public land, where there is no right of pre-emption, is illegal and void, the improver being a mere trespasser in making them; *Lindsey v. Sellers* 4 C. 169; S. P., *Merrell v. Legrand*, 1 H. 150.

22. *Same: Sale of slaves illegally introduced.* Contracts founded on an illegal consideration are void, and when the parties are in *pari delicto*, courts will assist neither in enforcing the contract, nor in recovering what has been paid or delivered, or parted with in pursuance of the illegal contract; *Hoover v. Pierce*, 4 C. 627. Therefore the seller of slaves introduced into the State for sale contrary to law, being in equal fault with the buyer in making an illegal contract, cannot recover back the slaves when the buyer has refused to pay for them; nor hire for them whilst in his possession; *Id.*

23. *Same: Taint of illegality.* So if the contract be tainted with the original illegality, or grow out of, or be so connected with it, that it cannot be established without referring to an original illegal contract, it is void. Hence, where a principal brought a slave to the State for sale contrary to law, and the agent sold him and turned over the proceeds

to his father, who had knowledge of the principal's rights, the latter cannot recover from the father, for he cannot establish his right to the money without basing it on the original illegal importation and sale; *Wooten v. Miller* 7 S. & M. 380; S. P., *Deans v. McLendon*, 1 G. 343.

See CONFEDERATE STATES, 1. CONTRACTS, 23 to 27.

24. *Same.* So when the original contract is void for illegality, all compromises and renewals based on it are also void, so long as they can be traced back to, and rest on the original illegal consideration. Thus, where slaves were introduced into this State and sold contrary to law, and a draft taken in payment, and afterwards a note was given by the purchaser for the draft, and then the note was settled by the purchaser returning all the slaves then alive to the seller, and giving his note and security for a balance still due; it was held that the last note was void; *Collins v. McCargo*, 6 S. & M. 128; S. P., *Wooten v. Miller*, 7 S. & M. 380; *Coulter v. Robertson*, 14 S. & M. 18. And in this last case, a note given by a debtor of a debtor, to the creditor of the last debtor, in satisfaction of the debt of the last-named debtor, was held affected by the illegality of the consideration of that debt, though the maker of the note gave it for a valid debt which he owed; S. P., *Adams v. Rowan*, 8 S. & M. 624; *Torrey v. Grant*, 10 id. 89; *Kcuntz v. Price*, 40 M. 341.

See CONTRACTS, 20 *et seq.*, and *post*, 43.

25. *Part legal and part illegal.* Where part of the contract is legal and part illegal—if the two can be separated and stand independent and distinct—the legal may be good and the other bad; but if they are inseparable, the whole will be bad; *Bank of Newberry v. Stegall*, 41 M. 142.

See CONTRACTS, 30, 26.

26. *Port duties.* A note given to the city of Natchez for port duties to be collected, is in violation of the act of Congress admitting this State in the Union, and is illegal and void; *City of Natchez v. Trimble*, W. 376.

27. *Gaming consideration.* A contract based on a gaming consideration is void, and will be relieved against in equity, even after judgment; *McAuly v. Mardis*, W. 307. And the judgment itself is void, and may be set aside at the instance of any party having an adverse interest; *Smither v. Keyes*, 1 G. 179; and so if a note be won at cards, the winner gets no title; *Holman v. Ringo*, 7 G. 690.

28. *Presumption in favor of legality.* Where a note states a consideration so as to leave it doubtful whether it be legal or illegal, the presumption will be in favor of its legality. Thus, where the note recited it was given for "the public money due on a half section of land," it will not be construed to mean it was given for a debt due the United States, which would make it illegal; *Riley v. Vanhouten*, 4 H. 428.

See CONTRACTS, 20, 21.

III. Miscellaneous.

29. *Increased price of land on condition of failure to improve it.* Where the vendor

of a town lot took from the vendee a covenant to pay \$200 more purchase money, in case the vendor should fail for twelve months to erect a good brick building on the lot; it was held there was a valid consideration for the covenant and it was binding; *Brewer v. Bessinger*, 3 C. 86.

30. *Consideration of specialty: How attacked.* The consideration of a sealed instrument can be attacked only by special plea; *Cardiff v. Thighen*, 1 G. 180.

31. *Parol evidence admissible to show true consideration.* Parol evidence is admissible to show the true consideration of a promissory note, even though a consideration be specified in it; *Marsh v. Lisle*, 5 G. 173. Thus where the note states that it was "for machinery bought of S. and A." it may be proven by parol that it was given in fact in satisfaction of a debt due by S. and A. to plaintiff; *Ib.* And so if usury be set up, it may be shown that the consideration was loaned money, so as to avoid the plea of usury; *Luckett v. Henderson*, 12 S. & M. 334.

See EVIDENCE, 148, 149.

32. *Same: When land is sold.* Parol evidence is always admissible to show the consideration of a note, and when the sale of land is the consideration, it may be shown by parol what land the vendor professed to sell, though it cannot be shown by parol what interest he had in the land sold. Thus in an action on a note given by vendor to vendee, a witness for vendee stated that he was present at a sale made by vendor as administrator of J. M.; that a tract of land on which vendor resided was then sold at auction to vendee, and in answer to the question from vendee, if it was the land of J. M. that was sold, the auctioneer replied that it was the entire tract then occupied by vendor; upon which vendor then asked the witness if proclamation was not also made by the auctioneer, that the individual interest of vendor was to be sold; it was held that the question was legal and proper, notwithstanding other proof introduced by vendee, showing that the orders of the court under which vendor sold, were illegal and void, and that if the question were answered affirmatively, the deed from vendor to vendee might be introduced to disprove and rebut it; *Matlock v. Livingston*, 9 S. & M. 489.

33. *Same: As to consideration of a deed.* Parol evidence is inadmissible to show a different consideration in a deed from the one mentioned in it; *Kerr v. Calvit*, W. 115.

34. *The consideration of promise to pay another debt.* The statute of frauds requires a promise to pay the debt of another to be in writing, but unlike the English statute, it does not require the consideration of the promise to be in writing; that may be proven by parol; *Wren v. Pearce*, 4 S. & M. 91.

35. *Proof of consideration by circumstances.* The proof of the consideration of a note may be made by circumstances; and if the maker show a certificate of stock issued to him by the payee (who, it was shown, about that time was selling stock in a town site, which he had located) of the exact date and

for the exact amount of the note, this of itself, in the absence of all explanatory evidence, is sufficient to justify the finding of the jury, that the stock was the consideration of the note; *Barringer v. Nesbit*, 1 S. & M. 22.

36. *Failure of consideration: Partial.* The court in this case was inclined to the opinion that a partial failure of consideration could not be set up at law; *Kerr v. Calvit*, W. 115. Whether it could be done was doubted in *Matlock v. Livingston*, 9 S. & M. 489. Such partial failure can be set up at law, to an action for a sum certain, but it must be done by special plea; *Rasberry v. Moye*, 1 C. 320 (citing *Harman v. Sander-son*, 6 S. & M. 41; *Brewer v. Harris*, 2 S. & M. 84). And so when partial failure arises from a breach of soundness of warranty, there being no offer to return, and in such case the vendee will be entitled to a deduction from the price of the difference between the value of the property as it would have been, if it had been sound as warranty, and its actual value in the condition that it then was; *Westmoreland v. Walker*, 3 C. 76. And a purchaser setting up only a partial failure of consideration for a breach of the warranty, need not offer to return the property; *Rasberry v. Moye*, *supra*.

37. *Total failure.* Fraud, or a total failure or want of consideration, may be given in evidence under the general issue, where the action is for a sum agreed on, as on a promissory note. Whether this is so where the action is for a *quantum meruit*, or for unliquidated damages; *Quære?* *Brewer v. Harris* 2 S. & M. 84.

38. *Failure: Caused by promisor.* The promisor cannot avail himself of a failure of consideration caused by his own fault in failing to comply with his agreement, as where a literary institution failed, by the neglect of the defendant and other subscribers to pay their subscriptions to carry it on; *Cook v. Whitfield*, 41 M. 541.

38a. *Failure of: Case in judgment.* A proprietor of land issued stock for a town to be located on it. He used various artifices to decoy purchasers to become such; he induced some leading citizens to buy stock upon a promise not to call on them for payment if they wished to relinquish their purchases; he succeeded in selling some stock, but afterwards abandoned the scheme, and declared his intention not to enforce payment of the purchasers of the stock; *Held*; that these facts showed a failure of consideration of a note given by a purchaser of stock; *Barringer v. Nesbit*, 1 S. & M. 22.

39. *Same.* So when the trustees of a small village sold town lots at auction, under an advertisement promising that they would build a male academy there, and they failed to do so, and the lots became worthless; it was held this was a failure of consideration, and that they could not recover for the lots sold; *Brewer v. Harris*, 2 S. & M. 84.

40. *Vendor and Vendee: Failure of part of title.* Where the vendor of land makes a deed with a general covenant of warranty of

title, and stipulates in it that he will deduct a named sum per acre for all the land sold, to which he cannot show a clear title when the purchase money becomes due; the vendee can show as a failure of consideration in an action for purchase money, the want of title to any part of land; *Chaplain v. Briscoe*, 5 S. & M. 198.

41. *Plea: Of want of consideration.* A plea to an action on a note that it was "executed without any consideration good and valuable in law," is good, and the replication may either be a traverse of the plea generally, or it may set out the consideration relied on by plaintiff; *Matlock v. Livingston*, 9 S. & M. 489; S. P., *Taylor v. McNairy*, 42 M. 276.

42. *Consideration of substituted securities.* Where the note of a third person was given by the purchaser in payment of a slave, and on the same day the purchaser gave his own in lieu of that note; it was held that the note of the purchaser was so far to be considered as based on the sale of the slave, that he could set up as a defence to an action on it, a breach of the warranty of soundness of the slave; *Rentfrow v. Shaw*, 4 H. 651.

43. *Same.* If a third party by agreement give his own note to a creditor in satisfaction of the indebtedness of the debtor, the consideration thereof is the release of the debtor, and no infirmity in the consideration moving from the debtor so released to the maker of the substituted note will affect it; *Marsh v. Lisle*, 5 G. 173.

But see *ante*, 24, where there is an illegality in the debt so paid and released.

44. *Toll road.* The keeping in repair of a toll road by the proprietors, is the consideration of their right to charge toll, and when the road is out of repair, they have no right to collect tolls; *Sims v. Yazoo & Big Black Plank Road Co.*, 9 G. 23.

45. *Payment of antecedent debt.* The taking of a bill in payment of an antecedent debt, and the release of parties collaterally liable thereon, is a valuable consideration, and makes the taker a holder for value; *Emanuel v. White*, 5 G. 56.

46. *Consideration of one dollar, love and affection.* A deed in consideration of love, and of one dollar, is so far on valuable consideration as to support a gift of personalty made on it without a delivery; but if in consideration of love alone, it would not be; *Fairley v. Fairley*, 5 G. 18; S. C., 9 G. 280.

47. *Seal.* A seal imports a consideration, but it may be impeached by special plea; *Botanico Medical College v. Atchinson*, 41 M. 188; S. P., *Cardiff v. Thighen*, 1 G. 180.

48. *Variance in allegation and proof as to consideration.* The consideration of a contract must be proven as averred in the declaration; *Drake v. Surget*, 7 G. 458.

See SEA SHORE, 5.

Consignee.

See SHIPPING.

Conspiracy.

See CRIMINAL LAW.

Constable.

1. *Remedy against.* Money voluntarily paid to a constable who has no execution in hand, cannot be recovered back by motion; *Radford v. Hull*, 1 G. 712.

2. *Not bound to examine judgment roll.* A constable is not bound to examine the judgment roll of his county before appropriating money made by him on executions in his hands; *Hightower v. Taylor*, 6 G. 389.

3. *May levy attachment against steamboat.* A constable may levy an attachment against a steamboat; *Wallace v. Seales*, 7 G. 53.

Constitutional Law.

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I. Rules for construing the Constitution.

See STATUTES, 25, *et seq.*

1. *Construed like statutes.* The rules which prevail in the construction of statutes apply generally to the construction of written constitutions; *Green v. Weller*, 3 G. 650.

2. *Words taken in popular and ordinary sense.* The true sense in which words are used in a statute or constitution is to be ascertained generally by taking them in their ordinary and popular signification, or if they be terms of art then in their technical meaning; *Green v. Weller*, *supra*. Words are to be taken in their plain and obvious sense, and when this sense is clear, no resort can be had to contention; *Brien v. Williamson*, 7 H. 14; *Smith v. Halfacre*, 6 H. 582.

3. *Words construed in a uniform sense throughout the constitution.* When it appears that the framers of the constitution have used a word in a particular sense, generally in the instrument, it will be presumed, that it was intended to be used in the same sense wherever it occurs in the constitution; unless the intention to give it a different meaning plainly appears in the particular part alleged to be an exception to the general meaning indicated; *Brien v. Williamson*, *supra*; *Green v. Weller*, 3 G. 650.

4. *Same: Case in judgment.* The constitution of this State (§ 15 art. 3) provides, that a majority of each house shall constitute a quorum to do business; and that each house shall judge of the qualifications and election of its own members. Each house may determine the rules of its own proceedings (§ 15); shall keep a journal of its own proceedings. § 17 vacancies in each house shall be filled by new elections, § 18 each house may punish for disorderly conduct in its presence § 20; the doors of each house shall be opened &c. § 21; neither house shall without the consent of the other adjourn for more than three days § 22; bills may originate in either house, shall be read in each house, and having passed both houses shall be signed, &c. From these and other provisions, it is evident that the term *House*, when applied in the constitution to the Legislature, means one branch of that body, as contradistinguished from the other; and that a majority of the entire members, composing a particular branch, constitute in legal contemplation the house or branch of the Legislature; and that this is the general sense in which that term is used in the constitution; and therefore it must be taken in that sense in all cases wherever it is used in that instrument, unless there be something in the context of a particular part of the constitution, which indicates that there it was used in a different sense; *Green v. Weller, supra.*

5. *Same.* The terms "branch" and "house" as having a fixed and definite constitutional meaning are first used in art. 4, § 3, of the constitution of this State, which declares that the legislative power of this State shall be vested in two distinct branches, one to be styled the Senate, and the other the House of Representatives; and they here manifestly mean, not a part of the Representatives or Senators but the whole of the constituent members of the respective houses or branches of the Legislature. In § 15 of same article, which provides that a majority of each house shall constitute a quorum to do business," they are used in the same sense, so in § 18 of same article, which provides for the filling of vacancies which may occur in either house; and in § 27, art. 4, which authorizes the governor to remove judges on the joint address of both houses and in § 15, art. 6, which provides for the passage of a bill over the veto of the governor, by a vote of two-thirds of each house; and in art. 7, § 8, which prohibits the appropriation of money for internal improvements, except by a vote of two-thirds of both branches; and in § 9 of same article, which prohibits the borrowing of money on the faith of the States unless the law is assented to by a majority of the members of both branches of two successive Legislatures. And these terms being so used in this plain and manifest sense in every department of the Constitution, they should receive the same interpretation in all other instances where they are used in that instrument, unless it manifestly appear from the subject, the context or the object of the framers of the

constitution, that a different or qualified signification was intended to be applied to them; *Ib.* per Smith, C. J.

6. *Same.* In some of the sections of the 3d article of the constitution, terms "house" and "branch," are used to designate a quorum, or simple majority of the members, as in § 16, "each house may determine the rules of its own proceedings, &c.; so in § 20 each house may imprison, &c., for disorderly behavior," &c.; and in §§ 22, 23, 24, which provide regulations for the adjournment of the houses, and for the introduction, amendment, alteration and passage of bills. But in these, as in every other instance, in which the term "house" and "branch" is used in a qualified sense, as implying only a quorum, or simple majority, the action of the house is limited to subjects of ordinary legislation, to the preservation of good order, and to matters connected with its own organization; Per Smith, C. J.; *Ib.*

7. *Constitution its own expositor.* A statute or written constitution furnishes the best means of its own exposition, and when the sense in which its words are used, can be clearly ascertained from all its parts and provisions, the intention thus indicated will prevail, without resorting to other means of construction; *Ib.*

8. *Construction adopted to produce harmony.* One of the primary objects of a constitution is harmonious order in the operations of the several departments of the government; and when the instrument is doubtful, or not sufficiently explicit in its provisions, a construction should not be adopted which would produce disorder and confusion; *Smith v. Half Acre*, 6 H. 582.

9. *Should not be construed to cripple the government.* Where a constitution is not entirely explicit in itself, it ought not to be construed so as to cripple the government, and render it unequal to the objects for which it was instituted; *Ib.*

10. *Same: Example.* Thus, the constitution of this State provides for all offices to be filled for a limited tenure; and by the 5th section of the schedule to the constitution, it is provided that officers elected at the first election under it, should hold their offices for the time prescribed in the constitution, to commence at the next general election, fixed by the constitution after the said first election. The constitution also provides for the holding of a general election biennially to fill all offices, the terms of whose incumbents have then expired. From these it is clear that the constitution means that the terms of all officers elected by the people should commence and terminate with the general elections. And this rule applies to circuit judges elected at special elections in new districts created after the formation of the constitution, and as to these, their terms will expire at the next general election succeeding their election, at which the terms of the other circuit judges expire, notwithstanding, that the constitution makes their first term less than four years; *Ib.*

11. *Scope and design of a constitution* looked to. It is a rule of construction that we must look to the scope and design of a constitution, viewed as a whole and in its component parts, and where the design and object are clear, if the words be doubtful, such construction will be adopted as will be consistent with the design and object of the constitution; *Ib.*

And the object of a constitution being to protect life, liberty, and property, no word in a constitution having this effect can be rejected or disregarded in construing the constitution, but all such words are to have full effect; *Thompson v. Grand Gulf R. R. & Banking Co.*, 3 H. 240.

12. *Construed to effectuate its policy.* A constitution should be construed so as to effectuate, not defeat, the policy indicated by its framers; *Brien v. Williamson*, 7 H. 14.

13. *Legislative exposition.* An act of the Legislature plainly in violation of the constitution, cannot be referred to as containing an authoritative exposition of it; *Ib.*

13a. *Intention of framers.* It is a cardinal rule for the construction of a constitution, and of statutes that the intention of the Legislature or convention is to be deduced from the whole, and every part of the statute or constitution taken together—the words and the context—and such construction adopted as will best effectuate the intention of the lawgiver; *Green v. Weller*, 3 G. 650.

13b. *How construed as to jurisdiction of courts.* The constitutional grant of jurisdiction to the several courts in this State is conferred in general terms “as equity jurisdiction,” “orphans’ business,” “matters testamentary,” &c. What is included in these general terms is not defined in the constitution; and to ascertain their meaning, reference must be had to the system of law, both written and unwritten prevailing in this State, when the constitution was adopted; *Servis v. Beatty*, 3 G. 52.

II. Duty and Power of Courts to Declare Laws Unconstitutional.

14. *The duty is a delicate one.* It is always a delicate judicial duty to declare an act of the Legislature unconstitutional, and in doubtful cases it should be avoided; *Campbell v. Union Bank*, 6 H. 625; *Newsom v. Cocke*, 44 M. 352. But where the act is palpably unconstitutional, it is the duty of the court so to declare it; *Campbell v. Union Bank*, *supra*; *Runnels v. State*, W. 146.

The statute should be sustained if possible; but the constitution must be preserved inviolate; *Thompson v. Grand Gulf R. R. & Banking Co.*, 3 H. 240.

Where the meaning of a clause in the constitution is doubtful, a statute alleged to be in violation of it will be held valid; *Newsom v. Cocke*, 44 M. 352.

15. *Construction which would make a statute unconstitutional avoided.* General words in a statute should not receive such a construction as would render the act unconstitutional, by giving it an effect beyond the

legislative power; *Marshall v. Grimes*, 41 M. 27.

16. *Courts cannot go behind legislative rolls.* Whenever a joint resolution or act is signed by the presiding officers of both houses, and approved by the governor, and filed in the office of the secretary of State, it becomes a record, and imports absolute verity, and proves itself; and the courts have no power to go behind it, and inquire whether it was passed through the Legislature regularly or not; *Swann v. Buck*, 40 M. 268 (citing *Green v. Weller*, 3 G. 650, in which case Smith, C. J., and Handy, J., expressed different opinions on this point).

III. Who can object that a law is Unconstitutional.

17. *Party whose right is affected can object.* No one but the party (or a person claiming under him), whose right is affected by an act of the Legislature, can plead its unconstitutionality. He who insists on the unconstitutionality of a law upon the ground that it impairs a right of his, must show he has a right impaired by the law. Therefore, where in an action of trespass the defendant introduced in evidence a tax deed, and plaintiff insisted that an act of the Legislature subsequent to the deed, making it *prima facie* evidence that the law had been complied with in making the sale, was unconstitutional; it was held that plaintiff could not make that objection to the deed, as it conveyed only the right of other parties to the land embraced in it, and plaintiff had not shown that he was claiming under them; *Dejarnett v. Haynes*, 1 C. 600.

18. *Same.* And so a stranger cannot object that an act of the Legislature authorizing an executor to sell the land of the minor distributees of his testator is unconstitutional; *Coleman v. Carr*, W. 258.

19. *Same.* And so a purchaser of a judgment sold for costs, cannot object to a bill by the owner to redeem, and to recover from the purchaser the money he has collected under it, that the statute authorizing the sale is unconstitutional; *Harman v. Barstow*, 1 C. 276.

IV. Eminent Domain, and the Appropriation of Private Property to Public use.

See RAILWAYS, 8 to 27.

20. *Eminent domain: Nature of the right.* The right of eminent domain is inherent in, and essential to sovereignty. It results from the social compact, without any express provisions of the organic law, and under it exists the power to appropriate private property to public uses. The exercise of this right is recognized and regulated in the constitution of the State, art. 1, § 13, which provides that just compensation in such cases shall be made to the owner before the appropriation is made; *Brown v. Beatty*, 5 G. 52; *Thompson v. Grand Gulf R. R. & Banking Co.*, 3 H. 240.

21. *Same.* Under this power the State has

the right, for the promotion of the public good, and without making compensation therefor, to contract and dispose of everything within her limits which is not absolute and exclusive private property. And the waters of a navigable stream does not so exclusively belong to the riparian owner, as to prevent the State from authorizing its diversion for the improvement of navigation. As against an individual, the right of the riparian owner will be protected; but as against the public, it must yield to the paramount right of the State for the public good; *Commissioners of Homochitto River v. Withers*, 7 C. 21.

See RIVERS, 6, 7, 8, 9, 10, 11, 12.

22. *Same: Not affected by act admitting the State in the Union.* The 4th section of the act of Congress admitting Mississippi as a State in the Union, provides "that the Mississippi river, and the navigable waters and rivers leading into the same, and into the Gulf of Mexico, shall be common highways, and remain forever free, as well to the inhabitants of said State as to the other citizens of the United States, without any tax, duty, impost, or toll imposed therefor by said State." This section does not prohibit the State from diverting the waters of a navigable river from its old channel into another river, in order to improve its navigation. And the Legislature, and not the courts, must decide whether such a measure be a destruction or an improvement of navigation; *Ib.*

22a. *Sale of land for taxes, not appropriation of private property to public use.* A sale of land for the non-payment of taxes due thereon, is not an appropriation of the land as private property to the public use, within the meaning of that clause of the constitution which prohibits the taking of private property for public use, except on due compensation first made therefor; *Williams v. Cammack*, 5 C. 209.

22b. *Consequential damages to adjacent owner.* Where the charter of a town gave the municipal authorities "power to open, grade, or improve any street, alley, or sewer," and in the fair and reasonable exercise of this power a sewer is made, adjoining the property of a citizen, by which the property receives a consequential injury, the owner will not be entitled to damages, for the work was done for the public good, and under competent authority, and the general good must prevail over partial individual inconveniences; *White v. Yazoo City*, 5 C. 357. See post, 24, 25.

23. *Railway is a public use.* Under the right of eminent domain, private property cannot be taken for private purposes, but a railway company, though composed entirely of private persons, is so far public as to authorize the Legislature to grant it the right of way over private lands, upon due compensation being first made; *Brown v. Beatty*, 5 G. 227; *S. P., Thompson v. Grand Gulf R. R. Co.*, 3 H. 240.

24. *When and how compensation is to be*

made. But the compensation must be first made before the appropriation of the property, and it must be made in money; a judgment in favor of the owner is not compensation till it is paid; *Thompson v. Grand Gulf R. R. Co.*, 3 H. 240. And hence, it is incompetent for the Legislature to direct that the benefit accruing to the remaining lands of the proprietor, shall be set off against the value of his land so appropriated; *Isom v. Miss. Cent. R. R. Co.*, 7 G. 300; *Brown v. Beatty*, supra; *Penrice v. Wallis*, 8 G. 172; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374.

25. *Same: Incidental benefits and consequential damages.* And this rule requiring full payment in money for the value of land so appropriated, and also for the damages sustained by the owner by reason of the appropriation, applies so as to prevent the incidental benefits arising from the construction of the public improvement, to which the property is appropriated, from being set off against the incidental damages to the remaining property of the owner; the whole of the damages must be paid in money; *N. O. J. & G. N. R. R. Co. v. Moye*, supra. See ante, 22a.

26. *Extent of the compensation.* The compensation thus secured to the owner of land is the actual value of the land appropriated, and full indemnity for the damage done his adjacent land to be paid in gold and silver, and undiminished by the enhancement of the value of his land occasioned by the improvement to which a part of it has been applied; *Brown v. Beatty*, 5 G. 227. *Isom v. Miss. C. R. R. Co.*, 7 G. 300, (*Contra, Thompson v. Grand Gulf R. R. & B. Co.*, 3 H. 240).

27. *Same.* The value of the property at the time it is appropriated, and the injury then known to result to the owner as the necessary and immediate consequence of such appropriation of his property, without reference to unascertained and remote benefits or disadvantages that may or may not accrue in future, is the loss for which the owner is entitled to compensation; *Ib.*

28. *Right to take property without first making compensation.* In cases of public emergencies, such as fire, war, pestilence, famine and flood, private property may be taken for public use without compensation being first made therefor; but to justify this, the necessity for the appropriation must be imperative and apparently present, and the danger so immediate as not to admit of the delay necessary to a judicial proceeding for the condemnation of the property; *Penrice v. Wallis*, 8 G. 172.

29. *Injunction against the appropriation.* The owner is entitled to an injunction against the appropriation of his property to public use until compensation is first made, except in case of the emergency above explained; *Ib.*

30. *Remedy prescribed for condemnation.* The charter of the Grand Gulf R. R. and Banking Co. contained a provision, which

vested in the company the right of way over land, merely upon a judgment being rendered against the company for compensation, and before compensation is made. The court say: The remedy thus provided being unconstitutional and void, it will not undertake to frame a new one, and hence, that the company was without any legal remedy for procuring the condemnation of the land. It was also said, that if the company, on the rendition of the judgment for the damages, had paid the money, the court would not have been prepared to say that it would not have been sufficient; *Thompson v. Grand Gulf R. R. & Banking Co.*, 3 H. 240. The charter of the Miss. Cent. R. R. Co. contained a provision that the jury impanelled to assess the damages to the owner, should take into consideration the benefits to his adjacent land arising from the improvements. The court, in declaring this provision unconstitutional, said, that the provision might be separated from the others, and a condemnation might be had under the charter, the jury being required to disregard the unconstitutional provision; *Brown v. Beatty*, 5 G. 227. So it appears that if the unconstitutionality consist in a separate provision, which may be eliminated from the statute, leaving a constitutional and efficient remedy within the words of the statute, except the unconstitutional part eliminated, the remedy will do; but if the statute—the unconstitutional part being eliminated—provide no remedy without the addition of new matter, or the substitution of new matter in the place of the part eliminated, the court will not make the substitution or addition, and the remedy will therefore fail.

31. *Remedy provided is exclusive.* The remedy provided in the statute authorizing such condemnation, is without any negative words to that effect, exclusive of the remedy which would otherwise exist at common law; *Brown v. Beatty*, 5 G. 227.

Sed vide RAILWAYS, 20, 21, 26.

31a. *Right to authorize railway in a city.* The Legislature may authorize a railway company to locate their track on the streets of a town or city, with its consent; or without its consent by providing for due compensation to be paid to the city for the damages. Whether the owner of the adjacent lots would be entitled to compensation; *Quære?* *Dornahue's Case*, 8 S. & M. 649.

See *SEA SHORE*, 4, 5.

V. Power of Taxation.

32. *Tax on imports and exports.* That clause of the 10th section of the 1st article of the Constitution of the United States, which prohibits the States, without the consent of Congress, from levying imposts or duties on exports and imports, does not prevent a State from levying an *ad valorem* tax on sales of merchandise made within the State, by a citizen of another State, though the merchandise were brought by him into the State for the purpose of sale. The taxing power of a State extends to all property within its limits, including that which was

brought into it solely for the purpose of commerce; *Harrison v. Mayor, &c., of Vicksburg*, 3 S. & M. 381. Therefore an ordinance of the city of Vicksburg, which imposes an *ad valorem* tax on sales of merchandise made within the city limits, by traders on flat-boats and other water craft, is not a violation of the Constitution of the United States, though a trader so taxed, be a citizen of, and brought his merchandise from, another State; *Ib.*

33. *Wharfage and tonnage duties: Distinction between.* The Act of 1825, which authorized the city of Natchez to establish rates of wharfage and collect the same through an harbor master, is not an authority to levy a tonnage duty, prohibited by the Federal Constitution to the States. A tonnage duty is a tax or duty imposed on vessels engaged in importing merchandise into the United States, and levied for the privilege of entering the ports of the Union. Wharfage is a mere charge claimed by the owner of the soil, for the use of it by a vessel in landing; and this right the owner of the banks of a navigable stream may exercise, by charging all vessels, using a portion of it for that purpose; *O'Conley v. City of Natchez*, 1 S. & M. 31.

34. *Taxing power may be delegated to a municipal corporation.* The Legislature may delegate to a municipal corporation the power to levy taxes on property within its limits, sufficient for its good government; *Smith v. Aberdeen*, 3 C. 458; *Harrison v. Mayor, &c., of Vicksburg*, 3 S. & M. 581.

35. *Uniformity and equality in taxation.* The Constitution of the State (of 1832), does not prohibit the Legislature from levying specific taxes, nor does it declare that taxation shall be equal and uniform; but if it did declare such equality and uniformity, a tax levied by a municipal corporation on lots situated on its streets, requiring the owners thereof to pave the streets in front of their property, would be equal, uniform and constitutional; *Smith v. Aberdeen, supra.*

36. *Same: Legislature has discretion as to mode of taxation.* The power of taxation whether for general or local purposes, is intrusted to the Legislature, and the mode and manner of exercising it, is not within the prohibition of the Constitution; and if the power be exercised within the scope of the grant, though unwisely and oppressively, it is beyond the power of the courts to interfere; *Williams v. Cammack*, 5 C. 209.

37. *Same: Power to exempt property from taxation.* The Legislature may exempt certain property from taxation, when the rule of exemption is determined by the locality of the property, and not its ownership by particular individuals; and the exemption though operating harshly upon those who own like property not so exempted, is no ground for declaring the exemption unconstitutional. Such hardships and inconveniences are incident to society, and a part of the sacrifices which every one must make in order to enjoy the greater advantages of law and government. But, if such exemption were unconstitutional, this would be no ground for de

declaring the tax imposed unconstitutional, for that part of the act alone, which is in violation of the constitution would be void; *Ib.*

As to effect of such exemption or future power to tax, see *post*, 89.

38. *Same.* When such exemption is made from a tax for a local improvement, upon the ground that the land so exempted is not to be benefited by the improvement, this will be no reason for declaring the tax on particular land situated in the district taxed, and supposed to be benefited by the improvement, unconstitutional, where it can be shown that the particular tract, so far from being benefited by the improvement, will be injured by it. Such matters are entirely within the taxing power of the Legislature, whose action cannot be reviewed by the courts, upon the ground that it is contrary to natural justice; *Ib.*

39. *Same.* Nor is such exemption of certain property from taxation, a violation of that clause of the constitution which declares that no man, or set of men, "is entitled to exclusive, separate public emoluments or privileges;" that provision relates to privileges and emoluments of a political and personal nature; *Ib.* See *post*, 63.

40. *Power of taxation for local improvement.* The Legislature has power, for local purposes, to impose local taxation upon any district or extent of territory less than the whole State, whether the citizens to be affected by it are residents of the same political subdivision or district, or members of the same political corporation or not; *Alcorn v. Hamer*, 9 G. 652.

41. *Same.* And it is no valid objection to a tax imposed on a district for the purpose of the erection and repair of a public improvement in it, that a part of the taxes so levied (and which part is to be derived from a part of the district), is directed by the act to be applied to the payment of a debt which had been previously contracted, towards the accomplishment of the authorized improvement, by the municipal authorities of that portion of the district, whose debt is thus provided for; *Ib.*

42. *Same: Levee laws.* An act entitled "An act to aid in repairing and perfecting the levee of the Mississippi river, in the counties of De Soto, Tunica, Coahoma, Bolivar, Washington, and Issaquena," approved 2d December, 1858," is constitutional; *Ib.*

See **LEEVE LAWS.**

43. *Sale of land for taxes.* A sale of land for the non-payment of taxes due thereon, is not an appropriation of private property to public use, within the meaning of that clause of the constitution which prohibits the taking of private property for public use, except on due compensation being first made; *Williams v. Cammack*, 3 C. 209.

44. *Forfeiture of land for the non-payment of taxes.* So much of the act of the 9th of March, 1850, as provides for a forfeiture of land for the non-payment of taxes due thereon, is in violation of the bill of rights, which declares that no citizen shall be deprived of

his property except by due course of law; *Griffin v. Mixon*, 9 G. 424.

45. *Same.* In the above case, the general principles regulating the taxing power of the State, are elaborately discussed, and the authorities collected and reviewed by Justice Harris, delivering the opinion of the court, and by Justice Handy, dissenting.

VI. Former Jeopardy.

46. *Constitutional provision.* That clause of the constitution of the United States, which declares, "nor shall any one be subject for the same offence to be twice put in jeopardy of life or limb," is binding in the State as well as in the Federal courts; *State v. Moor*, W. 134.

47. *No jeopardy till verdict.* But a prisoner is not in jeopardy till after verdict, and the court may, therefore, in a felony case, properly discharge a disagreeing jury, at the last moment of its term; *Ib.*

48. *Same.* The court has no power to discharge a jury in a capital case (after the evidence is closed and the cause submitted to them, without the consent of the defendant), on the ground merely that the jury say "they cannot agree upon a verdict;" and if it do discharge the jury under such circumstances, the prisoner having by that trial been once put in jeopardy of his life, is entitled to an acquittal. But the court has the power to discharge the jury and order a *mistrial* to be entered, in case of a legal necessity for so doing; and the fact that the jury report to the court in five minutes of the expiration of its term, as prescribed by law, that they are unable to agree, is such a legal necessity as authorizes the court to discharge them without the consent of the accused; *Josephine's Case*, 10 G. 613.

49. *But former conviction must be under valid indictment.* The rule of the common law, incorporated into the constitution of the State, which declares that "no person shall, for the same offence, be twice put in jeopardy of life or limb," is applicable only to cases where there has been an acquittal or conviction, under an indictment which is sufficient in law to authorize the court to pronounce judgment. But it seems that a party who has been convicted under a void indictment, and actually suffered the punishment prescribed by law, cannot be prosecuted again for the same offence; *Kohlheimer's Case*, 10 G. 548.

VII. "Due course of law," as used in the Constitution.

50. *Effect on indictments.* That portion of the constitution which declares "that no person can be accused, arrested, or detained, or deprived of his life, liberty, or property, but by due course of law," does not prohibit the Legislature from making new rules for the framing of indictments, and different from those at common law; *Noonan's Case*, 1 S. & M. 562.

51. *Requires service of process.* An ordi-

of an incorporated town, directing its marshal to seize and sell all hogs running at large in the town, and pay over the proceeds for public purposes, and which requires no notice to the owner, and gives him no opportunity of defence, is a violation of the 10th section of the 1st article of the constitution, which declares that "no person can be deprived of his life, liberty, or property but by due course of law," and the other provision, that the right of trial by jury shall remain inviolate; *Donovan v. Mayor, &c., of Vicksburg*, 7 C. 247.

52. *Requires notice.* It is not within the power of the Legislature to authorize the rendition of a judgment against a party without notice to him, either actual or constructive; *Jack v. Thompson*, 41 M. 49.

53. *Forfeiture of land for taxes.* So much of the Act of 9th March, 1850 (Session Laws, ch. 2, p. 50), as provides for a forfeiture of land to the State, on the failure of the owner to pay the taxes due thereon, is in violation of the 13th section of the bill of rights, which prohibits the taking of private property for public use without "a just compensation being first made therefor," and also of the 10th section, which declares that a citizen shall not be deprived "of his life, liberty or property, but by due course of law;" and said act is to that extent null and void; Handy, J., dissented; *Griffin v. Mixon*, 9 G. 424.

VIII. Trial by Jury.

See *Jury*, 1 to 6.

54. *Extent of.* The right of trial by jury as secured by the constitution, is at least as extensive as "it exists at common law;" *Smith's Administrator v. Smith*, 1 H. 102.

55. *Judge in favor of surety against principal: On motion.* The statute (Poindexter's Code, p. 142, § 160), giving a surety the right to move for a judgment against his principal for money paid by the surety for the principal, confers an exclusive right on a particular class of creditors, and is for that reason unconstitutional; it also violates that clause of the constitution which secures the right of trial by jury; *Smith v. Smith*, *supra*. But this is overruled in *Woodward v. May & Wife*, 4 H. 389, where the statute is held to be constitutional; but it is also said, that a jury should be called to ascertain both the fact of suretyship and the amount paid, except when there is a judgment already against principal and surety in a competent court, in which the fact of suretyship is shown, and the payment by him should be shown (if a jury be dispensed with) beyond doubt, and it seems, by the receipt and return of an officer of court. In *Scott v. Nichols*, 5 C. 94, *Woodward v. May & Wife*, was confirmed; and it was said, however, that a jury should be called wherever any question of fact is to be ascertained in such a proceeding.

56. *Sheriff's sale cannot be set aside on motion.* A sheriff's sale regular on its face, cannot be set aside on motion, the purchaser

having a constitutional right to have the matter tried by a jury. Hence, a judgment annulling a sheriff's sale of land, upon the ground that the purchaser was his deputy, cannot be rendered on motion; *Flournoy v. Smith*, 3 H. 62.

57. *Motion against sheriffs and their sureties.* The right of trial by jury secured in the constitution, does not mean that there shall, in all cases, be a jury trial of questions of fact, but that this right should remain and exist substantially as it does by the common law of England. By the common law, it is an inherent power of courts to punish their officers for contempt in not obeying their process or orders, and for abuses in the administration of justice, by summary corrections by the court, without the intervention of a jury. The sheriff is an officer of court, and may therefore be proceeded against in this summary way for his failure to execute process of the court, and be thus compelled to indemnify a party injured by his neglect. And this right of summary proceeding exists also as to the sureties on the sheriff's bond; for though they are not officers of court, yet by executing the official bond of the sheriff, they are to be understood as consenting to submit themselves to the summary proceedings provided by law, to compel the principal to discharge his duty. The statute, therefore, authorizing such proceedings by motion against the sheriff and his sureties is constitutional; *Lewis v. Garrett's Adm'r*, 5 H. 434.

58. *Motion on bonds taken by sheriff from tenants for rent.* The statute authorizing the court on motion to render judgment on bonds taken by sheriff from tenants replevying property attached for rent, is constitutional; *Peck v. Critchlow*, 7 H. 243.

59. *Seizure and sale of hogs without trial.* An ordinance of a town, directing its marshal to seize and sell all hogs found in the streets, without notice to the owner, is unconstitutional for denying the right of trial by jury; *C. Donovan v. Mayor, &c., of Vicksburg*, 247.

60. *Right of trial by jury secured by the Constitution of the United States.* Although the President of the United States had the power after the overthrow of the Confederate States, to establish civil government for the people, yet, in doing so, he could not violate the Constitution of the United States. Hence, in establishing courts in the Confederate States, he could not so organize them as to deprive the people thereof of the right of trial by jury, in cases cognizable in courts of common law, when the amount in controversy exceeded \$20; *Scott v. Bilgerry*, 40 M. 119.

61. *In appeals from juries to assess damages to land.* The constitution of the State secures the right of trial by jury in all cases in which it was allowed by the common law. Hence, on an appeal to the Circuit Court from an inquest of a jury impanelled to assess damages for the location of a railway either party has the right to demand a trial by jury; *Isom v. Miss. Cent. R. R. Co.*, 7 G. 300.

IX. Grant of Exclusive Rights.

See CORPORATION, 42, 43.

62. *Statutes allowing sureties to proceed by motion.* The statute (Poindexter's Code, p. 142, § 160), which gives a surety the right to move for judgment against his principal for money paid by the surety for the principal, confers an exclusive privilege on a particular class of creditors, and is for that reason unconstitutional; *Smith's Adm'r v. Smith*, 1 H. 102, overruled by *Woodward v. May and wife*, 4 H. 369; *Scott v. Nichols*, 5 C. 94, and also by *Peck v. Critchlow*, 7 H. 243. See ante, 55.

63. *Exclusive rights defined.* The first section of article 1 of the constitution of this State, which declares that "all freemen are equal in rights," and "that no man or set of men, are entitled to exclusive, separate, public emoluments or privileges from the community, but in consideration of public services," is directed against a superiority of personal and political rights, distinctions of birth, rank or station, and all claims to emoluments from the community of any man or set of men over any other citizen of the State; and it declares honors and emoluments, and privileges of a personal and political character, to be alike open and free to all the citizens of the State. It has no reference to the private relations of the citizen, nor to the action of the Legislature in passing laws, regulating the domestic policy and business affairs of the people, or of any portion of them. And hence, an act of the Legislature of the State levying a tax for levee purposes which exempts from the tax all lands lying between the levee and the Mississippi river, is not in conflict with this section of the constitution; *Williams v. Cammack*, 5 C. 209.

64. *Same.* So a law which dispenses with proof of subscription as a stockholder in a railway company, unless the subscription be denied under oath, is not in conflict with this section of the constitution; *Thigpen v. Mis. Cent. R. R. Co.*, 3 G. 347.

65. *Exclusive right to keep a wharf.* When an exclusive right to keep a wharf within certain limits, on the sea shore, is once granted by the Legislature it is irrevocable; *Martin v. O'Brien*, 5 G. 21.

X. Vested and Contingent Rights, and Retroactive Laws.

66. *Vested rights cannot be impaired.* Every statute which takes away a vested right, or which is to have an effect before its passage, is retrospective and void; *Davis v. Minor*, 1 H. 183. (See *vide*, post 71, 72); nor can a vested right be transferred to another against the owner's consent; *Com'l Bk of Natchez v. Chambers*, 8 S. & M. 9.

67. *Vested defence to an action cannot be taken away.* A valid defence to an action vested in a party by law, is a vested right, which cannot be taken from him without his consent. Hence, where he has a good defence by the statute of limitations, it cannot be taken away by a subsequent statute; *Davis v. Minor*, *supra*.

68. *Legislation cannot revoke a donation.* When the State parts with property, even by donation, the transaction is a contract, and places the property beyond her control; private rights are then vested, which are beyond legislative control; *Com'l Bk of Natchez v. Chambers*, 8 S. & M. 9; *S. P., Martin v. O'Brien*, 5 G. 21.

69. *Re-opening final judgments.* The Legislature has no power to pass an act allowing judgments and decrees rendered prior thereto to be re-opened, if according to the law in force when they were rendered, they were final and conclusive; *Hooker v. Hooker*, 10 S. & M. 599; *Stewart v. Davidson*, *ib.* 351.

70. *Contingent rights.* An act of the Legislature, which secures to women then married, all their personalty, which had not then been reduced to possession by the husband, is constitutional. Such an act violates no vested right of the husband, for his right is contingent only until he has reduced the property to possession; *Clarke v. McCreary*, 12 S. & M. 347.

See DOWER, 17. HUSBAND AND WIFE, 12, 16.

71. *Retroactive laws.* The Legislature may pass retroactive laws, which do not impair the obligations of contracts, nor divest vested rights, but such laws are unjust and condemned by the courts. Therefore, the Legislature may by law make that a ground of divorce, which at the time it was done was no ground for dissolving the bonds of matrimony; and so the Act of February 9th, 1860, which provided that where husband and wife, prior to its passage, had lived separate for four years, without collusion and without intent to procure a divorce, either party might procure it, is constitutional, and a divorce will be granted under it; *Carson v. Carson*, 40 M. 349; *S. P., Read v. Beall*, 42 M. 472; where it was held that the Legislature might pass a law imposing a tax on retailers who had already been licensed, and had paid \$100 for the privilege.

72. *Same.* The Legislature has power to change the rules of evidence and establish new ones, as to the sufficiency of proof of a new promise of acknowledgment to take a case out of the statute of limitations, and to apply such new rules to cases arising before their adoption; *Carothers v. Hurly*, 41 M. 71, (citing *Briscoe v. Anketell* 6 C. 361).

See STATUTES, 45, 46.

72a. *Same.* The Act of 19th February, 1867, which provides that all contracts for the payment of money entered into in the State, between 1st May, 1862, and 1st May, 1865, shall be deemed *prima facie* as payable in Confederate treasury notes, is constitutional (citing *Briscoe v. Anketell*, 6 C. 361); *Cowan v. McCutchen*, 43 M. 207. See post, 82, et seq.

XI. Laws impairing the Obligation of Contracts.

1. What is the Obligation of a Contract.

73. *What is the obligation of a contract.* The "obligation" of a contract, in the meaning of that clause of the Federal Constitution which prohibits the States from passing any

laws impairing the "obligation of contracts," is for the most part its binding force upon the obligor to perform the duty agreed on, according to the nature and terms of the agreement; and it has reference to the performance rather than to the consequences resulting from a breach of the contract. The essential constituents of a contract, in which consists its inviolable obligation, are its validity, construction, effect, and discharge; these are governed by the law in existence when it was made, and enter into and form a part of it wherever it may be sought to be enforced; *Coffman v. B'k of Kentucky*, 40 M. 29.

2. Remedy.

74. *Same: Distinction between obligation and remedy.* But the remedy is for the most part the act of the lawmaking power providing redress for a breach of a contract, and except in cases of peculiar character, it is subject to modification and repeal by the State Legislature; but the power over the remedy is not without restriction. The remedy, though not a part of the contract, is an incident of it, without which it would be of no value; the Legislature of a State cannot, therefore, under the power to modify the remedy, take it away altogether, or so change and obstruct it, as to materially impair its value as it existed when the contract was made (citing *Curran v. Arkansas*, 15 H. U. S. 319; *Bronson v. Kenzie*, 1 ib. 316; *McCracken v. Hayward*, 2 H. 612; *Nevitt v. B'k of Port Gibson*, 6 S. & M. 513; *Briscoe v. Anketell*, 6 C. 371); *Coffman v. B'k of Kentucky*, *supra*; *S. P., Nevitt v. B'k of Port Gibson*, *supra*; *Com'l B'k of Natchez v. Chambers*, 8 S. & M. 9; *Briscoe v. Anketell*, *supra*.

75. *Say laws.* Therefore, an act taking away all remedy on contracts for the space of a year, would be destructive of the obligation of contracts, and unconstitutional and void; *Coffman v. B'k of Kentucky*, *supra*. But the Legislature may exempt from suit a soldier absent in the army upon the same ground that it may exempt lunatics and idiots; the soldier being under duress is incapable of attending to a suit; *State v. McGinty*, 41 M. 435.

76. *Act prohibiting trustees of dissolved banks from suing.* The trustees appointed under the *quo warranto* act of 1843, to take charge of the assets of a bank, upon the rendition of a judgment of forfeiture against the bank, were thereby vested with the right and clothed with the duty to collect the debts due the bank, by action or suit, if necessary. The Act of 1846, which made it compulsory on these trustees to sell the debts due to the bank, deprived the trustees of a remedy to enforce these debts, and is therefore unconstitutional and void. And it is no answer to this, to say, they had the remedy to collect by sale; for the remedy which is secured by the constitution under the clause forbidding laws impairing the obligation of contracts, consists in a legal or equitable proceeding in a court of justice, whereby a judg-

ment is rendered, and execution issued to enforce it; *Com'l B'k of Natchez v. Chambers*, 8 S. & M. 9.

77. *Constitution only protects legal remedies.* On 25th of October, 1865, the Legislature passed a joint resolution in these words: "Resolved, that the auditor of public accounts be and he is hereby directed to issue no more warrants for the payment of money, until further orders." After the passage of this resolution, a State officer applied to the auditor for a warrant for his salary then due, and on the auditor's refusal to issue it, applied for a mandamus to compel him to issue the warrant: *Held*, that the resolution was not in violation of the constitution, upon the ground that it took away from the officer all remedy to procure his salary; that the procurement of an auditor's warrant by a creditor of the State, was in no legal sense a remedy to collect the debt, but a mere means adopted by the State for its own convenience to pay her creditors; that the State could not be sued upon executory agreements, except by her own consent; and if sued and judgment obtained, there was then no remedy to compel the State to pay; and that the only remedy of a creditor of the State, is to apply to the Legislature for payment; *Swann v. Buck*, 40 M. 268.

78. *May change remedy.* The remedy is no part of the contract; and the Legislature may change and modify the remedy in existing contracts in their discretion, if an adequate remedy be still left or provided. The act therefore which requires the makers, endorsers, &c., of bills and notes to be sued in a joint action, is as to bills and notes then made a mere change of the remedy and not liable to constitutional objection, upon the ground that it impairs the obligation of a contract; *McMillan v. Sprague*, 4 H. 647. And, the Legislature may, even as to existing causes of action, provide that an imparlance term shall be allowed; *Woods v. Baid*, 5 H. 285.

80. *Legislation affecting liens.* And whilst it seems that any legislation which might lessen the extent or efficacy of the remedy on existing contracts, or which would change or diminish the force of existing liens, would be objectionable on constitutional grounds, yet a statute cannot be said to impair a lien, which leaves it entirely at the discretion of a creditor whether he will do an act to preserve it; and hence, a statute in reference to judgments already rendered, and which are liens throughout the State, which enacts that these judgments after a reasonable time prescribed in the statute shall not be liens in any other county than the one in which they are rendered, unless an abstract thereof be filed in a county where the lien is sought to be preserved, is not unconstitutional, since it merely imposes as a condition for the continuance of the lien, the performance of an act entirely within the power of the creditor, and if he fail to perform it, the failure is a voluntary abandonment of his right; *Tarpley v. Hamer*, 9 S. & M. 310.

81. *Exemption laws.* Laws exempting

certain descriptions of property from liability to be taken under execution for debt, are founded on a wise and beneficial public policy. The State has an interest, that no portion of its citizens shall be reduced to a condition of destitution, so as to be prevented from pursuing useful industrial employments; and that families shall not, by extravagance or misfortune, be deprived of the shelter and the comforts necessary to health and activity. Such legislation, when retrospective in its character, is not liable to the constitutional objection of impairing the obligations of contracts. It has reference to the remedy and not to the obligation of contracts, and is within the power of the Legislature to modify and control; (citing *Bronson v. Kenzie*, 1 How. S. C. R. 315; *Sturges v. Crowningshield*, 4 Wheat. 200; *Mason v. Haile*, 12 id. 370; *Brown v. Dillahuntry*, 4 S. & M. 713; *Jackson v. Lamphire*, 3 Peters, 290; *Tarpley v. Hamer*, 9 S. & M. 310; *Stiphenon v. Osborne*, 41 M. 119.

82. *Statutes of limitations on existing causes of action.* The Legislature may pass laws limiting the time in which actions shall be brought, and apply them to existing causes of action, provided a reasonable time after the passage of the law be allowed, in which parties may bring their actions; *West Feliciana R. R. Co. v. Stockett*, 13 S. & M. 395.

83. *Same.* It is well settled that statutes of limitation pertain to the remedy and not to the essence of the contract, and that it is within the power of the Legislature to regulate the remedy and modes of procedure in relation to past as well as to future contracts, subject only to the restriction, that it cannot take away all remedy upon an existing contract, nor impose on its enforcement new burdens and restrictions which materially impair its value; (citing *Bronson v. Kenzie*, 1 How. S. C. R. 315; *McCracken v. Hayward*, 2 id. 612). And, hence, it is also held that the State Legislature may shorten the period of limitation of actions, and change existing rules of evidence and judicial procedure, and prescribe new rules as to past as well as future rights of action, provided that in changing the period of limitation of actions or rules of evidence, the Legislature do not deprive the party of all remedy, nor make it impossible for him to establish his right; *Briscoe v. Anketell*, 6 C. 361.

84. *Same: Case in judgment.* Therefore, the Act of 1844 (H. C. p. 832, § 16), which directs that no new promise or acknowledgment shall have the effect to save the bar of the statute of limitations, unless it be in writing, or it be shown that the very claim sued on was presented to the debtor, who acknowledged it to be due and unpaid, may be applied to a cause of action then existing, so as to exclude proof of a new promise made before the passage of the act, and which at the time it was made was valid, provided that the original cause of action, independent of the new promise, was not barred when the act was passed, and would not be till the

lapse of a reasonable time afterwards, in which suit could be brought on it. And in this case one year was held to be a reasonable time, and the failure to bring the suit within that time authorized the exclusion of the evidence of the new promise. But it will be noticed that a new promise in such a case is not a contract, the action not being brought on it. The rule would be different when new and impossible evidence was required to prove a contract which was valid at the time it was made; *Id.*

3. Corporate Rights and Franchises Granted by Statute.

85. *Corporate rights: Bank charters.* A bank charter is a contract within the meaning of that clause of the Federal Constitution, which prohibits the States from passing laws impairing the obligations of contracts; *Payne v. Baldwin*, 3 S. & M. 661; *Planters' Bank v. Sharpe*, 4 S. & M. 17; *Commercial Bank of Natchez v. State*, 6 S. & M. 599. And any legislation which withdraws any franchise or privilege granted in the charter, or enlarges the power of the State over the body corporate, or abridges the franchises granted, or alters the charter in any material point, is void; *same cases*. And the charter of a corporation is also a contract between the corporation and stockholders, which is equally protected by the constitution from legislation impairing its obligation; *N. O. J. & G. N. R. R. Co. v. Harris*, 5 C. 517. But this provision of the constitution does not protect a bank in any right or privilege which it enjoys under the general laws of the State. The power of the State to legislate on these rights and privileges is as ample and complete, with reference to banks, as it is over such rights and privileges when claimed by other citizens. And hence if the power to assign promissory notes be not granted in the charter, but is exercised only under the general laws of the State, it may be taken away by statute; *Payne v. Baldwin*; and *Planters' Bank v. Sharpe*, *supra*.

86. *Same.* And the Legislature may also prescribe a penalty for the failure of a bank to discharge a duty imposed on it by its charter; and hence, an act declaring that the failure of a bank to resume specie payments by a day fixed in the act, is constitutional; *Com'l Bk of Natchez v. State*, 6 S. & M. 599.

87. *Power of Legislature to preserve from extinction debts to and from a dissolved bank.* By the law, as it existed in this State prior to the passage of the *quo warranto* act of 1843 (Session Laws, p. 55), upon a judicial declaration of forfeiture of its franchises rendered against a bank or other corporation, the real estate belonging to it reverted to the grantors—the personality went to the State, and the debts due by and to it were extinguished. But these incidents of the judgment of ouster are in the nature of a penalty or forfeiture, and constitute no part of the contract between the bank and its debtors; and hence it was competent for the Legislature to pass the act of 1843; which provided, upon the

rendition of a judgment of forfeiture against a bank, that its debtors should not thereby be released from their debts and liabilities, but that the court rendering the judgment should appoint one or more trustees "to take charge of the assets," and collect and preserve them for the payment of its debts. Nor is the act liable to the objection that it attempts to revive in the trustees an obligation already extinct, for the mere judgment of forfeiture does not *ipso facto* work a dissolution of the bank at common law; but before this effect is produced, there must be first execution for the seizure of its franchises; *Nevitt v. Bank of Port Gibson*, 6 S. & M. 513. And under this act the trustees are appointed before execution; *Ib.*

88. *Quo warranto* act of 1843: *Injunction pending proceedings*. The 6th section of the Act of 1843 (Session Acts, p. 52), which directs an injunction to be issued by the circuit clerk upon the filing in his office of an information in the nature of a writ of *quo warranto* against a bank, restraining the bank, its agents and assignees from collecting any demand due the bank, and which is to continue in force until the trial of the information, is not unconstitutional on the ground that it impairs the obligation of the contract; *Com'l B'k of Rodney v. State*, 4 S. & M. 439. But this section is constitutional only when taken in connection with the 9th, 10th and 11th sections of the act which provides for the collection and preservation of the assets of the bank for the benefit of its creditors; *Nevitt v. Bank of Port Gibson*, 6 S. & M. 513.

89. *Provision in charter limiting power of taxation*. A provision in a bank charter limiting the power of the State to tax the property of the bank, is a contract within the meaning of that clause of the Federal Constitution, prohibiting States from impairing the obligations of contracts, and any law imposing a tax in violation of the charter will be unconstitutional and void; *O'Donnell v. Bailey*, 2 C. 386.

But as a general rule, the abandonment of the power of taxation is never to be presumed; nor is it presumed that the State has fettered itself in the exercise of the power in the future, except upon a clear and irresistible engagement in the nature of a private contract, as distinguished from a mere general act of legislation. The granting of a license to retail vinous and spirituous liquors is not to be construed into an abandonment of the right to tax such privilege further; *Coulson v. Harris*, 43 M. 728; S. P., *Reed v. Beall*, 42 M. 472.

90. *Power of legislation over municipal corporations*. The charters of municipal and public corporations may be repealed, modified and amended by the Legislature at its pleasure, so far as their matter relates to the political rights and privileges of the corporations. But public corporations may and often do have private rights and interests, and as to such they are to be dealt with as individuals; and grants of property and franchises

coupled with an interest to such corporations, are beyond legislative control, equally as the property of private corporations. Hence, where the charter of a town conferred on the corporation the power to grant license for the retail of vinous and spirituous liquors, and also gave the money arising therefrom to the corporation, and afterwards the Legislature donated the license money to an academy; it was held that the latter act was unconstitutional. That the Legislature might take away the franchise of granting licenses for retailing, as this was given for a public purpose, but as long as this franchise was permitted to remain, the Legislature could not take away the right to the license money, as that was for the private advantage of the corporation; *Aberdeen v. Saunderson*, 8 S. & M. 663. As to jurisdiction of State and Supreme Court of the United States over the foregoing questions; see *post*, 115 and 116.

90a. *Repeal of charter before rights vested under it*. The Legislature granted a charter and gave the company the power to conduct and carry on lottery schemes, upon the condition that the company paid \$5000 into the treasury, and executed a bond to be approved by the treasurer of the State, conditioned to pay certain proceeds of the sale of tickets into the State treasury. Before the company tendered the money or the bond, a law was passed, making all lottery schemes in the State unlawful. The company then tendered the money and the bond, which were refused, and this was a mandamus to compel the treasurer to accept them. The mandamus was dismissed, upon the grounds that no right had vested under the charter when that portion of it allowing lottery schemes was repealed. That it was competent for the Legislature to revoke the grant until rights had vested under it, and that as the payment of the money and the making of the bond were conditions precedent to the vesting of the right to deal in lottery schemes, and as these things had not been done before the law was repealed, the franchise was lost; *Miss. Soc. of A. & S v. Musgrove*, 44 M. 820.

90b. *Franchise granted by statute: License to retail*. A license to retail vinous and spirituous liquors issued in pursuance of law, on the payment of a fixed sum, is not a contract between the State and the retailer, which prohibits the State from afterwards levying an additional tax on the retailer. Such a license is merely a franchise, which is subject to taxation. Though the Legislature would not have the power to deprive the retailer of his right entirely, yet it may impose the burden of taxation on it; *Reed v. Beall*, 42 M. 472.

XII. Judicial Powers exercised by the Legislature.

91. *Act authorizing an executor to sell land*. Is a private act of the Legislature, authorizing an executor to sell the land of infant heirs or devisees, constitutional; *Quere?* But a third party has no right to

raise such objection; *Coleman v. Carr*, W. 258.

92. *Same*. A private act of the Legislature authorizing an administrator to sell the land of his intestate to pay his debts, and to invest the surplus in other property for the benefit of the parties interested, is not the exercise of judicial power by the Legislature, but the constitutional exercise of legislative power; *Williamson v. Williamson*, 3 S. & M. 715.

93. *Same*: *Authority given before appointment of guardian*. And an act may be passed, even before the guardian's appointment, authorizing the guardian of a minor to sell his land; *McComb v. Gilkey*, 7 C. 146.

94. *Same*. Such an act in itself confers the power of sale, though it requires the sale to be made on such terms and conditions as the Probate Court of a particular county shall prescribe. And it is presumed that the act was passed on proper representations, made on behalf of the infant; and hence, no notice is necessary under such an act, of the application of the guardian to the Probate Court, to have fixed the terms and conditions on which the sale is to be made; *Ib*.

95. *Same*: *Uncertainty in the act*. And if the act authorize the sale of "three lots" in a named town, belonging to the infant, and he was the owner of more than three lots in the town at that time, the act will not be void for uncertainty in not specifying which three lots are to be sold, but it will be construed to give the guardian the election to sell any three lots of the ward in the town; *Ib*.

96. *Same*: *Authority for foreign guardian*. A private act of the Legislature, authorizing a foreign guardian to sell land of his ward in this State, at private or public sale, is constitutional; *Boon v. Bowers*, 1 G. 246.

97. *Construction by Legislature of another act*. The Legislature has no power to pass an act putting a particular construction on another act—that is a judicial duty and power; but an act in terms placing a construction on a former act, though invalid as to past transactions, will have effect from its date as a new enactment; *Planters' Bank v. Black*, 11 S. & M. 43.

98. *Direction by Legislature to jury*. The Legislature cannot exercise judicial power; and hence, cannot direct a jury of inquest, impanelled to assess damages occasioned to the owner of land by the location of a railway on it, to set off against the damages the benefits resulting from the improvement; *Isom v. Miss. Cent. R. R. Co.*, 7 G. 300.

XIII. Judicial Powers conferred on Ministerial Officers.

99. *Power to issue injunction conferred on circuit clerk*. The 6th section of the *quo warranto* act of 1843, which directs an injunction to be issued by the clerk of the Circuit Court, upon the filing in his office of an information in the nature of a *quo warranto* against a bank, restraining the bank and its agents, &c., from collecting debts due the

bank, does not vest judicial power in the clerk; *Sharkey, O. J.* dissented; *Commercial Bank of Rodney v. State*, 4 S. & M. 439.

100. *Signing a bill of exceptions by members of the bar*. The signing and sealing of a bill of exceptions is a ministerial, not a judicial act, the performance of which is necessary to make matter *in pais* a part of the record, and is no part of the judicial prerogative; and hence, the statute authorizing such a bill to be signed and sealed by two attorneys in certain cases, is constitutional; *Van Buren's Case*, 4 C. 512.

101. *Selection of members of the bar to act as judge*. The statute which authorizes a chancellor or judge, when he is interested in a cause, to select four members of the bar, out of which one is to be selected by lot, to try the case, is not unconstitutional; it does not confer judicial power on the special judge so selected, since the decree or judgment is not pronounced by him, but by the regular judge; who in such case, however, gives judicial force and effect to the opinion and rulings of the special judge; *Grinstead v. Buckley*, 3 G. 148.

XIV. Laws partly Unconstitutional.

102. *When constitutional part may have effect*. The unconstitutionality of a part of a statute, does not affect other and distinct provisions of the statute, not dependent on the unconstitutional parts, and capable of having operation without them; *Isom v. Miss. Cent. R. R. Co.*, 7 G. 300; *Campbell v. Union Bank*, 6 H. 625, *Brown v. Beatty*, 5 G. 227. See *ante*, 30.

103. *Same*: *Examples*. Thus, a provision in a railroad charter which directs the jury summoned to assess damages to the owner of land, occasioned by the location of the road, on it to set off against the damages the benefits accruing to the owner from building the road, though unconstitutional, will not prevent an assessment being made by the jury, with the unconstitutional set-off omitted; *Isom v. Miss. Cent. R. R. Co.*, *supra*. And so if a provision in a statute imposing taxation, which exempts certain land from taxes, be unconstitutional, that part alone will be void, and the taxes levied on the other land will be valid; *Williams v. Cammack*, 5 C. 209.

104. *Unconstitutional supplemental act*. If an unconstitutional statute be passed, as a supplement to a valid and constitutional act, the supplement only will be void; it can have no effect to invalidate the constitutional statute; *Campbell v. Union Bank*, *supra*.

See HIGH COURT, 195.

XV. Rights and Jurisdictions of States, and Relations between them.

105. *Relations between the States*. The several States of this Union are each sovereign and independent, and their relations to each other is that of foreign States in close friendship, in regard to all matters not surrendered to the general government; and but for the act of Congress on the subject,

the judgments rendered in one State, would in all others be regarded as foreign judgments; *Dorsey v. Maury*, 10 S. & M. 298.

105a. *One State has no jurisdiction over judgment rendered in another.* A judgment rendered in favor of the assignee of a note against the maker, may be set aside by the creditors of the assignor, and the maker decreed to pay the money to them, if the assignment were made in fraud of their rights; but this can be done only in the courts of the State where the judgment was rendered. It cannot be done by the courts of a foreign State, though the judgment debtor reside there, but which has no jurisdiction over the assignee, who is plaintiff in the judgment; for if such action were taken in a foreign court, it would not relieve the judgment debtor from the judgment in favor of the assignee, since the foreign court would neither have jurisdiction over the judgment, nor over the person of the plaintiff in it, so as to compel him to satisfy it; *Sims v. Talbot*, 5 C. 487.

105b. *Jurisdiction as to ferries.* Ferries over rivers entirely within a State, and over those which are the boundary lines of States, are within the police powers of the States, and not within the grant of powers to the United States. A State may, therefore, pass a law granting the franchise of keeping ferries over such rivers and prohibiting others from establishing ferries in competition with the rights thus granted. Nor is the exercise of this power by the State, as to the Mississippi river, in conflict with that part of the statute admitting the State into the Union, which declares that the Mississippi river shall be a common highway, and forever free to the citizens of the United States, without any tax, duty, impost or toll therefor imposed by the State; *Marshall v. Grimes*, 41 M. 27 (citing *Fanning v. Gregaine*, 16 How. S. C. R. 534, and *Conway v. Taylor*, 1 Black, 604).

106. *Same.* The grant of such a franchise over the Mississippi river does not interfere with the coasting trade between the States, nor does it prevent a citizen from transporting his own property on his own vessels, within the district reserved from competition; it only prevents the keeping a ferry within those limits; *Ib.*

107. *How far State jurisdiction extends into the sea.* The jurisdiction of the State extends as far out into the sea as the public safety and the right to the undisturbed use of the shore may require; *Martin v. O'Brien*, 5 G. 21; but the right of the owner of the land bounded by the sea extends only to high-water mark; the shore below high-water mark belongs to the State, as trustee for the public; and the State may, without the consent of the adjacent owner, grant this much of the sea shore for the purposes of a wharf; *Ib.*

108. *State has no extra-territorial jurisdiction.* A State, through its courts, has no extra-territorial jurisdiction to punish an act done in another State; but in order to ascertain the intention with which an act is done in a State, its courts may consider the acts and

conduct of the party in another State; *Watson's Case*, 7 G. 593.

109. *Comity in following judicial decisions in another State.* Generally the courts of all States will follow the judicial decisions of another State, fixing the character of legality or illegality to an act done in that State; but it is doubtful whether the rule extends so as to bind the other States to follow the decisions of the courts in any State, as to contracts there made and acts there done, so far as such decisions undertake to settle questions arising, not in relation to the peculiar laws and policy of that State, but which concern the laws of Congress and the policy of the Union; *Murrell v. Jones*, 40 M. 565.

As to comity between the States, see INTERNATIONAL LAW.

110. *Concurrent powers of State and general government.* The Federal Constitution and laws made in pursuance thereof, are the paramount law of the land. When by the constitution concurrent powers are granted to the general government, and reserved to the States, the exercise by the State of its reserved power is subordinate to the paramount power of Congress, and the State cannot claim any right, or exercise any power under the concurrent jurisdiction, which would be inconsistent with or repugnant to, or in any wise impair or obstruct, the full exercise of the power by the general government. And hence the right of the State to keep troops in time of war to resist invasion, is subordinate to the war making power of Congress, and the latter may therefore conscript State troops into the Federal service; *Simmons v. Miller*, 40 M. 19.

XVI. The Civil War and Questions growing out of it.

111. *Status of Confederate States after the war.* The result of the civil war between the United States and Confederate States was the overthrow of the latter and the destruction of the State governments, and the subjugation of the Southern people to the military power of the Union. Whether this result was in accordance with the true theory of the Constitution of the United States or not, is immaterial, since that was the fact; and the government of the United States claimed the right and exercised the power to deal with the people and government of the Confederate States, as subjugated to the authority of the Union, and the people of the Confederate States had no option but to accept the condition thus imposed on them by the superior power, and to govern themselves by the rules and principles of law applicable to such cases; *Scott v. Bilgerry*, 40 M. 119.

112. *Same: Power of President of United States.* The President of the United States as commander-in-chief of its military and naval forces, has the power to create a government for conquered territory, and to appoint judicial tribunals, with jurisdiction more or less extended; to enforce the laws and to provide for the maintenance of order and the security of the conquered people in their persons and

property; and he may delegate this power to another. Hence at the close of the late civil war, when the State governments were overthrown in the South, he had the power to appoint provisional governors for the Southern States, with power to establish courts, as in cases of conquered territory. But these tribunals thus established were compelled to act in subordination to the constitution, and to allow jury trials in all cases of common law jurisdiction, when the amount in controversy exceeded \$20; *Ib.*

113. *Act exempting Southern soldiers from being sued.* The Act of 22d of January, 1861, which provided that it shall not be lawful to commence or prosecute any suit or action for debt against any Southern soldier, called into active service by the authorities of this State, whilst he is or may be engaged in the military service of any of the Southern States, is constitutional; *State v. McGinty*, 41 M. 435.

114. *Ordinance of Secession.* The ordinance of the Constitutional Convention of 1865, declared null and void the Ordinance of Secession passed in 1861, and all other ordinances in furtherance of it. The ordinance of 1861, levying a tax to raise means for the defence of the State, was in aid of the Ordinance of Secession. The State cannot, therefore, after this declaration of the nullity of the ordinance of 1861, maintain an action against a sheriff for his default in the collection and payment of the tax so levied by the ordinance of 1861; *State v. McGinty*, *supra*.

See CONFEDERATE STATES. INTERNATIONAL LAW.

XVII. Supreme Court of the United States.

See FEDERAL COURTS. HIGH COURT, 193.

115. *Supreme Court the final arbiter of constitutional questions.* The High Court of the State will conform its decisions to the decisions of the Supreme Court of the United States, on all questions involving the construction of the Constitution of the United States, as to which the Supreme Court has power of revision, under the 25th section of the Judiciary Act of Congress, passed in 1789, over the decisions of the State tribunals. Therefore, the Supreme Court having decided that the statute of this State, passed in 1840, prohibiting assignments of their assets by banks, was void for non-conformity to that clause of the Federal Constitution prohibiting the States from passing laws impairing the obligation of contracts; the High Court of this State, notwithstanding its former decisions, sustaining that law, will now hold it void; *Grand Gulf Bk v. State*, 10 S. & M. 428.

116. *Same.* When a State statute is alleged to be in violation of the Constitution of the United States, upon the ground that it impairs the obligation of a contract, or infringes a right created or secured by a former statute, the jurisdiction of the Supreme Court of the United States, under the 25th section of the Judiciary Act of 1789, does not extend to

the making of an authoritative exposition of the former statute, which would be binding on the courts of that State; but in such case the State courts have the right to expound the former statute, and declare what rights are secured by it, and the Supreme Court may then declare whether the last statute impairs or violates the right thus declared to be secured; *McIntyre v. Ingraham*, 6 G. 25.

See STATUTES, 98, and SUPREME COURT OF UNITED STATES, 1.

XVIII. The Constitution as it relates to Negroes.

117. *Negroes not embraced in the Constitution of the United States.* Negroes and persons of African descent are not embraced in the general words of the Declaration of Independence, or of the Constitution of the United States, and they are not citizens of the United States; *Heirn v. Bridault*, 8 G. 209; *Mitchell v. Wells*, 1b., 235. Citizenship, in the sense of the Constitution of the United States, can be conferred only on the white race; *Ib.*

118. *Power of States over this subject.* Each State may, in the exercise of its sovereignty, confer citizenship on negroes, but when they are so admitted as citizens of one State, this does not make them citizens of the United States, nor does it impose on the other States the duty to recognize such citizenship within their limits; for the same rights of sovereignty which authorizes a State to admit Africans as citizens, also authorizes each of the co-States to determine what effect such admission to citizenship shall have in its limits; *Mitchell v. Wells*, *supra*.

119. *Status of a slave fixed by our laws.* The status of a slave in this State is fixed by its laws, and it cannot be changed elsewhere, so as to confer rights or privileges in this State inconsistent with its policy and laws; *Ib.*

XIX. Prohibition of introduction of Slaves as merchandise.

120. *Constiuction of Constitution of 1832 on this subject.* That provision of the Constitution of 1832, which declares "that the introduction of slaves into this State as merchandise or for sale, shall be prohibited from the first of May, 1833," is not merely a mandate to the Legislature to pass a law prohibiting such introduction, but is an inhibition *per se*, and all contracts for the purchase of slaves so introduced after the 1st of May, 1833, are illegal and void; *Green v. Robinson*, 5 H. 80; *Brien v. Williamson*, 7 H. 14. And if this provision were regarded as a mere mandate to the Legislature, it was a mandate which the Legislature had no right to disobey or evade and it fixed the policy of the State to be against the introduction of slaves for sale, and for that reason all acts done in contravention of it were illegal and void, for the general principles of a constitution are *per se* laws without legislation to carry them out, and they annul all acts done in violation of them; *Brien v. Williamson*, *supra*.

XX. Referring laws to the people.

121. *Power of legislation cannot be delegated.* The whole legislative power of the State is vested by the constitution in the Senate and House of Representatives, and no part of it can be delegated by the Legislature to the people or any portion of them, or to any other department of the government; nor can the two houses associate with themselves in the exercise of legislative functions any other person, power or tribunal whatever. Hence, an act which is a mere legislative proposition, plan or project for a law to be submitted to the people for their adoption or rejection, is unconstitutional and void; *Alcorn v. Harmer*, 9 G. 653.

122. *Legislature may pass conditional law.* But when the act is complete within itself, having received its final sanction from the legislative will, and by its express terms goes into effect as a law, it is a valid exercise of legislative power, notwithstanding the operation of some of its provisions, is by the terms of the act made to depend upon the approving vote of the people of the district or locality to be affected by it. For the power, to make the law necessarily embraces within it the power to prescribe the conditions upon which in a given case the law shall come into operation, or be defeated; and this condition may as well be the vote of the people of the locality to be affected by it, as any other; *Ib.*

123. *Same.* And it is within the same rule, if a tax imposed by an act on a county be, by the terms of the act, liable to be defeated, if by a day named there is filed with the Board of Police a written protest against it by a majority of the voters of the county; *Williams v. Cammack*, 5 C. 209.

124. *Character of the district whose vote is taken.* And in the selection of a district by whose vote certain provisions of a statute is to go into effect or be defeated, the Legislature is not restricted to the political subdivisions of the State previously established by the constitution and laws; but the Legislature may create and define in the act itself, the district, without reference to previous political sub-divisions; *Alcorn v. Harmer*, *supra*.

XXI. Miscellaneous.

125. *Wager of law.* Wager of law is abolished by the constitution of this State; *Jennings v. Gibson*, W. 234.

126. *Abolition of office of probate clerk.* The statute abolishing the office of probate clerk, and investing the judge with the duties and emoluments of that office, is unconstitutional and void; *Runnells v. State*, W. 146.

127. *Appeal on doubts.* The statute authorizing an inferior court, when it doubts as to the law to transfer the case before final judgment to the Supreme Court, is constitutional; *Blanchard v. Buckholtz*, W. 64.

128. *Two circuit courts in a county.* The Legislature may constitutionally divide a county into districts, and provide for the

holding of a circuit court in each; and that the grand jury for each court shall be summoned exclusively from the district in which it is held; *Alfred's Case*, 8 G. 296.

129. *Fixing county seats.* The Legislature has the power to fix the county seats of the several counties, and to change them at its pleasure; *Monet v. Jones*, 10 S. & M. 237.

130. *Constitution: Its office and effect.* A constitution provides for a form of government and establishes general principles which are deemed fundamental. These principles are laws, and are self-executing to the extent that everything done in violation of them is void; *Brien v. Williamson*, 7 H. 14.

131. *Trial of slaves by justice of the peace.* The act confiding the trial of slaves to justices of the peace, when the charge is larceny, and attaching, as a consequence of conviction, the liability of the master for the value of the property stolen, without regard to the amount, is constitutional; *Dewell v. Boyd*, 3 S. & M. 592.

132. *Prohibition to bank director to act as attorney for the bank.* The act prohibiting bank directors from acting as attorneys-at-law for their respective banks, is constitutional; *West Feliciana R. R. Co. v. Johnson*, 5 H. 273.

133. *Sale of judgment for costs.* Whether the Legislature has power to give a defendant in a judgment the power to buy it, without the plaintiff's consent, for a less sum than is due on it; *Quære?* *Buckingham v. Riggs*, 5 C. 751.

134. *Special court of equity.* The constitutional convention of this State, held in 1865, in recognizing the existence of the special court of equity established by the provisional governor, and providing for appeals and writs of error therefrom, did not intend to confer any jurisdiction on that court, but simply to recognize its existence with the jurisdiction which had already been conferred on it; *Handy, J.*, dissented; *Scott v. Billgerry*, 40 M. 119.

135. *Style of laws.* The constitution provides that the style of all laws shall be: "Be it enacted by the Legislature of the State of Mississippi." A literal adherence, however, to this form is not necessary to the validity of a statute. The provision is merely directory and it is sufficient if any words be used which show on the face of the statute that it has been adopted and promulgated as a law by the Legislature, and was intended by that body to have that effect. Hence, if the words "Be it resolved by the Legislature of the State of Mississippi" be used, it will be sufficient; *Swann v. Buck*, 40 M. 268.

136. *Joint resolution.* A joint resolution of the Legislature frequently does not operate as a law, being but a means used by the Legislature to express its opinions on some subject; but whenever such a resolution is passed by both Houses, and approved by the governor, and undertakes to lay down a rule of conduct for any portion of the people, it will have the effect of a law; *Swann v. Buck*, *supra*.

137. *When acts of Legislature take effect.* The Constitution provides that a law shall take effect only after the expiration of sixty days from the date of its passage, unless otherwise provided for. But it is not necessary that this provision shall be in express terms, nor that it should be in the same act. It is sufficient, if the intent to give it an earlier operation be apparent from the act, if it so appear in any other manner than from the general phraseology of the act; *Swann v. Buck, supra*.

And when a supplemental act was passed at the same session that the original was passed, and in less than sixty days from the passage of the original, and the supplement, by express terms, went into operation from its date; it was held that the original went into operation at that time also; *West Feliciana R. R. Co. v. Johnson*, 5 H. 273.

138. *Nature of offices.* No officer holds his office, or receives his compensation under or by virtue of any contract with the State, within the purview of that clause of the constitution which prohibits the passing of laws impairing the obligation of contracts. Offices in this State are not incorporeal hereditaments, nor are they the subject of property. They are mere agencies of a political nature, which the government may regulate for the common good. The law creating an office may be repealed before the officer's term expires, and his compensation may also be diminished. A salary due by the State is a debt resulting from services rendered, but not in virtue of any contract; *Swan v. Buck, supra*; *S. P., State v. Smedes & Marshall*, 4 C. 47.

139. *Legislature may postpone payment of a just debt.* The power to postpone the payment of a just debt is a necessary incident to the taxing power, which is vested in the Legislature, and so is the power to provide which of several just debts shall be first paid; *Swan v. Buck, supra*.

140. *Meaning of "office" and "officer."* The constitutional and legal meaning of the term "office" is a continuing charge or employment, the duties of which are defined by rules prescribed by law, and not by contract, and the person who fills it is an "officer;" *Shelby v. Alcorn*, 7 G. 273.

141. *Unconstitutional appointment.* By the 26th section of the 3d article of the constitution, it is declared "that no Senator or representative shall, during the term for which he shall have been elected, nor for one year thereafter, be appointed to any civil office in the State which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as shall be filled by elections by the people." This provision extends to every continuing charge or employment of a civil nature, the duties of which are prescribed by law, and not by contract, and for the performance of which the incumbent is entitled to receive a stated salary or fees; *Ib.*

142. *Unconstitutional appointment void.* It is of the nature and essence of the funda-

mental law of a State, that it avoids every act done in violation of its provisions; and hence the appointment of a member of the Legislature to an office, in violation of sect. 26, art. 3, of the Constitution, is absolutely void, both for want of capacity of the appointee to accept, and for want of power in the functionary, in whom the right of appointment to that office is vested, to make it. And the rule of the common law, which holds as valid, in respect to the public and third persons, the acts of public officers, who are such *de facto*, acting under color of office by an election or appointment not strictly legal, does not apply when the constitution or a statute declares the appointment or election absolutely void; and such an appointment or election may be declared void wherever it comes, even incidentally, in question; *Ib.*

143. *Appropriation for internal improvements.* The 7th section of 8th article of the Constitution, which declares that no money from the treasury shall be appropriated for objects of internal improvements, unless a bill for that purpose be approved by two-thirds of both branches of the Legislature," &c., applies exclusively to appropriations of the public money of the State, which is deposited in and disbursed from the State treasury, located at the seat of government; *Alcorn v. Hamer*, 9 G. 652.

144. *Mortgage of steamboats, &c.* Congress may pass laws regulating the sale, mortgage, and hypothecation of vessels belonging to citizens of the United States, and engaged in foreign commerce, or in commerce among the States; and a mortgage of such a vessel, except in accordance with the act of Congress, though not in accordance with the laws of the State in which it is made, is good; *Shaw v. McCandless*, 7 G. 296.

145. *Extorted confessions of guilt.* Confessions of guilt obtained by force are inadmissible under any circumstances, or for any purpose whatever. Their admission would be a violation of that clause of the Constitution which prohibits the compelling of a party from giving evidence against himself; *Jordan's Case*, 3 G. 382.

146. *As to effect of assignments of debts in this State under foreign insolvent laws.* see CONFLICT OF LAWS, 17. 35, 36, 37; and *Beer v. Hooper*, 3 G. 246; *Kirkland v. Lowe*, 4 G. 423; *Tully v. Herrin*, 44 M. 626.

147. *Bill of credit.* The treasury notes issued under the ordinance of the convention of 1861, were not issued to circulate as money, but as a means to raise a loan for the State; and the fact that they did afterwards circulate as money, does not make their issuance an emission of bills of credit. The issuance by a State of notes payable at a future day, in consideration of money loaned or services rendered, is not a violation of the Federal Constitution, prohibiting the emission of bills of credit by the States; *Green v. Sizer*, 40 M. 530.

148. *United States legal tender notes.* The court in this case was under the impression that the Supreme Court of the United States

had decided that the Legal Tender Act of Congress was constitutional, and in consequence thereof, held that where it was necessary to ascertain the value of Confederate States treasury notes, their value should be estimated in the legal tender United States treasury notes, and not in specie; *Ezelle v. Parker*, 41 M. 520. (Decided in 1867.)

149. *For constitutionality of the law pledging the faith of the State for the Union Bank bonds*, see UNION BANK.

150. *Power of removal from office* The persons appointed to county office under sect. 6, art. 12, of the Constitution of 1870, by the governor, are subject to removal by him. It seems that the power of removal is vested in the appointing officer whenever there is no definite and fixed term to the office; *Newsom v. Cocke*, 44 M. 352. But there is no power in the governor to remove the judges appointed by the military governor; *Cooper v. Moore*, 44 M. 386.

And by statute, the chancellor had the power to fill any vacancy in the office of chancery clerk, after the first appointment by the governor; and in such a case the governor has no power to appoint; *Peyton v. Cabaniss*, 44 M. 808.

151. *Convention of 1865.* That convention having been recognized by the President and Congress, its acts are valid; *Thomas v. Taylor*, 42 M. 651.

Constructive Frauds.

See FRAUDS.

Contempts.

1. *Power of court to punish for contempts.* The right of punishing contempts by summary conviction, is a necessary attribute of judicial power, inherent in all courts from the nature of their organization, and essential to their existence and the due administration of justice. It is a trust given to the courts, not for themselves, but for the people whose laws they enforce, and whose authority they exercise; and each court has the power for itself finally to punish contempts without interference from any other; *Watson v. Williams*, 7 G. 331.

See PROBATE COURT, 142 to 145.

2. *Same.* The right to punish for contempts extends not only to acts which directly and openly insult or resist the powers of the court or the person of the judges, but to indirect and constructive contempts, which obstruct the process and degrade the authority of the court; and it includes the power of the Probate Court to imprison, by attachment, for a contempt, an administrator, guardian or executor, for his failure to comply with any lawful order or decree of the court; *Watson v. Williams*, *supra*. But this power does not authorize a court to punish for consequential contempts, not obstructing the process of the court, but only attaching to the person of the judge; such as a newspaper publication reflecting on the character of the judge. To

punish such an act, as for a contempt, summary conviction, would be at war with the constitution of the State. Per Thatcher J., in *Ex parte Hickey*, 4 S. & M. 751.

3. *Power of circuit courts to punish for contempt.* The statute (H. C. p. 736, §17) declares, that the court "shall have the power to fine and imprison any person who may be guilty of a contempt of the court, who sitting, either in the presence or hearing of the court: *Provided*, the fine shall not exceed \$100," and the imprisonment shall not exceed the term of the court; limits the power of the court to the punishment of contempt of the character defined in the statute; also limits the mode and extent of the punishment. Hence, a newspaper article published during the session of the court and pending the trial before the court of a prisoner indicted for murder, charging the judge with being an abettor of the murder is not a contempt of court, punishable by fine and imprisonment, but a libel upon that functionary; *Id.*; S. P., *Ex parte Adams*, 3 883.

4. *Power of the governor to pardon for contempt.* The governor of the State has the power to pardon a contempt committed against a circuit court, and to release a prisoner remitted the fine and imprisonment imposed upon the offender; *Id.*

5. *Judgment for contempt; how examined.* A judgment of a court convicting a party of a contempt, and imposing imprisonment and punishment therefor in a case where the court does not exceed its jurisdiction, is not examinable by another court or judge, habeas corpus. Whether examinable on writ of error; *Quere?* *Ex parte Adams*, *supra*.

6. *Same.* The constitution of this State declares, "that the High Court of Errors and Appeals shall have no jurisdiction, but such as properly belongs to a court of errors and appeals." By the common law in force in this State when the constitution was adopted, no appeal or writ of error lay to the judgment of a court on the subject of contempt, but each court was the sole and exclusive judge of contempts against its authority; and hence the High Court has no jurisdiction to review the judgment of any inferior court in this State, convicting a party of a contempt; *Watson v. Williams*, 7 G. 331.

7. *What the record must show.* When a party is held in custody for a contempt, the record must show a conviction of that offense, otherwise a discharge on habeas corpus may be ordered. Hence where the return to a writ of habeas corpus showed that the prisoner was held in custody in virtue of a court order, "That G. H. Adams be sent to jail and remain there until he signifies his assent to the court to answer questions to the grand jury;" it was held that though a refusal to answer questions propounded by the grand jury, and held by the court to be legal, was a contempt, yet the record did not show that the prisoner had been convicted of such contempt, and he was entitled to his discharge; *Ex parte Adams*, *supra*.

8. *Appearance by party after conviction for contempt.* It is an unusual practice to permit a party charged with a contempt, to put in a plea by attorney without an appearance in person. The regular mode is for him to answer interrogatories under oath, so as to clear himself of the contempt; *Vertner v. Martin*, 10 S. & M. 103.

Continuance.

See PRACTICE, 5 to 7.

1. *Court has power to impose conditions in granting.* The court has the right to impose as a condition to granting a continuance, that the applicant shall consent to the taking and reading of the deposition of a witness, whose deposition would be unauthorized, except by such consent; *Hamilton v. Cooper*, W. 542.

2. *Continuance in actions of replevin.* Notwithstanding the statute provides that actions of replevin are to be tried at the first term, yet continuances should be granted in replevin cases, just the same as in other actions; and it will therefore be error for the court to refuse to hear an application for a continuance in such a case; *Marshall v. Fulgham*, 4 H. 216.

3. *When petitioner in bill of discovery not entitled to.* The petitioner in a bill of discovery at law is not entitled to a continuance of the cause, in order to enable him to take testimony to overturn the answer. By filing the petition, he admits he has no witness to prove the facts sought to be discovered. The answer to such a petition is conclusive on the petitioner, and he is not permitted to contradict it, if he submit it to the jury as evidence in the cause; *Robinson v. Francis*, 7 H. 458.

4. *Granting or refusing, discretionary.* The granting or refusing a continuance is peculiarly within the discretion of the court, and cannot be re-examined in the Appellate Court; *Noe's Case*, 4 H. 330; *Muirhead v. Muirhead*, 6 S. & M. 451. The exercise of this discretion cannot generally be assigned for error; *Bohr v. Steamer Baton Rouge*, 7 S. & M. 715. But if flagrant and manifest injustice were done, by an ill-directed and capricious exercise of this discretion, the High Court might interfere; *Franks v. Wanzer*, 3 C. 121; *Ogle's Case*, 4 G. 383; *Lundy's Case*, 44 M. 669. Thus, where an administrator applied to the Probate Court for the postponement of the trial on his final account, until the determination of another suit then pending in another court, by which suit it could alone be determined whether the administrator was liable or not on certain notes which he gave to his intestate, and which he had returned as debts against himself; it was held that this was not an ordinary application for a continuance, and that the postponement should be granted; *Franks v. Wanzer*, *supra*.

6. *What affidavit should contain.* An affidavit for a continuance on account of the absence of a witness, should state that the applicant is expected to procure his attend-

ance at the next term of the court; *Noe's Case*, 4 H. 330.

7. *Same: Case in judgment.* Where the contestant of the widow's application for administration applied for a continuance, stating in his affidavit that he could prove by the absent witness, that a short time previous to the widow's marriage to the intestate, she was living with another man as his wife; it was held that the affidavit was insufficient, in not stating that the person with whom she was then living was alive at the time of her marriage with intestate; *Muirhead v. Muirhead*, 6 S. & M. 451.

8. *Proper steps must be taken to secure attendance of witness.* A continuance is allowable for the absence of a witness only where the proper steps have been taken to procure his attendance; *Week's Case*, 2 G. 490.

9. *Error cured by attendance of witness.* And if the court were to commit an error on the showing then made, in refusing a continuance, it will be cured by the subsequent appearance of the witness in time to testify on the trial; *Ib*.

See CRIMINAL LAW, sub-division Continuance.

10. *Case where continuance was refused.* The application was based on the absence of a witness, who was desired only for the purpose of impeaching a witness for the State, by proving that the State's witness had said, that if he could not convict the accused by telling the truth, he would do it otherwise; *Held*, that a continuance was properly refused; *Lundy's Case*, 44 M. 669.

Contracts.

See CONFLICT OF LAWS; CONSIDERATION.

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I. Construction of.

1. *Intention of parties.* Contracts are to be construed, as nearly as possible, by the intention of the parties, to be gathered from the whole context, which is to be interpreted according to the reasonable sense of the words; *Wadlington v. Hill*, 10 S. & M. 560.

2. *Words construed in sense understood by promisee: Justice favored.* Technical rules are not so much to be considered in the construction of contracts as the real meaning of the parties, where it can be gathered from the whole instrument. The words are to be construed in that sense in which they were most probably understood by the promisee, and that construction should be formed which is obviously most just. Hence, a covenant by vendor to make a good and perfect deed

should be construed to mean a covenant to make a good title, and not merely a good parchment deed; *Greenwood v. Ligon*, 10 S. & M. 615. See *post*, 123.

3. *Technical words.* Technical words in a contract generally receive a technical meaning, but they will be construed according to their popular sense, if it be necessary so to construe them, in order to carry out the obvious intention of the contracting parties; *Tatum v. Bonner*, 5 C. 760; *Greenwood v. Ligon*, *supra*.

4. *Construed to be legal when possible.* When contracts of doubtful import are susceptible of two interpretations, one legal and the other illegal, that construction will be adopted which will make the agreement legal; *Riley v. Vanhouten*, 4 H. 428; *Merrill v. Melchior*, 1 G. 56. See *post*, 21.

5. *Extrinsic matter referred to.* If extrinsic matter be expressly or impliedly referred to in a written contract, such matter may be considered in construing the contract and ascertaining its terms; if by that, the contract is made sufficiently certain, it is good. A law of Congress fixing the instalments in which money due by the purchaser of public land shall be payable, may be thus referred to, to ascertain when money contracted to be paid by a private party, is due and payable; *Riley v. Vanhouten*, *supra*.

6. *Same: Case in judgment.* When a contract refers to and adopts a statute, as fixing the times of payment by instalments, and it appears that the contract is made after the time when by the statute one of the instalments is payable, the contract is nevertheless good; for as to that instalment, the time of payment being past, it will be construed that it is due immediately; *Ib.*

7. *Insensible and impossible conditions.* Conditions in a contract which are insensible or impossible, are void, and the obligation remains absolute, if it be not for the doing of an illegal thing. But if any sense or certainty can be made of the condition, the contract and condition will both stand; *Merrill v. Bell*, 6 S. & M. 730.

8. *Same: Case in judgment.* Money was deposited with the defendant, to be repaid on the condition, that the depositor should, within two years, prove before a court of competent jurisdiction, to the satisfaction of the administrators of B., that the depositor had paid to B. a debt: *Held*, that the condition was impossible as expressed, as no court had jurisdiction to take proof, except in a cause depending in it; and that as the obvious meaning of the whole transaction was, that the depositor made the deposit for a debt which he alleged had been paid, but the payment was disputed, he was entitled to recover it back upon proof that he had paid the debt to B., and that the proof was to be made in an action by the depositor, on the agreement of bailment against the bailee; *Ib.*

9. *Construction of agreement to repay upon allowance of a claim as a set-off.* A. held a note on B., which was stolen from him and had come to the possession of H., who was a

debtor to B. on another account, and claimed the note as a set-off against his indebtedness to B. A. sued B. on the lost note, and B. confessed judgment for the amount, and afterwards privately had a settlement with H., in which he allowed H. the amount of the note as a set-off, and B. then procured from A. a bond to repay the judgment, in case H. was allowed the note as a set-off against B. B. brought an action on the bond, and it was held that he was not entitled to recover, because the allowance of the set-off was by private agreement between him and H. and not by judicial determination, as was the meaning of the contract; *Ainsworth v. Ainsworth*, 2 C. 145.

9a. *Repugnant clause in.* A repugnant clause in a contract must be construed according to the object and spirit of the instrument, and thus be made to yield to the general intent to be collected from all its parts; *Heard v. Garritt*, 5 G. 152.

9b. *Abeysance.* A contract will not be construed so as to leave the title to the property conveyed in it, for any considerable time, in abeyance; *Ib.*

9c. *Written contract construed by the court.* A written contract is to be construed by the court, and not by the jury; *Fairly v. Fairly*, 9 G. 280.

9d. *Construed with reference to law in existence when made.* Contracts are presumed to be made with reference to the law in existence at the time they are made. Hence, a promise to pay money, without stating what kind, will mean legal tender; *Carter v. Cox*, 44 M. 148.

II. Contemporaneous Writings and Correspondence.

10. *Construed together.* When two instruments being contemporaneous in their execution and referring to the same subject matter, refer to each other, they will be construed together and deemed but one instrument; *Doe v. Bernard*, 7 S. & M. 319. Thus, where an absolute deed was made, and the grantee at the time executed an instrument showing that the conveyance was a mere trust for the grantor, the two instruments are to be construed together; *Ib.* And so, if the vendee give an absolute note for the purchase money, payable in "dollars" as such, and at the same time take from vendor a bond showing that the note was only to be paid on a contingency, and then only in depreciated bank notes, the two instruments are but parts of the same transaction, and will be construed together; *Williams v. Jones*, 10 S. & M. 108.

10a. *Endorsement on contract: Construed with it.* An endorsement on a note payable on demand, that it was not to be paid till the happening of a certain contingency, is to be construed as if incorporated in the note and a part of it; *Effinger v. Richards*, 6 G. 540; and so an agreement endorsed on the back of a deed, at the time of its execution, and signed and sealed by the grantor and grantee, and in relation to the subject matter of the deed,

is as much a part of the deed as if incorporated in it; *Baldwin v. Jenkins*, 1 C. 206.

11. *Example.* The vendee executed his promissory note in the usual form for the purchase money of land and slaves. The vendor, in the deed conveying the property, agreed to take in satisfaction of the note the notes of certain banks; it was held that the agreement in the deed was not to be construed as a part of the vendee's promissory note, so as to make it a contract to pay in the bank notes specified in the deed; but that the promissory note was an absolute agreement to pay in specie, and the agreement in the deed was a defeasance, which was strictly to be complied with; and that if the bank notes were not paid or tendered at maturity, the promissory note was collectable in specie; *Saunders v. Richardson*, 2 S. & M. 90.

12. *Contract by letters.* Where a contract is made by a written correspondence between the parties, all the letters relating to it before its consummation are to be looked to, in order to ascertain its terms; *Stebbins v. Niles*, 3 C. 267.

13. *Same.* Where a letter is written proposing terms for a contract, and the answer modifies the terms, but refers to the letter containing the proposition, the answer is to be considered as accepting the terms in the proposition, except so far as they are modified in the answer, or inconsistent with the terms therein proposed, unless the answer, expressly or by implication, purport to contain all the terms of the contract; and an acceptance by the party making the first proposition of the terms proposed in the answer will be considered an acceptance, subject to the above rule; *Ib.*

14. *Same: Case in judgment.* N. by letter proposed to S., as agent for an association, that if the latter would advance to him \$50,000 to enable him to complete his purchase of fifty sections of land from Indian reservees, that S. should have one-third interest in the profits, after repaying the \$50,000; the expenses of locating the land and making sales to be borne by each party *pro rata*, and that N. should give his services gratuitously in making locations and sales. S. answered, agreeing to make the advance but claiming two-thirds interest, and also stipulating that \$1,000 should be advanced for each section, as the title should be made out complete and vested in S., as trustee for the association; that N. should attend to locating and selling the land, and that the money received from the sales should be first applied to the repayment of the \$50,000 and interest, and that the proceeds of the sales "over and above said \$50,000 and interest" should be divided, one-third, to N., and two-thirds to S.; and \$5 per acre was stipulated as the minimum price for sales until enough was realized to repay the \$50,000 with interest, and the remainder was to be held for a higher price. N. replied, accepting these terms: *Held*, that N. was entitled to charge S. with two-thirds of the expense of locating, and selling the land, as nothing was con-

tained in the answer of S. to N.'s original proposition rejecting that part of it; *Ib.*

III. Capacity to make Contracts.

15. *Presumption in favor of.* When a contract is shown to have been made, the parties thereto will be presumed to be capable in law of contracting, until the contrary appears. Hence, when a distribution of personal estate is shown to have been made among the heirs by consent, they will be presumed capable of agreeing to such division, unless their incapacity be shown; *Henderson v. Clarke* 5 C. 436.

16. *Effect of intoxication.* A contract made when one of the parties is so intoxicated as to be incapable of transacting business, is not obligatory on him; and much more is this the case, when the intoxication was brought about by the contrivance of the other party; *Newell v. Fisher*, 2 C. 431.

16a. *Same: Case in judgment.* A father having been induced whilst drunk, to execute his note for the indebtedness of his adult son, which he had refused to do when sober, after the maturity of the note and when he was sober, promised the holder he would pay the note if he would indulge him until next autumn: *Held*, that the note having been given during a state of intoxication on the part of the maker, and without any consideration whatever as to him, could not be rendered valid by the subsequent promise and forbearance; the holder in that case could have no previous demand on which a recovery could have been had, to make the forbearance of suit a legal consideration; *Fisher v. Newell, supra*. But it must be noted that the above rule, which declares that a promise made by the maker, in consideration of forbearance given in the payment of the note, is void, if the note be without consideration as to him; because there was no previous demand against the maker which could have been enforced; does not apply, so as to make invalid a promise by a third party to pay the debt of another, in consideration of forbearance given to the debtor; *Waul v. Kirkman*, 13 S. & M. 599.

See CONSIDERATION, 6.

17. *Contract by one non compos mentis.* The contracts of a person *non compos mentis* are, if not wholly void, at least voidable, unless they relate to necessities suitable to his condition in life. The legal incapacity to contract being shown, the contract is avoided, and it is not a matter of discretion in the court or judge to affirm or disaffirm it; *Fitzgerald v. Reid*, 9 S. & M. 94.

18. *Same: Rescinding of such contracts.* But in rescinding such contracts, the court will put the parties in *statu quo* as near as may be practicable, and whatever benefit the lunatic or his estate may have received from such a contract, must be given up; *Ib.*

19. *Incapacity to give assent.* There can be no contract without the assent of the parties, and there can be no assent if the party is incapable mentally to comprehend the full value of the property, and the terms of the contract; *Hill v. McLauren*, 6 C. 288.

19a. *As to incapacity of married women*; see HUSBAND AND WIFE; as to incapacity of infants; see INFANTS.

19b. *Proof on the subject of sanity* When there is a conflict in the evidence, in relation to the sanity of a grantor, that evidence is best *ceteris paribus*, which relates to his mental condition at a point of time nearest the date of the deed. And in such a contract, the fact that the deed is in accordance with his declarations made when he was unquestionably sane, is a consideration in favor of his sanity when it was made; *Exum v. Canty*, 5 G. 533.

IV. Illegal Contracts.

See CONSIDERATION, 21 to 28.

20. *Contracts: Construed to be legal when possible.* When contracts of doubtful import are susceptible of an interpretation which makes them legal, such interpretation will prevail; *Riley v. Vanhouten*, 4 H. 425; and if a contract be susceptible of two interpretations, one legal and the other illegal, that interpretation will prevail which renders the contract valid; *Merrill v. Melchior*, 1 G. 516.

See CONSIDERATION, 28.

21. *Presumption in favor of legality.* Every presumption of law is in favor of the legality of a contract; it is incumbent on a party alleging its illegality, to show everything necessary to render it so, though it involve proof of a negative character. Hence, it is the duty of a seller of a slave, who seeks to avoid his warranty, on the ground of a want of the certificate of character required by law, to show by proof that such certificate was not in existence at the time of the sale; *Ib.*; S. P. as to usury. See USURY; and *Brown Bros. & Co. v. Freeland*, 5 G. 181. See ante, 4.

22. *Contracts in violation of law or public policy.* All contracts which are in violation of law or public policy, or grow out of an immoral transaction are void; *Brien v. Williamson*, 7 H. 14; *Wooten v. Miller*, 7 S. & M. 380; *Odineal v. Barry*, 2 C. 9; *Hoover v. Pierce*, 4 C. 627; *Bank of Newberry v. Stegall*, 41 M. 142; *Barker v. Justice*, 41 M. 240; *Deans v. McLendon*, 1 G. 343.

23. *Contracts growing out of, or connected with illegal transactions.* If the original transaction be illegal, all subsequent contracts and agreements in renewal of it, or based on it, are illegal and void; *Collins v. McCargo*, 6 S. & M. 128; *Adams v. Rowan*, 8 S. & M. 624; *Wooten v. Miller*, 7 ib. 380; *Torry v. Grant*, 10 ib. 89; *Coulter v. Robertson*, 14 S. & M. 18; *Kountz v. Price*, 40 M. 341. And so, if the subject matter of a contract can be traced to an original illegal contract, which the latter contract is intended to carry into effect, the substituted agreement will be void. And this is so though the party sought to be charged on the substituted security was ignorant of and unconnected with the illegality of the original contract, and though *as to him*, there is a valid consideration for the substituted security, if the party seeking to enforce it was privy to the

original illegal contract, and received the substituted security in lieu of the original illegal one; *Coulter v. Robertson*, *supra*.

24. *Same: Examples* Thus, where slaves illegally introduced into this State for sale, were sold for a draft of the vendee, which on a compromise was settled by the note of the vendee, and the note settled by another compromise, by which the vendee returned all the slaves then alive and gave a note for the price of those which had died in his possession, the last note is illegal and void; *Collins v. McCargo*, *supra*. And so where A. borrowed money at an usurious rate of interest, and B. being his (A.'s) debtor on a valid contract, it was agreed between A., B. and the lender, that B. should substitute his note to the lender in place of A.'s, which was done, and A.'s note given up to him; it was held that B. could set up the usury in the loan to A., and was only liable on his substituted note to the lender, to the same extent A. was liable on his original note, which was given for the usurious loan; *Coulter v. Robertson*, *supra* (see post, 27). But this rule does not apply where there has been a valid assignment of the original illegal contract, to a *bona fide* holder without notice, and he accepts in lieu of the original, a substituted security founded on a valid consideration, from a stranger to the original illegal contract; *McLauren v. Graham*, 4 C. 400.

25. *Same.* And the rule is the same, where a contract is illegal, because made on Sunday, for in such case any subsequent renewal of the promise, or any security given on the original consideration, is void. Thus, if a sale be made on Sunday, and completed by delivery of the thing sold, a note given afterwards on a secular day for the price, will be void, notwithstanding the only element of illegality in the sale, viz., the time, be eliminated from the subsequent contract; *Kountz v. Price*, 40 M. 341. But in other cases, since if a part only of a contract be illegal, that which is legal will be enforced if it can be separated entirely from, and be independent of the illegal part; the elimination by the act of the parties of the illegal part, will leave the contract unobjectionable; *Bank of Newberry v. Stegall*, 41 M. 142.

26. *Same: Examples: Test as to connection.* Where the contract grows out of, or is connected with an illegal or immoral transaction, it will not be enforced; but if the subsequent promise be unconnected with the illegal act, and is founded on a new consideration, and not tainted by the illegal act, it may be enforced. And the test whether a demand connected with an illegal transaction can be enforced, is whether the plaintiff requires any aid from it to establish his case. Hence, where a principal residing in another State, sent a slave to this State for sale, by an agent immigrating hither, and the agent sold the slave in this State, and transferred the note taken for the price to his father, who afterwards collected it; it was held that the principal could not succeed in a suit in equity to recover the proceeds from the agent and his

father, because the introduction and sale of the slave were contrary to law, and the demand was so immediately connected with the illegal acts, that the plaintiff could not establish his case without aid from them; *Wooten v. Miller*, 7 S. & M. 360. A new contract based on a new consideration, though in relation to property, in relation to which there had been an unlawful transaction between the parties, is not of itself necessarily illegal; *Gilliam v. Brown*, 43 M. 641. Thus, B. donated cotton for an illegal purpose, the donee sold the cotton to H. to raise money to carry out the illegal purpose, and afterwards B. agreed for a valuable consideration to keep the cotton as bailee for H.: *Held*, that the subsequent contract between B. and H. for the bailment of the cotton was unaffected by the illegality in the donation, and that B. was liable on it for the value of the cotton; *Holt v. Barton*, 42 M. 711.

See CONFEDERATE STATES, 1.

26a. *Rule: When illegal enterprise is ended.* So long as the illegal contract is in *feri*, in the course of execution, neither party can have a remedy grounded upon it, either for its specific enforcement, or for damages, for any breach of it. But it is well established that after the illegal contract has been executed, one party in possession of all the gains and profits arising from the illicit traffic and transactions, will not be tolerated to interpose, as against his copartner, the objection that the business which produced the fund was illegal, and on that account, that the plaintiff is not entitled to recover his share of the property. For all harm that can enure to the public from an infraction of the law has already occurred, and it is but to encourage dishonesty to allow the defendant to retain, under this plea, the just property of another. Hence, in this case, the partner who was in possession of the proceeds of cotton, which he and the plaintiff had illegally carried through the lines during the late war, was held to account for the other's share; *Gilliam v. Brown*, 43 M. 641.

27. *Where assignee claims title through illegal contract.* A note or other security, which is valid and legal between the original parties, may become void for illegality as to subsequent parties, who derive title to it through an illegal contract to which they are parties, and it may also become void as to an innocent holder, if he be compelled to trace his title through the parties to the illegal transaction. Thus, where the purchase of slaves illegally introduced into this State for sale, was sued by the vendor in the United States Circuit Court for the purchase money, and he resisted judgment on the ground of unsoundness in the slaves, and this suit was compromised by the purchaser transferring, in satisfaction of his own debt, the note of another validly due to him; it was held that the endorsee could not collect this note, as it was transferred to him on an illegal consideration; *Adams v. Rowan*, 8 S. & M. 624. And so, if the assignee of a note take it on

a gaming consideration, he cannot recover; *Holman v. Ringo*, 7 G. 690. See *ante*, 24.

28. *Courts help neither party in pari delicto.* Where the parties to an illegal or immoral contract are in *pari delicto*, the courts will assist neither party, either in enforcing the contract nor in recovering back what he has paid, or delivered, or parted with, in pursuance of the contract. Hence, the seller of slaves, illegally introduced as merchandise, being in equal fault with the buyer, cannot recover the purchase money, nor hire for the slaves, whilst in vendee's possession, nor the slaves themselves, nor the proceeds of a subsequent sale of them made by the vendee. In such cases the courts on grounds of public policy refuse to assist either party; *Hoover v. Pierce*, 4 C. 627.

28. *Same: Where parties are not in pari delicto.* In England it has been decided that in a class of illegal contracts in which the plaintiff was not in equal fault, but was oppressed and taken advantage of by the illegal act of the defendant—as where usury has been demanded, or the payment of money by a bankrupt required, as a condition of assenting to his discharge—there might be a recovery, but this distinction has not yet been recognized in this court; and as to it; *Quære? Ib.*

29. *Grounds on which courts act.* Courts of justice in refusing to enforce illegal and immoral contracts are not influenced by considerations of tenderness and respect for the party insisting on their invalidity, but are governed exclusively by reasons of public policy; *Deans v. McLendon*, 1 G. 343. And hence, they impose no terms or conditions on the party setting up the illegality; wherefore it is unnecessary that the purchaser of a slave introduced illegally into the State for sale, setting up that defence to an action for the purchase money, should make an offer to return the slave; *Barker v. Justice*, 41 M. 240.

30. *Partly legal and partly illegal.* That part of a contract which would *per se* be legal, cannot be supported as such, unless it can be entirely separated from the illegal and made wholly independent of it. If the illegal and legal consideration be so intermixed, or the contract so entire, that there can be no apportionment, the contract is void. Hence, when a bond was taken from an agent of a foreign bank, appointed to use in this State the notes of such bank in the purchase and discount of negotiable securities here—that object being illegal—a stipulation in the bond that the agent shall account to the bank for the money he shall receive under the agency, is connected with the illegal part, and cannot be enforced; *Bank of Newberry v. Stegall*, 41 M. 142, S. P., *Wooten v. Miller*, 7 S. & M. 380; for which see *ante*, 26.

31. *Foreigner bound by our laws, avoiding his contract here.* If the contract of a foreigner is to be completed in another country, and is repugnant to the laws of that country, he is bound by them. Hence, where a foreign principal sent a slave to this State by an agent, to be sold here, in violation of

our constitution, it was held that the principal was bound by the laws of this State, and that he could not recover the proceeds of the sale from the agent; *Wooten v. Miller*, 7 S. & M. 350.

32. *Gaming contracts.* The statute Rev. Code of 1857, art. 1, p. 361, makes all contracts void *in toto*, where the whole or any part of the consideration is money or other valuable thing won at any game or horse race, &c.; *Crawford v. Storms*, 41 M. 540; S. P., *Holman v. Ringo*, 7 G. 690.

See GAMING.

33. *Sunday contract.* A promissory note executed on Sunday, to secure the payment of a balance then found due by the maker, upon a settlement of previous legal transactions, is void under the statutes of the State; *Miller v. Lynch*, 9 G. 344. And so is a promissory note executed on a secular day, as security for the price of property sold and delivered to the maker on Sunday; *Kountz v. Price*, 40 M. 341. See Rev. Code of 1857, art. 226, p. 609.

34. *Contract imposing inconsistent duties.* A contract is against public policy and void, which imposes on one party the performance of two or more public or fiduciary duties, which are inconsistent with each other; *Spinks v. Davis*, 3 G. 152. Hence, a contract by which an attorney-at-law receives a claim for collection, and to that end agrees to administer on the estate of the deceased debtor, is void; it being the duty of an attorney to enforce collection by all legal means, and of an administrator to resist collection by all legal defences; *Ib.* As to inconsistent private duties, not of a fiduciary character, assumed by contract, the rule is, that the party is obliged to perform both, and his inability to perform one without omitting the other is no excuse for such omission; *Heirn v. McCaughan*, 3 G. 17.

35. *Contract to waive a benefit secured by law.* A party may waive a right secured to him by law, but he cannot bind himself by contract not to avail himself of such right, if it be secured to him on grounds of public policy. Hence, a contract not to rely on the statute of limitations in a particular case is void as an estoppel to rely on the statute, but it is good as a new promise or acknowledgment to save the bar; *Crane v. French*, 9 G. 503.

35a. *Contract to restrain officer from doing his duty.* A contract which obliges one of the parties to do an act in violation of law, or restricts the free exercise of a discretion vested by law in a public or municipal officer, in reference to a trust imposed on him, or which contemplates such violation of law, or destruction of the free exercise of a public duty, is a nullity; *City of Jackson v. Bowman*, 10 G. 671. Hence, a contract by which a municipal corporation, having 2000 or more inhabitants, agrees, in consideration of the erection of a commodious hotel within the corporate limits, to grant to the builder the exclusive right to retail vinous and spirituous liquors in the corporation for five years,

at the lowest rate of license allowed by law, and to refund the license money so paid; and in case the corporation grant license to another, then that it would donate \$5000 in aid of the erection of the hotel; is contrary to public policy, and utterly null and void; *City of Jackson v. Bowman*, *supra*. See post, 42a.

36. *Illegal condition annexed to a grant.* If an illegal condition be annexed to a grant, the grantee will take the estate discharged from the condition. Thus, where a grant was made upon condition that the grantee would emancipate a slave, also granted, it was held that the grantee took the property discharged of the illegal condition; *Barksdale v. Elam*, 1 G. 694.

37. *Where lawful promise becomes illegal before performance.* Where a party agrees to do a thing which is lawful at the time of the promise, but it afterwards becomes unlawful by legislative act before it is done, the statute avoids the promise, or repeals the covenant. This principle, however, does not apply where the covenant has been performed and the right secured by it taken away by statute, but only to executory agreements. Hence, it is no ground of defence to an action for the purchase money of a slave, where the sale was completely executed whilst slavery was lawful, that slavery is now abolished; *Bradford v. Jenkins*, 41 M. 328.

See BOND, 11.

38. *Same.* A contract lawful when it was made will be enforced, notwithstanding, by change of the law, such contracts have become unlawful; *Ib.*

39. *Foreign contracts becoming unlawful.* The courts of this State will not refuse to enforce a foreign contract which was lawful, and not against the policy of this State when made, merely because it has since become unlawful, or against public policy; *Murrell v. Jones*, 40 M. 565.

40. *Right of Board of Police to receive property for locating court house.* The Board of Police, when it becomes necessary to build a new court house, have the power to build it on the old site, or to build it on any lot or site owned by the county within the limits of the town which has been designated by the Legislature as the county seat; and they may lawfully accept for the county, money and property to influence their decision as to the particular lot on which they will rebuild. Such donations being for the exclusive benefit of the county, are proper elements of consideration by the board in determining the site of the new court house; *Odineal v. Barry*, 2 C. 9. And a note executed to the board by parties interested in having the court house rebuilt, on the old site, given in the consideration that the board would reject a proposition to rebuild on another site is collectable in law; *Ib.*

41. *Restraint of trade: Case in judgment.* A contract by which a physician binds himself, not to settle or to continue as a practitioner of medicine within fifteen miles of a designated place, is legal and binding if made on a valuable consideration; and if the promisees

be a physician, and a purchaser of the promisor's house and medicines for a valuable consideration, and it be a part of the agreement that the vendor will not settle or practice as aforesaid, that will be a valid consideration to support the agreement; *Thompson v. Means*, 11 S. & M. 604.

42. *Same: Case in judgment.* When a physician binds himself "not to settle or continue as a practitioner of medicine within fifteen miles" of a designated place, it will be a breach of the contract, if he settles beyond the designated limits, but continues from the point of his settlement to practice within the prohibited area; *Ib.*

As to sale of slave charged with felony, see *Dougherty v. Owen*, 2 C. 404.

As to contracts for Confederate States treasury notes, see CONFEDERATE STATES, 1, and *Green v. Sizer*; 40 M. 530; *McMath v. Johnson*, 41 M. 439; and CONFEDERATE MONEY.

42a. *Effect of statutes authorizing illegal contracts to be carried out.* An act of the Legislature which merely authorizes and empowers the corporate authorities of a city to carry out an illegal contract which it had previously made, by which the exclusive right to retail vinous and spirituous liquors for five years, was granted in aid of the building of a hotel in the city, does not *per se* validate the contract. And if the corporate authorities insist on the invalidity of the contract it will not be enforced against them, notwithstanding the passage of the act; *City of Jackson v. Bowman*, 10 G. 671. See *ante*, 35a.

V. Assent of Parties.

43. *Assent necessary.* The actual assent of the parties to an agreement, given either by themselves or agents, is necessary to the making of a contract. Hence, a mere authority given to an agent to settle a debt in a particular way, is no settlement *per se*, but the agent and the other party must come to some agreement, in order to make it binding and conclusive; *Freeland v. Compton*, 1 G. 424.

44. *Same.* An inquiry is not a proposition. Hence, if a debtor apply, through an agent, to know if he can pay his debt in a particular way, without making an offer to pay it in that way, and he is answered by the creditor that he can pay it in that way, this is no binding agreement on either party; and there is no payment unless it is afterwards consummated; *Harper v. Calhoun*, 7 H. 203.

45. *Acceptance of proposition: Case in judgment.* B. and D. were sureties of C., upon a note held by a bank, on which suit was then pending. C., the principal debtor, becoming insolvent, the sureties proposed each to execute his separate note with security for one-half the debt, and thus take up the old note. In February, 1841, B., one of the sureties, made his note as proposed, and delivered it to the bank; the bank retained this note, but whether it at once accepted it or not, was a matter of doubt. In August, 1841, B. applied to one of the directors of

the bank for the note he had given for his share of the old debt, and requested that it should not be discounted by the bank. In October, 1841, the suit on the old note against C. and his sureties, was dismissed. *Held*, that B. and his surety were liable on the new note; that the holding of that note for so long a time by the bank, was of itself, an acceptance of the proposition; and that it would be unjust to allow B. to avoid payment of the new note, without first putting the bank, in reference to the old note and the suit on it, in the same condition she was when that suit was dismissed; *Com'l B'k of Manchester v. Bonner*, 13 S. & M. 649; S. P., *Bacon v. Ventrass*, 3 G. 158; and *post*, 94.

46. *When written contract must be signed by all the parties.* When a written agreement contains stipulations on both sides and is obviously intended to be executed by both parties, the signature of one party to the agreement will not be binding on him, until the other party also signs it; for he will be understood as having signed on the tacit condition that the other would also sign; but where the contract contemplates two instruments, as a title bond by vendor, and a note for the purchase money by the vendee, it is unnecessary that both should sign the title bond; and if the bond contain a stipulation that both should sign it, and is delivered by vendor to vendee already signed by the former, the vendee cannot complain that his signature is wanting, as he could sign it at any time; *Lee v. Dozier*, 40 M. 477.

47. *Same.* So the signing by one of two joint vendors of land, of a deed drawn up in their joint names, is not sufficient to bind him unless it be signed by the other; it is incomplete until signed by the other. Thus, where a husband signed a joint deed drawn up in the name of himself and wife, and delivered it to a justice of the peace to procure the signature and acknowledgment of the wife, it was held that he was not bound by the deed until it was executed by the wife; *Johnson v. Brooks*, 2 G. 17.

VI. Contract for Delivery of Onerous Articles.

48. *When demand necessary.* When the contract is for the delivery of onerous property on demand, and no time or place is specified for the delivery, a special demand must be alleged and proven; *Minor v. Michal*, W. 24.

49. *When delivery must be of the whole.* When a contract is made for the delivery of ten slaves by a certain day, and a note is taken for the purchase money due after the day named for the delivery, no recovery can be had on the note, unless all the slaves were tendered or delivered on the day fixed; *Farrar v. Gallard*, W. 269.

50. *Damages for non-delivery.* When there is a failure to deliver cotton in pursuance of a contract to pay so much in cotton, the rate of damages is the value of the cotton on the day it was to be delivered; but if cotton afterwards rose in value during that

season, the debtor may, without being guilty of fraud as to his other creditors, legally allow the creditor the higher value to which cotton afterwards rose; *Coppage v. Brown*, 10 S. & M. 635; 8 P., *Whitfield v. Whitfield*, 40 M. 352.

VII. Time—Performance and Breach.

51. *Time of performance.* Time is not always considered as of the essence of a contract in a court of equity; *Runnels v. Jackson*, 1 H. 358. When the covenants are mutual and dependent, the contract is rigidly enforced in a court of law, and the time of performance is considered as of the essence of the contract; but equity will extend the time of performance; *Id.*; *Liddell v. Sims*, 9 S. & M. 596. Time is not generally considered as of the essence of a contract, but it is so considered when expressly so treated by the parties, or it necessarily results from the circumstances; *Walton v. Wilson*, 1 G. 576.

See TIME.

52. *When reasonable time not required.* As a general rule, when a party to a contract stipulates to perform a particular act as his part of an agreement, he is bound to use due diligence, and to perform it in a reasonable time; but this rule cannot be applied with strictness to a case where the agreement was that the assignee of a note given for the purchase money of land should prosecute a suit in chancery in the name of the purchaser, to procure a good title to the land for him as a condition on which the latter was to pay the purchase money; for the time of the final determination of the suit depends as well upon the action of the court as upon the diligence of the party charged with its management; *Turpley v. Wilson*, 4 G. 467.

53. *Party bound to perform only what is in the contract.* If an agreement be made between A. and B., by which they are to buy land in partnership, A. to advance the whole purchase money, which is a sum fixed, and B. to repay one-half of that sum by a day named or forfeit his interest in the contract, B., in making a tender of his half on the day named, is not bound to tender interest, nor to tender one-half of the cost of the improvements made on the land by A., since neither of these were in the agreement; *Connell v. Mulligan*, 13 S. & M. 388.

54. *Performance not excused by inconsistent obligations.* If a person assume obligations to different parties, the performance of which may become incompatible with each other, both parties being entitled in equal right, it is no excuse for a default to one party that both obligations could not be performed, and that the person bound chose to discharge his obligation to the other; and hence if a common carrier, engaged in carrying the United States mail, and also in transporting passengers, fail to discharge his obligations to the latter, it will be no excuse that such failure was rendered necessary in order to transport the mail in proper time; *Heirn v. McGaughan*, 3 G. 17.

55. *Time and mode of performance may*

be changed by parol. A parol agreement to accept performance of an executory agreement for the sale of land at a time and in a mode different from the stipulations of the written agreement, is, when executed, valid and binding on the parties; and hence when the written agreement bound the vendor to convey title to the vendee by a certain day, if the title be afterwards conveyed by vendor to a third party at the request of the vendee, it will be a sufficient performance; *Moore v. McAllister*, 5 G. 500.

56. *Inevitable accident no excuse for non-performance.* Where a party by his own contract engages to do an act and does not provide in it against contingencies, and exempt himself from liability in certain events, he is not, in the case of an absolute and general contract, excused from performance by an inevitable accident or other contingency, although not foreseen by or within the control of the party; *Jenison v. McDaniel*, 3 C. 83.

57. *Same: Case in judgment.* Therefore, where a lessee agreed to pay a sum certain for the rent of a house for a year, and before the expiration of the term the house became untenable, by the falling in of the gables, occasioned by high water, he is entitled to no abatement in the rent; *Id.*

58. *Duty imposed by law and not by contract, excused by inevitable accident.* When the law casts a duty on a party, the performance shall be excused if it be rendered impossible by act of God. But where a party, by his own contract, engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from liability in certain events; and in such case, in the instance of a general and absolute contract, the performance is not excused by an inevitable accident not foreseen by or within the control of the party; *Harman v. Fleming*, 3 C. 135.

59. *Same: Case in judgment.* And on this principle, it was held that the hirer of a slave for a year, was bound to pay the whole hire, though the slave died during the year; and, moreover, the hirer is considered as owner for the term of the hiring; *Id.*

VIII. Duress.

60. *Duress of goods.* A party giving his note to procure a release of an illegal levy of a satisfied execution on his property, will not be released therefrom on the ground of duress of his goods, unless it appear that the circumstances of the duress were so urgent and imperative that he had no choice to seek and obtain redress by action; *Bingham v. Sessions*, 6 S. & M. 13.

61. *Contract made under arrest.* It is no objection to the validity of a contract, where no advantage was sought or taken of the party, that, at the time it was made, he was under arrest, under civil process, at the suit of the other party, brought in relation to the subject matter of the contract. But such a contract is watched with great jealousy by courts of equity; and if legal process has been

used as a means of oppression, and to extort disadvantageous terms from a party in custody, the contract will be set aside; *Stebbins v. Niles*, 3 C. 267.

62. *Same.* And in determining upon the fairness of such a contract, made in settlement of existing differences between the parties, the court will look into the rights of the arrested party, as they then existed, and if it appear that he has released or surrendered a right to which he was fairly entitled, the settlement cannot stand; *Ib.*

63. *Ratification of such a contract.* And when subsequent acts of recognition by the arrested party, made after his release from arrest, is relied on as a ratification of an (otherwise than for such recognition) illegal and oppressive settlement, the point of inquiry for the court is not whether it shall be deemed fair and reasonable from these subsequent acts of recognition, but whether it would be unjust and fraudulent in him to seek a rescission, after such recognition; *Ib.*

64. *Same: Case in judgment.* And on these principles, it was held that when an agent, residing and transacting business in Mississippi, at his principal's request visited him in New York, to adjust the accounts between them, and upon his arrival was arrested on civil process, by the principal, and required to give bail in the sum of \$50,000, and whilst so under arrest, a settlement, unfair to the agent, was made between him and the principal, the subsequent acts of recognition and part performance of the settlement, made whilst the agent was still in New York, and whilst he still feared another arrest, were no ratification of the settlement; *Ib.*

IX. Contracts for Work and Labor.

65. *Abandonment by laborer of the contract.* When a contract is made by which one party agrees to do certain work for the other, and to furnish the requisite lumber, in consideration of a fixed price, to be paid on the completion of the work, the laborer cannot abandon the work before its completion, and recover for what has been done. He cannot recover on the special contract, because he has not complied with it, nor on the common count, because there is a special contract. But, it seems, if the other party afterwards use any of the materials so furnished, he will be liable for their value. But his employment of another, at the same price, to complete the work, will not make him liable for so much of the lumber used by the second employee, without his direction; *Wooten v. Read*, 2 S. & M. 585.

66. *When laborer entitled to quantum meruit, on partial performance: Case in judgment.* W. employed Z. to erect a mill-dam and mill for him, at a stipulated price, knowing at the time that objections would be raised to the erection of the work, as a common nuisance, and failing to communicate these objections to Z., who was ignorant of them. After Z. had completed a part of the work, its further progress was arrested by an injunction sued out against W. and Z., on

the ground that it was a nuisance: *Held*, that under these circumstances, Z. was entitled to recover upon *quantum meruit*, for the work he had done; *Whitfield v. Zellnor*, 2 C. 663.

67. *Contract of service by the year—discharge of employee.* A. was employed by N. to teach school for a year, at a certain academy, for the sum of \$1200. A. partially complied with his contract, by teaching three months, and was prevented by N. from completing his engagement, and thereupon A. sued N. for the whole sum, who pleaded in bar of the action, that, by reasonable diligence A. might have obtained employment as a teacher for the balance of the year, at a compensation equal to that he had agreed to pay him: *Held*, that the plea did not disclose a good defence to the action—the matter pleaded was, at best, but in mitigation of damages; *Armfield v. Nash*, 2 G. 361. See DAMAGES, 26. See next sub-division.

X. Overseer's Contract.

68. *Not dissolved by death of employer.* An overseer who has contracted for the entire year and performed the services, is entitled to recover the full amount agreed on against the administrator of the employer, notwithstanding the employer died before the completion of the contract. The death of the employer does not terminate such a contract; *Hill v. Robeson*, 2 S. & M. 541.

69. *Not an entire contract for the time agreed on.* A contract to oversee for a year, is not an entire contract in the ordinary sense of that term; and if the overseer be turned off for misconduct before the year expires, he may recover his wages for the time he conducted himself properly; and so if he abandoned the contract before the term expires, he may recover for the time he actually served; *Hariston v. Sale*, 6 S. & M. 634; *S. P. Robinson v. Saunders*, 2 C. 391.

70. *Has no right to substitute another.* But the contract contemplates his personal services and skill to be given to the business of the employer; and hence he has no right to substitute another overseer in his stead, though even for a short period, and the other be equally competent with himself; *Hariston v. Sale*, *supra*.

71. *Liability of employer for improper discharge of overseer.* It is well settled, that where the employee is prevented by the employer, without reasonable grounds, from performing his contract, he may sue upon the special contract of employment, and recover damages to the amount of the actual loss sustained; and which loss will consist in the contract value of the services actually rendered, and the damage sustained by the refusal to allow performance of the rest of the contract. And the action for the loss may be brought immediately upon the breach of the contract by the employer, by his unlawful discharge of the employee; and the plaintiff may recover not only the damages then actually sustained, but also for such other damages as may afterwards occur in consequence of the breach, and within the contem-

plation of the contract; *Prichard v. Martin*, 5 C. 305. Hence, if the employer wantonly and without cause turn off his overseer, at a season of the year when it is impossible for the latter to get employment, and his time for the remainder of the year is thereby wholly lost, the overseer is entitled to the stipulated wages for the whole time for which he was employed; *Ib.*

72. *Liability of overseer for improper abandonment of his contract.* And so if the overseer abandon his employment wantonly and without sufficient cause, to the injury of the employer, the latter is entitled to recover any damage occasioned by this illegal abandonment of the contract; *Ib.*

73. *Duties of overseer.* An overseer, like other persons contracting to render particular services, must use such diligence in, and give such attention to, his employer's business as may be necessary to accomplish the desired object, viz.: the production, safe keeping, and preservation of a good crop; making, of course, due allowance for the seasons and such casualties as could not be prevented by him. And his failure to do so is a breach of his contract, which the employer may set up against an action for the recovery of his wages, or to reduce them to a proper standard; *Dunlap v. Hand*, 4 C. 460.

74. *Same.* The obligation of the contract of an overseer is to do everything according to the means furnished by his employer, which a prudent and economical man would do in attending to his own business; and if from his negligence the employer sustain damage, the amount thereof may be deducted from his wages; but the proof to authorize such deduction must be clear; *Harper v. Ray*, 5 C. 622.

75. *His duty to obey orders of employer, and discharge for refusal.* If an overseer countermand an order given by his employer, his conduct will be reprehensible and imprudent; and if done to set at defiance the authority of the employer, or in such a manner as to produce insubordination in the slaves, that would be good ground to discharge him. But where the employer had given an order to a slave to remove some bales of cotton, which the slave was incapable of doing, and the overseer perceiving this, ordered the slave to desist, saying to the slave, he would cause the cotton to be removed when the other slaves arrived; it was held this was no good ground for discharging the overseer; *Prichard v. Martin*, 5 C. 305.

76. *Leave given to overseer to remain after improper discharge.* If after the employer has improperly ordered the overseer to leave his employment, he give him permission to remain and continue his contract, without attaching thereto any improper conditions, the overseer will not be entitled to damages for such improper discharge. But if improper conditions be attached to the permission to remain, or if the overseer be told he can stay if he will treat the employer's teams and slaves better than he has done, and will treat the employer with more respect, and it be shown

that the overseer had not been delinquent in these matters, the permission to remain will not prevent the overseer's recovery of damages for the improper discharge, in case he choose to go away; *Ib.*

77. *Action on overseer's contract.* An action by the overseer on his contract, if it contain no conditions in respect to the times and periods of payment, nor in respect to the nature and peculiarity of the work, need not be on the special agreement, but the overseer may recover in *indebitatus assumpsit* for work and labor done; *Hill v. Robeson*, 2 S. & M. 541.

XI. Account Stated.

77a. *Need not be signed by the parties.* It is not necessary to the validity of an account stated that it should be signed by the parties; *Stebbins v. Niles*, 3 C. 267.

78. *What is an account stated?* An account stated exists only where there has been an examination of accounts, and a balance admitted as the true balance between the parties remaining unpaid. But the admission may be implied from circumstances; and in cases of merchants residing in different countries, if an account be transmitted from one to another, and no objection be made by the party receiving the account, after several opportunities of writing have occurred, an admission of the correctness of the amount will be presumed; *Ib.*

79. *Same: Case in judgment.* N., residing in this State, was agent of an association, located in New York, for the purchase and sale of lands, and in the year 1838 rendered an account showing the amount due him for expenses in making the purchases and sales. No objection was made to this till 1844, though N. had attended a meeting of the association, and explained fully his transactions, and one of the members of the association, acting as agent for all, had visited N. in Mississippi and examined his books. The trustee, of the association, in making out a power of attorney to N. to sell the land, appended thereto an invoice of the cost of the land, including the expenses returned by N. in his account. The association gave as a reason for not objecting to N.'s account, that they desired N. to visit New York, and they were afraid he would not do so if any objection were made to the account: *Held*, that the failure to object rendered it an account stated; *Ib.*

80. *Same.* Where accounts showing the collection and disposition of paper placed in a creditor's hands as collateral security, and the state of the indebtedness of the debtor has been rendered by the creditor, and no objection has been made thereto for several years, they were held to be accounts stated; and if the debtor afterward assert them to be incorrect, he must show the errors complained of by clear and satisfactory evidence (citing *Stebbins v. Niles*, 3 C. 267); *Coopwood v. Bolton*, 4 C. 212.

XII. Ratification.

81. *Ratification by action on the contract.*

An action by the obligee in a bond, voidable at his election, in which he seeks to enforce it, is a ratification of it; and this principle is applicable to an action by the heirs, on a bond given by an administrator to sell land, and which bond is voidable at the election of the heirs; *Cohea v. State*, 5 G. 179, S. P., *Bank of Augusta v. Conrey*, 6 G. 667; *Dove v. Martin*, 1 C. 588; for which see ATTACHMENT, 45.

82. *Same.* A party who has affirmed a contract by bringing a suit to enforce it, and by receiving the benefits thereof cannot afterwards, even as heir of one of the contracting parties, avoid it for any infirmity in its original creation. Hence, where a distributee claimed and received the benefits of a purchase made by the executor, upon the ground that it was made with the assets of the estate, and after the death of the seller in that contract, being also an heir of the seller, he attempted to avoid the sale upon the ground of the incapacity of the seller to make it; it was held that he was estopped to do so by his ratification as distributee in receiving the benefits of the sale; *Dunlap v. Petrie*, 6 G. 590. See post, 100.

83. *Of void contracts.* A void contract is incapable of ratification; *Harris v. McKissack*, 5 G. 590. And so a promise void for want of consideration cannot be ratified by a new promise to pay, without any new consideration; *Newell v. Fisher*, 11 S. & M. 431.

XIII. Rescission of Contracts.

See VENDOR AND VENDEE, 116, et seq.

84. *Good faith required in.* Good faith is required in the rescission of a contract, as well as in the making of one; *Joslin v. Caughlin*, 1 G. 502.

85. *Effect of executory agreement to rescind.* A party cannot avail himself of an executory agreement to rescind a contract, without a compliance on his part, with the terms imposed on him as conditions to the exercise of the right to rescind; nor when the contract to rescind has been mutually abandoned; *Land v. Wallace*, 3 G. 630.

86. *Party cannot rescind for his own fault.* A party paying money on a special agreement for the purchase of chattels, and stipulating to pay the balance of the purchase money on delivery of the chattels, cannot, upon his inability to pay the balance, abandon the contract and recover back what he has paid; *Morrison v. Ives*, 4 S. & M. 652.

87. *Rescission on failure as to part of a contract.* The failure of a party to comply with a portion of his agreement is no ground to rescind the whole contract, so as to deprive him of the benefit of other provisions in it which are wholly independent of that in which he has made default. Thus, where the maker of a promissory note was the brother of the payee, and bound himself in an agreement with the payee to settle up the payee's estate, when the latter died, and the payee resided in this State, and died here, before the note became due, but the note was in Louisiana, and was there administered and

sold under judicial proceedings, at a great sacrifice, and the maker then bought the note from the purchaser at a discount, it was held he was entitled to the discount; it not appearing that he knew where the note was until it was sold, or that there was any collusion between him and the purchaser; *Dunlap v. Petrie*, 6 G. 590.

88. *Contract for scholarship in a college.* The purchase of a scholarship in an incorporated seminary of learning will be entitled to a rescission of his contract, if the trustees in violation of the contract of sale, charge the purchaser tuition fees for one of the studies embraced in the scholarship; and the purchaser cannot be compelled to pay for the scholarship, if the corporation has become insolvent, and has abandoned the school contemplated in its charter; if it were understood when the purchase was made that the scholarship was an endowment fund, and that only the interest was to be expended; *Mary Washington Female College v. McIntosh*, 8 G. 671. See post, 103.

89. *Agreement to rescind construed: Case in judgment.* An agreement was made between P. and A. R. R. Co., that P. should build their railroad, and complete and equip it for a sum in gross. The company, after a large portion of the work was done, adopted the following resolutions:—

1. To release P. from his obligation to furnish the locomotive.
2. That the mortgage P. had given to secure his compliance with the contract to build and equip the road should be cancelled.
3. After admitting the failure of the company to comply with their contract to furnish P. with par funds, they requested that P. should finish the road at his own expense, and retain it till he should be repaid by the profits.

The company subsequently agreed that F. should be substituted as contractor in lieu of P., and that they would give him \$15,000 to complete the road—P. at the same time giving his verbal promise that F. would comply. F., with the knowledge of the company, proceeded to work for some time, but did not finish the work: Held, that the resolutions by substituting new terms and conditions, inconsistent with the original agreement, amounted to an abandonment of the contract with P.; *Petrie v. Wright*, 6 S. & M. 647.

90. *Example: Adjudged no rescission.* Company P. had in the year 1836, purchased from company N. a large amount of land, and in the year 1842, their respective agents agreed "that N. would take back" 35 sections, and that the agent of P. should give his note to N. for \$16,000, and that N. should surrender P.'s notes, given for the purchase money of these 35 sections. Afterwards P. filed a bill for a settlement, and claimed that the transaction of 1842, was, in fact a rescission of the trade of 1836, as to the 35 sections, which N. had then agreed "to take back," and that P. was entitled to be credited on the amount due on the sales of the remaining land, the cash payments which had prior to 1842 been

made on account of the purchase of the said 35 sections. But it was held, that the words "take back," in the agreement of 1842, did not, under the circumstances, mean a rescission as to the 35 sections as contended for by P., but that agreement was an adjustment by which N. was to take the 35 sections, and the note of P.'s agent for \$16,000, in satisfaction of P.'s liability for the original purchase money for the said 35 sections; *Cootwood v. Bolton*, 4 C. 212.

91. *Mutual error.* Contracts may be rescinded for the mutual error of the parties, as in cases of fraud; *Harrison v. Stowers*, W. 165.

92. *Action where contract is rescinded.* Where a contract has been rescinded by mutual consent, or abandoned by the defendant, an action may be maintained for money paid on the agreement; *Morrison v. Ives*, 4 S. & M. 652.

92a. *For other decisions on rescission of contracts*, see *VENDOR AND VENDEE*, 116, *et seq.*

XIV. Novation and Substitution.

93. *Substitution: Liability of substituted debtor.* If, by agreement of all parties, the note of a third party be accepted in satisfaction of a valid debt, such third party will be compelled to pay his substituted note, notwithstanding any infirmity in the consideration, moving from the released debtor to him, in consequence of which he gave the substituted note; *Saddler v. Hoover*, 2 G. 260; *Marsh v. Lisle*, 5 G. 173. In such case, the consideration of the substituted note is the release of the original debtor, and not any agreement or contract between the substituted debtor and the original debtor; *Marsh v. Lisle*, *supra*.

94. *Novation: Case in judgment.* Ventress and his surety were indebted to the Planters' Bank of this State, by two notes, which were overdue in 1839. The bank proposed to transfer this with other debts, to the trustees of the United States Bank of Pennsylvania, but it being considered doubtful whether, under the act of 1840 (H. C. 325, § 7), prohibiting assignments by banks, the bank could rightfully make the transfer, the agent of the trustees of the United States Bank of Pennsylvania, refused to accept the proposed assignment, without the previous assent of the debtors, and their agreement to renew, by giving notes payable directly to the trustees. Ventress agreed to the transfer, upon condition, that in the proposed novation further time of payment was to be allowed him. He, accordingly, in August, 1842, immediately after the transfer of his indebtedness, executed his notes in renewal of the old debt, and also a deed in trust to secure their payment, and sent them to an agent of the trustees, who declined accepting them upon his own responsibility, and retained them for the decision of R., the principal agent, upon his return from a trip on which he was then absent. In October, 1842, R. returned, and took possession of the new notes and deed of trust, and in July, 1843, he wrote to Ventress, insisting that the latter had not,

in making the new notes and deed, fully complied with the agreement by which they were to be accepted, but not expressing any intention not to accept them; and also requiring payment according to the time of payment specified in the new notes. In 1845, the trustees brought suit against V., on the old notes, and in 1846, a judgment was rendered in favor of V., upon his plea in abatement filed under the aforesaid Act of 1840, contesting the right of the Planters' Bank to transfer the old notes. In January, 1850, the judgment was reversed by the High Court. Errors and Appeals, and the right of the bank to transfer the notes established. In 1849, the agent, R., refused to deliver up the new notes on the demand of V., but in 1850, after the decision as aforesaid by the High Court, he sent them to another agent of the trustees to be delivered to V., but this agent dying soon afterwards, they were never delivered. In 1849, a bill in equity was filed by the trustees, to collect the old notes from the surety of V.: *Held*, in this last suit, that it was the duty of R., the agent of the trustees, if he intended to decline accepting the new notes, to have notified V. of such intention in a reasonable time; and that his failure to do so, coupled with the other circumstances above set forth, conclusively established an acceptance of the new notes by him; and that therefore the old notes were discharged. *Bacon v. Ventress*, 3 G. 158; S. P., *Commercial Bank of Manchester v. Bonner*, 13 S. M. 649, and *ante*, 45.

94a. *As to substituted securities.* Whether either the old or new debt is founded on an illegal contract, see *ante*, 23, 24, 25, 26.

XV. Miscellaneous.

95. *Partly in parol.* A contract cannot rest partly in parol and partly in writing. *Kerr v. Calvit*, W. 115.

See further on this subject, *EVIDENCE*, 158, *et seq.*

96. *Uncertain contracts.* Uncertain contracts will not be enforced in equity, especially against the legal representatives of one of the contracting parties; *Montgomery v. Norris*, 1 H. 499.

97. *Demand of payment.* If the payer agree to pay a certain sum at a particular time, in case a stranger does not pay it, a demand on the stranger is necessary to enable the payer to recover; *Baughan v. Graham*, 1 H. 220.

98. *Building contract.* A contract made with B. that the latter should furnish the materials and do certain brick work. B. represented his materials as of bad quality, but agreed to do the work as well as he could with such materials. A. was often present during the progress of the work, and examined the materials and the condition of the work. After its completion, the work was exposed to the weather and uncovered for six months, and it was then worthless. B. recovered a verdict for the work and material and the court refused to set it aside; *Collins v. Money*, 4 H. 11. See *WARRANTY*, 9.

99. *Remedy where there is a special contract.* If a declaration contain a count on a special contract, and also the common counts, the plaintiff cannot resort to the common counts, unless there be no proof of the special contract; nor then, unless the transaction be such that, supposing there was no special contract, it would sustain a recovery on the common counts; *Morrison v. Ives*, 4 S. & M. 652. And so if he prove a special contract, but materially different from the one declared on, he cannot recover either on the count on the special contract or on the common counts; on the first he will fail because of the variance, and on the latter because a special agreement is proven; *Drake v. Sargent*, 7 G. 458.

100. *Ratification of unauthorized contract.* A planter in the country ordered bagging and rope from his cotton factor, who had, however, at that time gone out of business, but was indebted to the planter. The factor bought the articles from a merchant and caused them to be charged to the planter, who received and used them, not knowing but that they were furnished by his factor. Afterwards, the factor gave his note to the planter for the balance due him, and in the settlement the bagging and rope were not credited to the factor: *Held*, that the planter was liable for the bagging and rope to the merchant who furnished them; *Rives v. Odineal*, 8 S. & M. 691.

101. *Note by guardian.* A note signed by A. as guardian of B. is the individual contract of A., and he is liable on it as such; *Robertson v. Banks*, 1 S. & M. 666.

102. *Trust relation.* A party possessed of information as to the location and value of public land subject to private entry, who has sold this information to another to enable the latter to make an entry of the land, cannot afterwards enter the land in his own name, and thus deprive the vendor of the privilege of entering it. Such entry is fraudulent, and constitutes the enterer a trustee for the party to whom he sold the information (citing *Murphy v. Sloan*, 2 C. 658); *Winn v. Dillon*, 5 C. 494.

103. *Subscription to college: misrepresentation.* The defendant subscribed \$500, to an endowment fund of \$60,000 raised for a literature institution, and gave his note therefor, payable in five instalments, after the said sum of \$60,000 was subscribed, and he was to have a certificate of scholarship in the institution upon the payment of his note. To an action on the note, he relied on the alleged fact that the institution had gone down, and that the agent of the institution who had procured his subscription had promised, that if it did go down that the money would be refunded; and, moreover, that the agent represented that the scholarships would be at par, and that the funds raised had been misapplied. In answer to this, the plaintiff proved by one of the trustees, that the institution had not gone down, but was now being carried on to a limited extent, and it was the intention of the trustees to re-organize it fully, as soon as the

subscriptions to the endowment fund could be collected, of which there was an ample amount for that purpose: *Held*, that the proof of plaintiff was competent on the issues made; that the defendant could not set up a misapplication of the funds by the trustees as a defence to the note; that the representations alleged to be made by the agent procuring the subscription were contrary to the contract entered into, and were without authority and not binding on the institution; that the expression of opinion by the agent as to the value of the scholarships was incompetent evidence; and that the defendant could not complain of the condition of the institution, as it was caused by the failure of himself and his co-subscribers to pay their subscriptions; *Cook v. Whitfield*, 41 M. 541.

But if the institution has become insolvent and is abandoned the price of the scholarship cannot be recovered from a purchaser; *Mary Washington Female College v. McIntosh*, 8 G. 671. See *ante*, 88.

104. *Covenant not to sue.* A covenant not to sue is equivalent to a release; *Stebbins v. Niles*, 3 C. 267.

105. *Commissions for advancing money.* Commissions for advancing money are recoverable by the lender only when there is an express contract to pay them; or such contract can be inferred from the course of dealing between the parties; *Houston v. Crutcher*, 2 G. 51. But the debtor's acknowledgment of the justice of an account in which such commissions are charged, is evidence of an agreement to pay them; *Ib.*

106. *Advertisement by common carrier.* A common carrier is bound to the public to comply with his published advertisement to stop and take on passengers at a particular place; *Heirn v. McCaughan*, 3 G. 17.

107. *Debt payable in instalments.* When several promissory notes are taken to secure the instalments of a debt, they will be considered as separate and distinct debts so far as the question of the appropriation of payments is concerned; *Miller v. Leflore*, 3 G. 634.

108. *Implied contracts.* The law will not imply a contract when there is an incapacity of the party to make an express one; *Tucker v. Cocke*, 3 G. 184.

109. *Unsealed injunction bond.* An unsealed instrument having the form and substance of an injunction bond, is valid as a simple contract, if the obligee do not object; *Cox v. Vogh*, 4 G. 187.

110. *Contract of forbearance of suit.* A contract to forbear suit must be certain and definite as to the period of forbearance; *Garnett v. Kirkman*, 4 G. 389.

111. *Contract by partner to pay when firm debts are settled.* A contract by one partner to pay the other a sum certain for his interest in the partnership assets whenever the firm debts are paid, binds the promisor whenever that event happens, though payment of the debts were made by him out of his individual assets; *Ellis v. Kelly*, 4 G. 695.

112. *Factor and correspondent.* An agreement between a country merchant and cotton

factor, that the proceeds of sales of cotton of planters shipped by the former to the latter, should be credited to the former who was to pay the planter, is temporary in its nature, if not limited expressly to a specified time, and will be terminated by a notice from the shipper to the factor to account directly to the planters for the proceeds of the sales; *Kirkland v. Carr*, 6 G. 584. And such a correspondent of a cotton factor, is not liable to the planters for the proceeds of the sales, though they are credited by the factor to him, if this were done without his authority; *Id.*

113. *Conveyance of contingent interest.* In *Dunlap v. Petrie*, 6 G. 690, an heir was held bound by his release of his interest in his ancestor's estate made before the ancestor's death.

114. *Contract by telegram.* The superintendent and part owner of a hotel at a watering place, at which yellow fever had broken out among his guests and visitors, telegraphed to a friend in a neighboring town, "There are many cases of yellow fever here, send out a physician without fail, this evening." The friend showed the telegram to plaintiff, and requested him to go, which he did, and attended on the guests and visitors at the hotel: *Held*, that the telegram did not bind the superintendent to pay for plaintiff's services; *Williams v. Brickell*, 8 G. 682.

115. *Contract to make a will.* A party receiving a deed conveying to him property absolutely, may bind himself by parol, to make a will disposing of it at his death, to a designated beneficiary. And, if in pursuance thereof he makes a will, it is irrevocable, and if he fail to make a will, it will be a fraudulent violation of his parol agreement, against which equity will give relief to the beneficiary; *Anding v. Davis*, 9 G. 574.

116. *Agreement to make a bridge and turnpike construed.* A contract was made by a bridge company and P., by which the latter was to build a bridge and turnpike; afterwards a contract was made between P., the bridge company, and a railroad company, by which P. agreed to build a railroad for a sum in gross, of which road the bridge and turnpike mentioned in the first contract was to be a part, and the bridge company assigned all its rights under their contract with P. to the railroad company, but it was expressly stipulated in the last contract that the building of the bridge was not included in it. It was held upon a review of both agreements, that not only the bridge but the embankments for the turnpike, were excluded from the last agreement, and that P. was entitled to recover for building the railroad, the amount agreed to be paid him by the bridge company, in addition to the sum in gross agreed to be paid by the railroad company; *Petrie v. Wright*, 6 S. & M. 647.

118. *Receipt.* A receipt in these words, "Received of M. one note on B. for \$107, Oct. 23d, 1840," signed S., is evidence *per se* of an indebtedness of M. to S., and of a payment thereon; and is not evidence that the

note was given to M. for collection; *Sims v. McIntyre*, 8 S. & M. 324.

119. *Carpenter's contract: Price.* A carpenter undertook to build a house, stating that it would not cost over \$400. During the progress of the work he proposed to add some extra work, and the employer objected, stating it would cost too much. The carpenter then made a calculation, and stated that the whole job would not cost over \$500 or \$600, and the employer assented to the proposition to put on the extra work: *Held*, that this constituted an agreement on the part of the carpenter, that the whole work should not cost over \$600, and that he could recover no more for it; *Britney v. Bolding*, 6 C. 53.

120. *Uncertainty in.* A contract to convey "the land in the town of B., on which the college is erected," is not void for uncertainty in the description of the land, parol evidence being admissible to show what land the college was located on; *Whitworth v. Harris*, 40 M. 483.

121. *Conditions concurrent.* Wherever the contract is special, and the payment of the money and the delivery of the thing sold, are to be concurrent acts, it is incumbent on the plaintiff in an action to recover damages for a breach of the contract, to aver and prove an offer on his part to comply with the contract; *Morrison v. Ives*, 4 S. & M. 652.

122. *Conditions precedent.* An agreement for the settling and release of debts, stated that a certain deed in trust should be released by the creditor to the debtor, and that the latter should deliver to the former certain slaves conveyed in the deed by a named day, and it also concluded with the following clause: "Whenever the above stipulations of compromise are complied with, it is to be a full settlement of all debts and demands of either party against the other party, and a full release either at law or equity." The debtor failed to deliver the slaves, and the trustee in the deed in trust sued for them, setting up his title conveyed by the deed, and the debtor relied on the agreement of compromise, as a satisfaction of the deed: *He'd*, that a delivery of the slaves was a condition precedent to the taking effect of the release, and that the deed in trust was still in force, the debtor having failed to comply with the conditions of compromise; *Fultz v. House*, 6 S. & M. 404.

See CONDITIONS.

123. *What words constitute: Case in judgment.* O. had been purchasing goods at plaintiff's store on a credit; plaintiff determined to sell him no more goods, until he could see defendant. Plaintiff called on defendant and told him O. was making an account with him, and that he did not wish to let him go any further, until he knew more about him; defendant replied, that C. was getting \$300 per year and his board, and "to let him have on," which plaintiff did: *Held*, there was no promise on the part of the defendant to become either primarily or secondarily liable to plaintiff for goods sold to C.; *Lombard v. Martin*, 10 G. 147.

124. *Special agreement: Discharge: Case in judgment.* F. received from S. a sum of money which he agreed to invest in building a steamboat for the Pearl river trade, and that he and one H. would build and complete the boat by a specified day: *Held*, that F. was not discharged from his agreement to build the boat or return the money, by a delivery of the fund received, with the knowledge and consent of S. to his partner H., who was to use it in building the boat, but who lost it, by the failure of the banker with whom he deposited it; it would have been otherwise, if F. had merely agreed to invest the money in building the boat; *Fox v. Smith*, 10 G. 350.

125. *License to retail.* A license to retail vinous and spirituous liquors, is not a contract, and is therefore subject to be taxed in addition to the license fee; *Reed v. Beall*, 42 M. 472; *S. P., Coulson v. Harris*, 43 M. 728.

Contribution.

1. *Between tenant for life and remainderman.* Where there is an incumbrance on an estate, devised to one for life, remainder to another, each party is bound to contribute in proportion to his interest to pay it off, and if the tenant for life pay off the incumbrance, he is entitled to a lien on the estate for his advances; *Peck v. Glass*, 6 H. 195.

2. *Same: Case in judgment.* A. devised all his estate, real and personal, to his wife for life, remainder over in fee, and appointed his wife executrix. He directed in his will that all his debts be paid as soon as possible, "out of such funds as my (his) executrix may be able to appropriate for that purpose." At the time of his death he owed \$40,000, and had a cotton crop on hand worth \$18,000. His executrix applied the cotton to the debts, and paid the balance out of her own means, and then filed this bill in the Probate Court against the remainderman to sell a part of the *corpus* of the estate, on his default in paying what she had advanced to pay the debts: *Held*, she was not bound to discharge the debts out of the rents and profits; that she and the remainderman must contribute according to their respective interests, to be ascertained by a commissioner, who was to take into consideration her age, health, &c., in determining the probable length of her life; but in no event was she to be charged with more than one third, and that she had a lien on the estate for her advances, to pay the debts, and also to pay the costs of the administration; *Id.*

3. *Between specific legatees.* But this doctrine does not apply to a case between specific legatees under a will when all the property bequeathed to them is subject to an incumbrance *paramount to the title of the testator*, and the property bequeathed to one of the legatees has alone been seized to satisfy the incumbrance. Thus, where A. died, giving all his estate to B., who afterwards died, leaving specific legacies of the personalty so bequeathed to him, to several legatees, and afterwards a judgment was rendered against the

administrator of A., which was wholly satisfied by a levy and sale of that portion of the property which B. had bequeathed to one of the legatees; it was held that this legatee was not entitled to contribution from his co-legatees, whose property, equally with his, was liable to satisfy the execution. In such a case the creditor has the right to levy his execution on any part of the property, and if he levy solely on the legacy of one, it is a misfortune for which the legatee has no remedy against his co-legatees. But it will be noted that this rule is applicable to a case only when the property of one legatee is lost by an incumbrance *paramount to the title of the testator*. Yet when the property of one of several specific legatees is taken to satisfy a debt due by the testator, he will have no right to contribution against his co-legatees, if there be assets enough to pay the debt independent of the legacies; or if there was a sufficiency of such assets, and they have been wasted by the executor; *Peebles v. Horton*, 10 G. 406.

4. *Between sureties.* The right of contribution between sureties rests not on contract, but on natural equity. And if one surety show he has paid the whole debt, the other may rebut the equity by showing that the surety thus paying had received from the principal a sum of money equal to the debt, with which he had purchased at sheriff's sale a valuable tract of land of the principal, at a reduced price; *Dennis v. Gillespie*, 2 C. 581.

Coroner.

1. *Acting under execution.* A coroner to whom an execution has been directed, and who acts under it, is estopped in an action on his official bond, for misconduct in reference to the execution, from denying his authority to act under it, and it is unnecessary, therefore, in such an action, to show that the sheriff was incapacitated to act, from interest, or that the sheriff's office was vacant; *Longacre v. Conway*, 2 H. 637.

2. *Process must be directed to him.* A coroner can execute process only when it is directed to him; if directed to the sheriff and delivered to the coroner, he has no power; *Arnold v. Wynne*, 4 C. 338.

Corporation.

See *BANKS*, under which head will be found numerous cases, illustrating the doctrine of corporations generally.

See also *PLANK ROADS AND RAILWAYS*.

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I. Charter.

1. *Charter a contract.* A charter of incorporation is a contract between the State granting it and the corporation, within the meaning of that clause of the Constitution of

the United States, which prohibits the States from passing laws impairing the obligation of contracts; and a contract between a member of a corporation and the corporation itself is equally within the protection of the Constitution; *N. O. J. & G. N. R. Co. v. Harris*, 5 C. 517.

See *BANKS*, 44, 45, 46.

2. *Amendment to charter.* A corporation has the implied power to accept of amendments proposed to its charter; but this power does not extend to the acceptance of an amendment which changes fundamentally the nature of the corporation, if even one single corporator dissents; such an amendment would materially impair the contract between the corporator and the corporation; *Ib.*

3. *Same.* Nor does the power to accept amendments authorize a corporation to assent to an amendment or law which authorizes the corporation to transfer all its rights and franchises to another company, whereby the first would become extinct, and its members become incorporators in the latter. Such a transfer is not a surrender by the corporation of its charter, which act would release the corporators from all liabilities on that account, but is an attempt to make its corporators members of another association different from the one in which they had contracted; *Ib.*

4. *Effect of transfer by amendment of charter.* Such a transfer being void for want of authority in the corporation to make it, has no effect; it confers no rights on the assignee and deprives the assignor of none, and leaves the corporators in the condition they were when the assignment was made; and hence, if a stockholder in the assigning corporation assent to the transfer, he cannot be made liable by the assignee corporation for the stock subscribed in the first, the latter having acquired no rights against the stockholder by virtue of the transfer; *Ib.*

5. *Same: Case in judgment.* A railroad company was chartered with power to build a railway from Canton in this State to Tusculumbia in Alabama. Subsequently another company was chartered with power to build a railway from New Orleans to Canton, and thence over the route of the first company to Tusculumbia. The first company was organized and H. subscribed for stock in it. Afterwards the Legislature passed an act authorizing the first company, with the assent of a majority of the stockholders (in value), to transfer all its rights and franchises, including its stock, to the second, which was done in accordance with the act. The assignee company then sued H. for his stock subscribed in the first: *Held*, that H. was not liable, even though he assented to the transfer; *Ib.*

6. *Amendment allowing railroad company to change its route.* By the original act incorporating the Memphis & Charleston Railroad Company, passed in 1830, the corporation was required to locate their road through the town of Holly Springs, and then eastwardly to the Alabama line, and the defendant, who resided on the route fixed by the charter,

subscribed for stock in said company upon the representation of its president, that the road should be located as prescribed in the charter. Afterward, in 1854, at the instance of the corporation, the Legislature amended their charter, removing all restrictions as to the route on which the road should be located, and in pursuance thereof, the company abandoned the route prescribed by the original charter, and located the road materially different and against the defendant's consent: *Held*, first, that the location of the road on the route prescribed by the original charter, on which the defendant resided, was, under the circumstances, a consideration for his subscription for stock. Second, that the amendment to the charter removing the restrictions on the location of the road was, under the circumstances, material and fundamental, and not binding on non-assenting stockholders, who had subscribed for stock under the original charter, upon the faith that the road would be located as therein prescribed; and, third, that upon an abandonment by the company of the route prescribed in the original charter, and the location of a new route materially different under the provisions of the amendment, such subscribers were released from all obligation to pay their stock; *Hester v. Memphis & Charleston R. R. Co.*, 3 G. 378; *S. P., Champion v. M. & C. R. R. Co.*, 6 G. 692. But every deviation in the location of the road from the route prescribed in the charter, will not release the subscribers for stock who do not assent to it. It is impracticable to lay down any general rule to serve as a sure guide in determining the question of the materiality of the deviation; each case must be determined by its own particular circumstances. A subscriber setting up a deviation as a defence to an action for his stock, must show its materiality; *Champion v. M. & C. R. R. Co., supra.*

6a. *Effect of acceptance of amendment.* But the mere acceptance by a railroad company of an amendment to its charter, authorizing it to build a branch road to the main trunk, will not *per se*, without any steps being taken by the company to appropriate its funds in building the branch, be a ground to release a stockholder who had previously subscribed for stock, and who did not assent to the amendment; *Hawkins v. Miss. & Tenn. R. R. Co.*, 6 G. 688.

II. Public Corporations.

7. *Trustees of the poor.* The trustees of the poor are a public corporation, and subject to the control of the Legislature; *Governor v. Gridly*, W. 328.

8. *Trustees of school lands.* Trustees of school lands are *quasi* corporations, and possess only the powers granted by law; *Carmichael v. Trustees School Lands*, 3 H. 84.

9. *Municipal corporation: Judgment against.* An incorporated city or town in this State, having the power conferred by its charter to levy taxes and to be sued, is a corporation; and a judgment against it is a judgment against the corporation only, and

not against the inhabitants thereof; and such judgment cannot be levied of the property of one of the inhabitants. The remedy of the judgment creditor, if the corporation has no property, is by *mandamus* on the municipal authorities to compel them to levy a tax; *Hurner v. Coffey*, 3 C. 434.

10. *Same*. The rule allowing a levy on the private property of the inhabitants of a town or district, to pay a debt recovered against such district or town, applies only when such district or town is a *quasi* corporation, and the suit or action is brought against the inhabitants, all of whom are parties, and the subject of the suit is the violation of a duty imposed by law on all the inhabitants; *Ib.*

11. *County*. A county is a *quasi* corporation, but there was no statute prior to the Rev. Code of 1857, allowing the county as such to sue or be sued; *Anderson v. State*, 1 C. 459.

See *COUNTY*.

12. *Taxation by*. The State has the power to delegate to a civil corporation the power of taxing property within its limits, so far as may be necessary for the good government of the corporation; *Harrison v. Vicksburg*, 3 S. & M. 581; *Smith v. Aberdeen*, 3 C. 458.

13. *Same*. A tax imposed by an incorporated town in pursuance of its charter, requiring each owner of property situated on certain streets, to make a pavement in front of his property, is not unconstitutional; *Smith v. Aberdeen*, *supra*.

14. *Improvement of streets by*. When the charter of a town gave the corporate authorities power to open, grade or improve any street, alley or sewer, and in the fair and reasonable exercise of this power, a sewer is made, adjoining the property of a citizen, which receives from the sewer a consequential injury, the owner will not be entitled to damages, for the work was done for the public good, and under competent authority, and the general good must prevail over partial individual inconvenience; *White v. Yazoo City*, 5 C. 357. That municipal corporations cannot contract to grant exclusive right to retail vinous and spirituous liquors, see *CONTRACT*, 35a, 42a.

14a. *Power of towns to license retailing under Act of 1865*. Under the Act of 1865, the corporate authorities of all cities and towns in the State, have the exclusive right to grant or refuse licenses for retailing within their respective limits; *Licks' Case*, 42 M. 316.

III. Subscriptions for Stock in.

15. *Conditional subscription*. If the charter of a railroad company expressly authorize it to collect its subscription for stock by instalments, as it shall see proper, it may lawfully take subscriptions for stock, subject to the condition that it shall not be collected until wanted to pay for work on the road in a specified locality. And if it were otherwise, the whole contract would be void, and not the condition only; *Roberts v. Mobile & Ohio R. R. Co.*, 3 G. 373. See *post*, 21, 38.

16. *Construction of such subscriptions*. The

defendant subscribed for several shares of the capital stock of the Mobile & Ohio Railroad Co., payable "when requisite for the payment of contractors for the construction of the road, in such instalments as may be required by the president and directors of the company from time to time, the same to be expended in Itawamba county, upon the local work of said road;" *Held*, that the president and directors were not vested with a discretion to make calls for the stock until it became necessary to pay contractors for work done in Itawamba county; *Ib.*

17. *Construction of contract to pay by instalments: Case in judgment*. By a contract of subscription for stock in a railroad company, it was stipulated that two per cent. should be paid at the time of subscription, and three per cent. should be payable in three months thereafter, and the remainder when called for by the president and directors; it was also provided in the contract that the two first named sums—two and three per cent.—should not be called for till 1st March, 1853: *Held*, that these two instalments of two and three per cent., were due and payable on 1st March, 1853, and the remainder thereafter, at the discretion of the company; *Ib.*

18. *Payment of percentage required by charter at the time of subscription*. When the charter of a corporation requires a certain percentage to be paid by each subscriber, at the time of subscription, such payment is essential to make the subscription valid; *Hayne v. Beauchamp*, 5 S. & M. 515.

See *BANKS*, 30; *S. P.*, *Lewis v. Robertson*, 13 S. & M. 558; *Fiser v. Miss. & Tenn. R. Co.*, 3 G. 359. If payment be made at the time by a third person, it will be good, though made without the knowledge of the subscriber, if he afterwards assent to it. And if he, on being informed of such payment afterwards by an officer of the corporation, make no objection, it is a ratification; *Miss. & Tenn. R. Co. v. Harris*, 7 G. 17.

See *BANKS*, 30.

19. *Same: Payment afterwards*. But if the payment be made afterwards, and before any calls have been made for the payment of the balance of the stock, it will be an affirmation of the subscription, and a substantial compliance with the charter; *Fiser v. Miss. & Tenn. R. Co.*, *supra*.

20. *Same: prior payment*. And the payment need not be contemporaneous with the act of subscription, and may be made before subscription; *Barrington v. Miss. C. R. R. Co.*, 3 G. 376.

21. *No power to waive a right of company in making a contract of subscription*. A corporation has no power to bind itself by contract with one of its stockholders, not to exercise a power conferred, nor perform a duty imposed by its charter for the general benefit of the corporation. And a person in becoming a member of a corporation, is presumed to contract with reference to its powers and rights as prescribed in its charter, and to give his assent to the exercise of

such rights and powers, in the mode and to the extent laid down in the act of incorporation; and hence, where the directors of a railroad company were authorized by the charter to build a road on such route as they should deem expedient and proper, if a representation be made by the company to a person about to subscribe for stock, that the road had been located and should be constructed on a particular specified route, and thereupon and in consideration thereof, such person becomes a subscriber, such representation is not binding on the company, though false and fraudulent, and will not release the subscriber from his liability to pay for the stock; *Ellison v. Mobile & Ohio R. R. Co.*, 7 G. 572. See *ante*, 15, and *post*, 38.

See RAILWAYS, 3.

21a. *Subscription for stock taken by a person having no authority: Ratification.* It is not essential to the validity of subscription for capital stock in a corporation, that the person who procured it was at the time duly authorized to do so by the company. It will be sufficient to bind the parties if the corporation, in a reasonable time thereafter, ratify the act of their pretended agent; and a suit to enforce the subscription by the company is a ratification; *Walker v. Mobile & Ohio R. R. Co.*, 5 G. 245.

21b. *Fraud and misrepresentation in procuring subscription.* Representations made by the agent of a railway company, in reference to the value of a donation of land made to the company by Congress, and in relation to the amount of the assets of the company, and their ability to complete the road within a specified time, and the probable costs and profits of the road, though false and exaggerated, and intended by him to induce persons to subscribe for stock in the company, are but mere expressions of opinion in reference to matters open to the investigation of both parties, and a person subscribing for stock in the company has no right to rely on them; and if he do so, and thereby invest his means in an unprofitable enterprise, it will be no ground for avoiding the contract of subscription; *Ib.*

21c. *Same.* Nor can a subscriber for stock in such a company avoid his contract of subscription upon the ground that the agent who obtained it, procured from an influential person in the neighborhood, whom he represented to be well acquainted with such matters, a colorable subscription for stock, with the secret understanding that such person was not to be bound thereby, and presented such colorable subscription to the subscriber and others as *bona fide*, to induce them to take stock, unless it also appear that he relied upon that fact, and was induced thereby to make his subscription; *Ib.*

21d. *Same.* A member of an incorporated company is bound by the acts of its officers and agents within the scope of their authority; and he cannot, therefore, set up against a creditor of the company who seeks to subject to the payment of his claim, the indebtedness of such member arising from his sub-

scription for stock in the same, that his subscription was obtained by the fraud of the agent of the company; nor can he set up any secret agreement between him and such agent, by which he was to be released from his subscription in case certain conditions promised by the agent were not complied with; *Saffold v. Barnes*, 10 G. 399.

IV. Calls for Stock, and Actions for.

22. *Made by directors, good.* A requisition for the payment of stock, made by the directors of a corporation, under the authority of the by-laws, is binding without the assent of each individual subscriber; *Smith v. Natchez Steamboat Co.*, 1 H. 479.

23. *Subscription paper evidence in action for stock.* The subscription paper for stock in a company, is legal evidence, and when it contains an absolute promise to pay money, an action may be maintained on it; *Ib.*

24. *Action for.* When the charter of a corporation provides for a forfeiture and sale of the stock of delinquent stockholders, the remedy is merely cumulative—the company may also sue the delinquent stockholders; *Freeman v. Winchester*, 10 S. & M. 577.

25. *Act dispensing with proof of subscription.* The act of the Legislature which dispenses with proof of subscription in an action by a corporation against a subscriber for stock, unless the subscription be denied under oath, is constitutional; *Thigpen v. Miss. Cent. R. R. Co.*, 3 G. 348.

V. Powers of Corporations.

See BANKS, 74 to 86.

26. *To make contracts.* A corporation is an artificial being, created by law for specified purposes, and possesses only the powers and capacities which are specifically granted by the act of incorporation, and such as are necessary to carry into effect the powers expressly granted; and hence, it can make only such contracts as are connected with the purposes for which it was created, and which are necessary, either directly or incidentally, to that end (citing *Com'l Bk of Manchester v. Nolan*, 7 H. 508; *Abby v. Billups*, 6 G. 618; *McIntyre v. Ingraham*, 6 id. 25); *Mobile & Ohio R. R. Co. v. Franks*, 41 M. 494. A corporation has no power to make a contract not expressly authorized by its charter, nor necessarily incident to the purposes of its creation; *Bacon v. Miss. Ins. Co.*, 2 G. 116; *McIntyre v. Ingraham*, *supra*. And a power cannot be implied unless it be so necessary to the enjoyment of some right expressly granted, that without it that right would fail; *McIntyre v. Ingraham*, *supra*.

27. *Same: Instances.* The charter of the Mobile & Ohio R. R. Co. gives it the power to construct a railway for the transportation of persons and property, and to make by-laws not inconsistent with the laws of the State, for the regulation of its affairs, and also to regulate the freight and charges for the transportation of persons and property. This charter made it a common carrier, subject to the common law liabilities of such

carriers, and it conferred no power on the corporation to make contracts for the transportation of persons and property, with liabilities different from those imposed by the common law: and hence, an act of the Legislature, which prohibited railway companies from making contracts for the transportation of persons and property, by which their common law liabilities are modified, is not unconstitutional, when applied to a company having no other powers than this corporation; *Mobile & Ohio R. R. Co. v. Franks*, 41 M. 494.

28. *Same.* And so a corporation having power to loan money on bottomry and *respondentia*, &c., has no power to borrow money, and *prima facie* no power to make a promissory note, and the holder of such a note must therefore show the special circumstances, if any exist, which make it valid; *Bacon v. Miss. Ins. Co.*, 2 G. 116.

29. *Same.* And so the power to assign promissory notes, held by a corporation, is not essential to the franchise of banking and dealing in stocks and bills of exchange, and constructing a railway, and cannot be implied from an express grant of these franchises; *McIntyre v. Ingraham*, 6 G. 25. And the charter of the Grand Gulf Bank, granting these franchises, is not to be held, therefore, to grant the power to assign promissory notes; *McIntyre v. Ingraham*, *supra*.

30. *Same.* But the power to take a lease includes within it the power to covenant, to keep and retain the demised premises in good repair; and a lessee corporation will, therefore, be bound by its covenant to rebuild in case the demised premises are destroyed by accidental fire; *Abby v. Billups*, 6 G. 618.

35. *Same.* An express power granted to a corporation "to acquire property by gift, purchase, or otherwise," includes the power to lease; and the consequent incidental power to covenant, to rebuild in case of accidental destruction of the property; *Id.*

36. *Same: Effect of general words in conferring a power.* General words in an act of incorporation must receive such a construction as is consistent with the general and obvious policy of the association, as indicated by its charter, and will not be held to confer a right or vest a power not necessary or usual in the course of its business; and hence, the general words in the charter of the American Colonization Society, empowering it "to receive and hold by gift, bequest, or purchase any species of chattels, and to sell and dispose of the same, as it shall deem most conducive to colonizing in Africa, free negroes and mulattoes residing in the United States," does not confer the power to hold slaves for any other purpose than for emancipation and colonization; *Lusk v. Lewis*, 3 G. 297.

37. *Powers of municipal corporations.* And the same rule of construction as to implied powers is applicable to municipal corporations, they having no powers except those expressly granted or necessarily incident to the granted powers; therefore, a

grant to the city of Canton "to tax or entirely suppress all petty groceries," was held not to confer the power on that corporation to grant a license for retailing; *Leonard v. City of Canton*, 6 G. 189.

37a. *Same: Power to destroy private property.* A municipal corporation has no power, by an arbitrary ordinance, to destroy private property by force, or compel the owner to destroy or remove the same, unless it were a nuisance, and be so declared by an ordinance, and also be shown to be such by its locality, or the sanitary condition of the town; *Pieri v. Shieldsborough*, 42 M. 493.

38. *Contracts ultra vires: Rule.* Where a corporation makes a contract entirely foreign to the purpose of its creation, the contract is void simply for want of power in reference to the subject matter of it. But where a corporation makes a contract in reference to a subject matter within the scope of its granted powers, but in so doing exceeds them, the contract will not, by reason of such excess, be rendered void. The making of such a contract might constitute a good ground for a resumption by the State of the corporate franchises, but cannot be objected to by the party sought to be charged (citing *Commercial Bank of Manchester v. Nolan*, 7 H. 508; *Wade v. American Colonization Society*, 7 S. & M. 663, 697); *Haynes v. Covington*, 13 S. & M. 408.

Under this rule it has been held that the taking of usury does not invalidate the whole contract; *Commercial Bank, &c., v. Nolan*, 7 H. 508; *Grand Gulf Bank v. Archer*, 8 S. & M. 151.

And so when the Board of Police was directed to loan the three per cent. fund by investing it in stocks, it was held if they loaned it to individuals on notes, the loan could be collected; *Haynes v. Covington*, *supra*.

See TRUSTS AND TRUSTEES, 54; and BANKS, 86.

And that a contract not to exercise one of its corporate powers was void; *Ellison v. Mobile & O. R. R. Co.*, 7 G. 572; for which see *ante*, 21.

VI. How Corporations may Contract.

See BANKS, sub-divisions Cashier, and Board of Directors.

39. *Power of president.* The president of a private corporation has no power to make contracts on behalf of the company, except in pursuance of authority conferred on him by the board of directors; *Bacon v. Miss. Ins. Co.*, 2 G. 116.

40. *Mode of making contracts.* A corporation may make contracts under its corporate seal by a vote of the directory entered on its books, or by its agent acting within the scope of his authority. And it may contract by parol or in writing; and binding contracts may be implied from its corporate acts, or the acts of its agents, without a vote, or deed, or writing; *Petrie v. Wright*, 6 S. & M. 647; *Abby v. Billups*, 6 G. 618. But

this is to be understood of corporations where a particular mode of contracting is not required by the charter; *Abby v. Billups*, *supra*.

41. *Same: Case in judgment: Private seal of head of corporation.* Where the charter of a municipal corporation authorizes it to have "a common seal, and to contract under the same, or without it," an appeal bond of the corporation is sufficiently sealed with the private seal of the chief magistrate, if there be no common seal; *Deberry v. Holly Springs*, 6 G. 385.

See ATTACHMENT, 35a.

VII. Grant of Exclusive Rights.

See CONSTITUTIONAL LAW, 62 to 65.

42. *Exclusive right not presumed.* The retention of power in the State is for the benefit of the public, to be exercised to that end whenever the State may deem it expedient; and the State is never held to be excluded from the exercise of a particular power, unless there be a plain and manifest surrender of it; and the grant of power and privileges to corporations of an exclusive nature is never presumed. Hence, unless there be an express grant in the charter of a turnpike and ferry company, of an exclusive right to establish a ferry and turnpike on a particular river, and on a particular line of travel, the Legislature may afterwards incorporate another, and authorize it to establish a turnpike and ferry on the same river, and on the same line of travel, although the establishment of the latter may materially impair the value of the franchise granted to the former; *Collins v. Sherman*, 2 G. 679.

43. *Same.* That the Legislature in granting a charter to a turnpike and ferry company, required of the corporation to keep in good repair the improvements made thereunder, is no ground for inferring a grant of an exclusive privilege to the contractors to make that kind of improvements over that particular stream and on the same line of travel; *Ib.*

VIII. Dissolution of Corporations.

See BANKS, 48 to 60; and QUO WARRANTO, *ubique*.

44. *By non-user.* The failure of a corporation to meet according to its fundamental rules, does not necessarily work its dissolution; nor does a failure to elect its officers at stated times have that effect, since the old officers hold till their successors are elected; *Smith v. Natchez Steamboat Co.*, 1 H. 479; but when the charter requires an election of the directory annually, a failure to elect for five years is a cause of forfeiture of the charter; *State v. Com'l Bank of Manchester*, 4 G. 474.

See BANKS, 55, 56, 57.

45. *Same.* But non-user does not *per se* work a dissolution; it is only a cause for dissolving the corporation, and until judgment of dissolution on *quo warranto* is pronounced, the corporation must be still re-

garded as in existence; *Bohannon v. Binns*, 2 G. 355.

46. *Misuser: Usury.* It is true that every accidental omission of duty or accidental commission of an error by a corporation will not be a cause of forfeiture of its charter; but when the corporation deliberately abandons a salutary rule prescribed by its charter for the benefit of the public, and substitutes another rule for the transaction of its business in violation of its charter, this will be a sufficient cause of forfeiture. A restriction contained in a charter of a bank, as to the rate of interest or discount it may take, is such a rule, the deliberate violation of which will be a cause of forfeiture; *State v. Com'l B'k of Manchester*, 4 G. 474.

47. *Same: Sale of its assets.* The sale by a bank of its property, so as to disable it from resuming banking operations, which had been suspended, is a cause of forfeiture of its charter; *Ib.*

48. *Same: Sale or abandonment of its franchises.* An incorporated bank has no power to sell its franchise of banking, and if it do so, it will be a cause of forfeiture, and so if it abandon the franchise of banking, and permit another to intrude upon and usurp its privileges in that respect, and issue and put into circulation, as money, bills and notes in the name of the bank; *Ib.*

49. *Same: Reduction of capital stock.* Where the charter of a bank required \$100,000 to be paid in as capital stock before it should be organized, and that the circulation of the bank at any time should not exceed double the amount of capital stock paid in; it was held that after due organization, the subsequent withdrawal of the stock paid in, and its conversion to other uses, so as to reduce the amount thereof below \$100,000, was no cause of forfeiture of its charter, if the bank did not at any time put in circulation its issues exceeding double the amount of the stock then retained; *Ib.*

50. *Expiration of charter.* After the expiration of the time for which a corporation has been chartered it ceases to exist for any purpose, and suits by it abate; *B'k of Miss. v. Wren*, 3 S. & M. 791.

51. *Effect of forfeiture as to debts.* It is now settled, where there is no statute to the contrary, that upon the dissolution of a corporation, the debts due to and from it are extinguished; *Port Gibson v. Moore*, 13 S. & M. 157.

See fully on this subject, BANKS, 59, *et seq.*

IX. Revivor of Corporation.

52. *In what cases.* According to the English rule, when a municipal corporation was once dissolved, it could not again be revived as revival could take place only where there was merely a suspension of its power, and not where the corporation was completely dissolved; *Port Gibson v. Moore*, 13 S. & M. 157.

53. *Same: Case in judgment.* In 1841 the Legislature repealed an act incorporating a town, and in 1844 it repealed the repealing

act: *Held*, that this was not a revival of an extinguished corporation, but a new creation, to take effect from the passage of the act which repealed the act repealing the charter, and that the new corporation was not liable for the debts of the old; *Ib.*

54. *Same: Power of Legislature to revive.* Whether the Legislature has the power to revive an extinct municipal corporation, so as to invest it with the rights and liabilities of the old one, noticed and considered, but not decided; *Ib.*

X. Miscellaneous.

55. *Books of company.* After the death of the secretary, any member of a corporation may rightfully take possession of the books, and such possession will justify their introduction in evidence, as the books of the company. The company has power to place its books in whose custody it pleases, and the books are the best evidence of the acts of the corporation as between its members; but they are not admissible until proven to be the books of the company; *Smith v. Natchez Steamboat Co.*, 1 H. 479.

56. *Must prove corporate character.* A corporation must, under the general issue, prove its corporate character, and *nul tiel* corporation is a bad plea, as amounting only to the general issue; nor can its right to sue be denied by plea in abatement; *Carmichael v. Trustees of School Lands*, 3 H. 84. But under the Act of 1836, re-enacted in Rev. Code of 1857, dispensing with proof of the character of parties, unless it be denied under oath, *nul tiel* corporation is a good plea when sworn to; *Vicksburg Water Works & Banking Co. v. Washington*, 1 S. & M. 536.

57. *How proven.* Under a plea of *nul tiel* corporation (sworn to) to an action by a bank, the charter incorporating the bank and proof of user under it, is sufficient to prove the issue for the plaintiff; *Henderson v. Miss. Union Bk.*, 6 S. & M. 314.

58. *Corporator a competent witness by release.* A release of his interest in the suit by a corporator, will make him a competent witness; *Smith v. Natchez Steamboat Co.*, 1 H. 479.

59. *Power to hold land.* The Mississippi & Alabama R. R. Co., has power, under its charter, to hold land for its banking house, as well as for railroad purposes, *De ex dem. Cocke v. Lane*, 3 S. & M. 763.

60. *Release of securities by corporation.* A voluntary release of its securities by a corporation is void as to its creditors, yet, in a settlement of mutual and conflicting claims, a corporation may allow a creditor more than is strictly due him, and this of itself will not be fraud. To constitute it a fraud, there must be some device to injure its creditors, or the act must be so grossly extravagant and wasteful as to amount to a fraud in law; *Petrie v. Wright*, 6 S. & M. 647.

61. *Same.* An incorporated seminary of learning, has the right to release a subscriber for a scholarship therein from the payment of

a note executed for its purchase; *Mary Washington Female College v. McIntosh*, 8 G. 671.

62. *Embraced in word "person."* A corporation is embraced in the term "person" or "individual;" *Bank of U. S. v. State of Miss.*, 12 S. & M. 456.

63. *Illegal collection by.* A person paying money under an illegal ordinance of a municipal corporation, may recover it back; *Leonard v. City of Canton*, 6 G. 189.

64. *Garnishee of a subscriber for stock: Pleading.* A subscriber for stock was garnisheed by a creditor of the company, and he answered in the usual form denying indebtedness to the company. The creditor took issue on the answer, alleging that the defendant was indebted to the company on account of his subscription for stock in the same: *Held*, that on the trial of this issue, the garnishee could not object that the company had never been legally incorporated; he having failed to deny under oath, the legal incorporation of the company as required by art. 237, p. 518, of Rev. Code; *Saffold v. Barnes*, 10 G. 399.

Costs.

1. *Retaxing.* After the extinguishment of a judgment by a forfeiture of a forthcoming bond, a motion will not be entertained to set aside or quash execution on the judgment on the forthcoming bond, on the ground of exorbitant charges in the bill of costs; *Clark v. Anderson*, 2 H. 852; and it is doubtful whether there can be a retaxation of the costs after final judgment, it being the duty of the parties to attend to the taxation before the entry of the judgment, and if they fail it seems to be a waiver of the objection; *Ib.* But this rule would not apply now, under the practice to enter judgment for the costs generally to be taxed by the clerk.

2. *Successful party liable for his own costs.* The successful party in a suit, though he recover his costs against the other, is, nevertheless, liable therefor, to the officers of the court; and under the statute the clerk may tax them, and issue execution against the party liable for their payment; and a judgment against him for the costs is unnecessary; *Officers of Court v. Fisk*, 7 H. 403.

3. *Void process.* A defendant is not liable for the costs of void process; *Wingate v. Wallis*, 5 S. & M. 249.

4. *Where court has no jurisdiction.* A court upon dismissing a case over which it has no jurisdiction, has a right to enter judgment against the plaintiff for costs; *Balfour v. Mitchell*, 12 S. & M. 629.

5. *Costs in assumpsit.* An action of assumpsit, is not an action on the case in the sense of the statute (H. & H. 572, § 108), which provides that if the plaintiff in an action in the case recover less than \$10, he shall recover in no more costs than the verdict; *Fletcher v. Benbrook*, 5 S. & M. 619.

6. *Assignee of unfounded claim.* The assignee of an unfounded claim may recover from the assignor, the costs he has expended

in attempting to enforce it; *Cartwright v. Carpenter*, 7 H. 328.

7. *When costs included in term "damages."* Where a contract is made to pay the damages which a party may sustain by a suit, the costs of the suit as a general rule are included in the damages; but if the contract be to pay the damages assessed by a jury, the costs are not included, as they are not assessed by the jury, but taxed by the clerk; *Gayden v. Marshall*, 8 S. & M. 489.

8. *Security for costs.* The statute is imperative in requiring security to be given for the costs, upon motion made and proper affidavit filed; and if the court disregard the motion and proceed to enter judgment for plaintiff, it will be reversed; *Besancon v. Shirley*, 9 S. & M. 457.

See PRACTICE, 111, 112.

9. *When security may be taken.* The Circuit Court has a discretionary power to allow the plaintiff to give security for costs, after the expiration of the sixty days in which he has been required to give it by a rule of court; and such security may be given at the next succeeding term by permission of the court, and the granting of such permission is in conformity to the object and spirit of the law; *Kyle v. Stinson*, 13 S. & M. 301.

10. *Power of clerk to take security.* The clerk has no power to take security for costs, without a previous order of court for that purpose; *Overstreet v. Davis*, 2 C. 393.

11. *Judgment against sureties on motion.* The statute allowing judgment to be entered against sureties for cost on motion, applies only when the plaintiff is a non-resident; *Ib.*

See PRACTICE, 115.

12. *Costs in Probate Court.* The awarding of costs in a litigation in the Probate Court, is in the sound discretion of the court, according to the rule in chancery; *White v. Littlefield*, 7 H. 406.

13. *When verdict is for one of several defendants.* If one of several defendants, in an action of trespass be acquitted, he is entitled to recover his costs against the plaintiff; *Binns v. Brittain*, 1 G. 693.

14. *When attack on will was unsuccessful.* Heirs who have unsuccessfully attacked a will, are not entitled to have the costs of the suit taxed against the estate, upon the certificate of the court before which the issue *devisavit vel non* was tried, that there was probable ground for attacking the will; *Piper v. Heatherington*, 3 G. 806.

15. *On dismissal of appeal.* A party dismissing his appeal, is liable to be taxed with the costs; *Miss. C. R. Co. v. Beatty*, 6 G. 668.

See ATTACHMENT, 32.

Counsel Fees.

1. *When allowed against defendant.* The jury may allow the counsel fees of plaintiff in a case where they are authorized to allow vindictive damages; *N. O. J. & G. N. R. R. Co. v. Allbritton*, 9 G. 242.

See EXECUTOR AND ADMINISTRATOR, 99,

215, 216. TRUSTS AND TRUSTEES, 84 to 87. ATTORNEYS AT LAW, 36 to 40. DAMAGES, 29.

Cotton Money.

1. *"Cotton money" illegal.* Treasury notes of the State, and what is commonly called "cotton money," having been issued at a time of great pecuniary want, to supply a medium for ordinary business transactions, and also to furnish the means by which the empty treasury of the State might be replenished, were in operation and effect in aid of the "rebellion," and therefore, by virtue of the ordinance of the convention of 1865, illegal and void. And the State is not bound now to receive such money in payment of taxes; *Thomas v. Taylor*, 42 M. 651.

County.

1. *Quasi Corporation.* A county in this State is a *quasi corporation*, but there is no statute which authorizes it to sue and be sued. Hence, to an injunction restraining the collection of county taxes, the tax collector is a proper party; *Anderson v. State*, 1 C. 459.

2. *Same: Right to sue and be sued.* But now, by art. 34, p. 419, of Rev. Code of 1857, any person having a just claim against a county, may, upon its rejection by the Board of Police, bring suit against the county; and in case he recovers judgment, it is the duty of the Board of Police to issue a warrant on the treasury of the county for its payment. But the claim here referred to is a claim against the county, and not a claim against the individual members of the board for a dereliction in the performance of a duty required of them by law, such as a failure to have the road and bridges of the county kept in repair; *Sutton v. Board of Police of Carroll Co.*, 41 M. 236.

See BOARD OF POLICE, 13.

3. *Same.* The Boards of Police are in certain respects municipal corporations, charged with the duty of making provision for the building of roads and bridges, and keeping them in repair. If they discharge the duty imposed on them by law, by making contracts with proper persons for building bridges and keeping them in repair, and by appointing overseers over the public roads and assigning them hands to work them, the county will not be liable for damages occasioned by a bridge or road being out of repair. The liability in case of a bridge, will be on the person with whom the board have contracted to keep it in repair, and in case of a road, on the overseer; *Ib.*

4. *Liability of municipal corporations.* Private corporations are liable for the tortious acts of their agents, but this is not generally so with municipal corporations, and especially where these agents have been appointed in obedience to statutory provisions, and where their duties are prescribed by law, with penalties for their non-performance. But these agents will themselves be liable to the public and third parties for a failure to perform their duties; *Ib.*

County Court.

See ATTACHMENT, 144, 145.

1. *Criminal jurisdiction.* The criminal jurisdiction of the County Court conferred by the Act of 1865, is concurrent with, and not exclusive of, the criminal jurisdiction of the Circuit Court; *Harlan's Case*, 41 M. 566.

2. *Old County Court.* The County Court is an inferior tribunal, and its acts, beyond its jurisdiction, are absolutely void, and may be so regarded in a collateral proceeding; *Stockett v. Nicholson*, W. 75.

3. *Same: A court of record.* It is a court of record, and defects in its proceedings cannot be supplied by parol; *Ib.*

4. *Same: Jurisdiction.* It is empowered to audit all claims against the county, and to levy a tax for the payment of the same, and if it refuse to do so, the Supreme Court will grant mandamus; *Madison County Court v. Alexander*, W. 523.

5. *Custodian of its record.* The probate clerk is the proper officer to certify the records of the old county court; *Byrd's Case*, 1 H. 247.

6. *County Court of 1865: Appeal.* No appeal lay from this court to the High Court; *Davis v. Wingfield*, 42 M. 251. Nor in criminal cases after trial by jury, did an appeal or writ of error lie from this court to the Circuit Court; *Dawkin's Case*, 42 M. 631.

Court.

1. *Rule of court.* A rule of court cannot make that valid which is void in law; *Pickett v. Pickett*, 1 H. 267.

2. *Act of court is act of the judge.* The act of a court composed of a single judge, is the act of the judge, even in a case where the law requires a thing to be done by the judge, and not by the court; *Boon v. Bowers*, 1 G. 246.

3. *Province of court in certain matters.* It is in the province of the court to determine whether the evidence introduced by the plaintiff conduces to establish his demand, and if it does not, the court may instruct the jury to find for the defendant; *Perry v. Clark*, 5 H. 495. A writing must be construed by the court, and not by the jury; *Beasley v. Evans*, 6 G. 192; *Fairly v. Fairly*, 9 G. 280. So the effect of the erasure of a name from a guaranty, is a question of law for the court, and must not be left to the jury; *Hill v. Calvin*, 4 H. 231. So in an action for malicious prosecution, whether the alleged inculpatory facts exist or not, is a question for the jury, but whether, conceding them to exist, they amount to a probable cause, is a question for the court, and must not be left to the jury; *Greenwade v. Mills*, 2 G. 464.

See INSTRUCTIONS, 1 to 7, 25 to 29.

4. *Judicial knowledge of foreign laws.* The court cannot take judicial notice of the laws of a foreign State, nor charge the jury as to the rate of interest in such State, unless proof of it be first made to the court; *Swett v. Dodge*, 4 S. & M. 667. But this is changed

now by statute, so far as the laws of the United States and of the several States and Territories of the Union are concerned; *Rev. Code of 1857*, p. 516, art. 226.

5. *Contempts.* For power of courts to punish for contempts, see CONTEMPTS.

6. *Power to take evidence.* A court has no power to take proof except in a cause pending in it, or it be expressly conferred by statute, or derived from a commission; *Merrill v. Bell*, 6 S. & M. 730.

7. *Cannot exercise unconstitutional jurisdiction.* A court cannot exercise a jurisdiction contrary to the constitution, even by consent of parties; *Hurd v. Tombs*, 7 H. 129.

8. *Control over process.* Any court from which an execution emanates against an administrator, has power to stay it, upon the estate being declared insolvent by the Probate Court; *Parker v. Whiting*, 6 H. 352.

9. *Control over its judgments.* As a general rule, a court has control over its judgments or decrees, during the term at which they are rendered, but after that term, its power over decided cases is gone; *Sagory v. Bayless*, 13 S. & M. 153.

10. *Cause taken under advisement.* When a judge takes a cause under advisement, to be determined in vacation, under the provision of the statute allowing that to be done, that fact should be noted on the minutes of the term at which it is taken; otherwise he will have no authority to make a decision in vacation; *Ross v. Gary*, 7 H. 47.

11. *Spirit of courts.* The whole spirit of modern jurisprudence is directed to prevent substantial justice from being defeated by an adherence to technical forms, and this tendency is wholesome and wise, and should be fostered by the courts; *Hewett v. Cobb*, 40 M. 61.

12. *Decision of court in lieu of a jury.* If an issue of fact is by agreement submitted to a probate judge, "in lieu" of a jury, the decision of the judge will have the same force and weight as if rendered by a jury; *Kelly v. Miller*, 10 G. 17. See JUDGE.

Covenant.

1. *Breach of.* A covenant not to set up, or cause to be set up, a printing press in opposition to the covenantee, and in the same town, is broken when a new press is established by another, the covenantor managing it, and receiving for compensation a part of the profits; *Anderson v. Falconer*, 1 G. 145.

2. *Same: How long binding.* But such a contract is binding only so long as the covenantee continues the business in that town, and ceases with his death or retirement from business; *Ib.*

3. *Covenant to repair.* A covenant by a lessee to return the premises in good repair, is a covenant to rebuild in case they are destroyed by fire; *Abby v. Billups*, 6 G. 618.

3a. *Covenant to stand seized.* Past services, gratuitously rendered by the covenantee, and which are to be continued during the life of the covenantor, are a sufficient con-

sideration for a covenant to stand seized between strangers in blood; *Exum v. Canty*, 5 G. 533.

See **MUTUAL AND DEPENDENT AND INDEPENDENT COVENANTS**, and **VENDOR AND VENDEE**, sub-division **Covenants for Title**, 217, *et seq.*; and **DEED**, sub-division **Warranty**, 88a, *et seq.*

Criminal Law.

For this title see end of Digest.

Custom of Merchants.

See **USAGE**.

1. *As to credit.* It is competent to show by the custom of merchants that, when cash is not paid for goods, the sale is on the customary credit; *Effinger v. Henderson*, 4 G. 449.

2. *Is local.* A particular custom of merchants only affects contracts made in that locality where it is shown to exist; *Allen v. Lyles*, 6 G. 513.

3. *Proof of.* To prove or disprove a particular custom in one city, it is incompetent to show that it exists or does not exist in other cities; the proof must be confined to the particular place where the transaction to be affected by it took place; *Ib.*

4. *Same.* Customs and usages must be proven by evidence of facts (and not by mere speculative opinions) and by witnesses who have had frequent and actual experience of the custom or usage about which they testify; *Ib.*

5. *Character of valid custom.* A custom is inadmissible to explain a transaction, unless it be shown that it is established, existing at the time and place of the transaction, and known to the parties; it must also be certain, uniform, reasonable, and not contrary to law; *Shackelford v. N. O. J & G. N. R. R. Co.*, 8 G. 202.

6. *As to damage to goods.* It is competent to prove the custom of merchants, by which when goods are damaged over a certain per cent. of their value, they are to be sold at auction by the underwriter, and that the sale, and not the estimate of the appraisers, is the criterion of the damage; *Stanton v. Natchez Ins. Co.*, 5 H. 744.

7. *As to custom of banks*, see **BILLS OF EXCHANGE**, &c., 29a, 39 to 40a.

Courtesy.

See **HUSBAND AND WIFE**, 26 to 31.

Cutting Trees.

1. *Title of the land.* Possession of land under color of title is *prima facie* sufficient evidence of title, to enable the possessor to recover the statutory penalty for cutting trees on it; *Ware v. Collins*, 6 G. 223.

2. *Form of action for.* Debt and not trespass is the proper remedy to recover that penalty; *Elder v. Hitzheim*, 6 G. 231.

3. *Same.* Counts in debt for the statutory damages and in trespass cannot be joined; *Ib.*; *Exum v. Brister*, 6 G. 391.

See also **TRESPASS**.

Damages.

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I. Liquidated Damages.

1. *When liquidated damages may be agreed on.* An agreement for liquidated damages for the non-performance of covenants of an uncertain nature and amount, may be enforced for the amount of the damages agreed on, but it cannot when the covenant is fixed and certain in amount; and if there be mutual covenants for stipulated damages, and one be bad because it is for a certain and fixed amount the other, though uncertain in amount, will be bad also, for if not obligatory on one party, it will not be obligatory on the other party; *Bright v. Rowland*, 3 H. 398.

2. *Same: Not good where the breach is non-payment of money.* Thus if the covenant be to pay a sum as liquidated damages for the failure of the promisor or another to pay a certain amount of money by a day named, it will not be good. The covenantee can recover only the amount due and interest; *Bright v. Rowland*, *supra*; *Hughes v. Fisher*, W. 516.

II. Damages in Detinue, Trespass, Trover, &c.

3. *In detinue for a slave.* The *descriptio rei* in an action of detinue for a slave, has always been deemed sufficient to warrant the jury in assessing some value, and it is immaterial how much is allowed, if the defendant has it in his power to deliver the slave in satisfaction of the assessment; *Jennings v. Gibson*, W. 234.

4. *Rule when taking, &c., is without fraud.* In action for taking, detaining and converting personal property, when the taking, &c., is unaccompanied by circumstances of fraud, malice, oppression or wilful wrong, the measure of the damages is the value of the property at the time of the taking, detention or conversion, with interest thereon to the time of the trial; and this is a rule of law for the court, about which the jury have no discretion; *Whitfield v. Whitfield*, 40 M. 352; *Briscoe v. McElween*, 43 M. 556; *Jamison v. Moon*, 43 M. 598.

5. *Same: Where there is fraud, malice, &c.* When the trespass, detention or conversion is attended by circumstances of malice, fraud, oppression or wilful wrong, the law abandons the rule of compensation in a legal sense, and the measure of damages becomes a matter for the consideration of the jury, guided by the evidence before them, and under this rule may be embraced the following:

1. All cases where the original act was wilful and wrongful.

2. Where the original act was *bona fide*, but the subsequent detention, sale or other disposition of the property after a knowledge of the plaintiff's claim, was wilful or injurious.

3. Where the defendant took the property and disposed of it for a sum greater than the market price in ignorance of the plaintiff's rights, and he seeks to retain the difference between his sale and the market price, as a speculation resulting from his unintentional wrong.

4. Where the property in controversy has some peculiar value to the plaintiff, and is wilfully withheld from the rightful owner; or where he has been deprived thereof by the wilful and wrongful act of the defendant. In all these cases it is the peculiar province of the jury to find such additional damages as in their judgment is right; *Whitfield v. Whitfield*, 40 M. 352; S. C., 44 M. 254; S. P., *Jamison v. Moon*, 43 M. 598.

6. *Application of these rules to detinue and replevin.* In applying the above rules to actions of replevin and detinue where a return of the specific property is adjudged, the circumstances of malice fraud and oppression will be considered and compensated for in that part of the verdict which allows damages for the detention or taking; *Whitfield v. Whitfield*, *supra*.

7. *Where there is a sale.* Where there is a sale of a chattel, and a failure to deliver it according to contract, the damages recoverable will be the market price on the day the delivery was to be made, and interest from then till the trial, and not the highest market price between that day and the trial. And this is the rule though the price be paid in advance; *Bickell v. Colton*, 41 M. 368. But where defendant agreed to gin and bale defendant's cotton for one-third of it, and under this contract he got possession of it and converted it to his own use, without complying with his contract, he was held liable for the highest market price of the cotton between the conversion and the trial; *Fullton v. Woodman*, 40 M. 593.

8. *Trover.* In trover the measure of the damages is the value of the thing on the day of conversion, and interest to the trial; *Hinds v. Terry*, W. 80; but in *Texada v. Camp*, W. 150, the yearly value of a slave converted, instead of interest, was allowed.

9. *Liability of party refusing to deliver property for its subsequent loss.* Where a party without just claim or interest wrongfully detains the property of another after due demand, he is liable for a loss of the property occurring, after the demand, from accident or casualty; but this rule does not apply where the defendant in a chancery suit having an interest in the property retains it during the litigation, under a bond to have it forthcoming to abide the judgment of the court; and this though he resists the plaintiff's claim, which, however, is not a title to the property, but a mere right to subject it

to his debt; *Trotter v. White*, 4 C. 88. In such a case the possession by the defendant under the bond, will be merely a legal custody, and will impose on him the same responsibility, as a sheriff would have incurred if he had been in possession by virtue of legal process; *Ib.*

9a. *Damages in detinue; Loss of the property.* The rule seems to be settled, that in detinue the defendant may plead *puis darsin* continuance, the destruction of the property, and if it be sustained there will be no assessment of it in the verdict; but the plaintiff shall have judgment for the damages arising from the wrongful detention only. If the destruction happened whilst in defendant's possession and without his fault, no part of the value of the property should be included by the jury in the verdict in their estimate of damages; but such value may be included, if the destruction resulted from ill treatment, fault or neglect of defendant. Damages for the destruction may be recovered in the amount assessed for the wrongful detention; *Whitfield v. Whitfield*, 44 M. 254.

See DETINUE, 13.

9b. *Compensatory damages for injuries to persons.* In estimating compensatory damages for injuries to the person, the jury may take into consideration, loss of time, pecuniary expense, bodily pain, any incurable hurt, expenses of cure, and mental suffering caused by the injury; also future damages for loss of health, time and use of limbs, bodily pain and suffering, and mental suffering; *M. & C. R. R. Co. v. Whitfield*, 44 M. 446.

III. For False Warranty of Title.

10. *Warranty of personalty.* Where the vendee of personalty loses it by paramount title which authorizes a recovery of damages from him for its detention, the rule of damages for the breach of the warranty of title, is the purchase money and interest; *Bozman v. Brower*, 6 H. 43; *Noel v. Wheatly*, 1 G. 181. But if the property be lost in virtue of a sale under an execution having a lien on it prior to the sale, the damages will be the value of the property at the time of the sale; *Bozman v. Brown*, *supra*.

10a. *Warranty of title to land.* The measure of damages for a breach of the warranty of title to land, is the purchase money and interest; the vendor cannot recover for the loss of a good bargain; *Phipps v. Tarpley*, 2 G. 433; *Herndon v. Harrison*, 5 G. 486. And the rule is the same, where the sale is by title bond, and the vendor refuses to convey; *Harrison v. Herndon*, *supra*.

10b. *Vendee may tender notes for purchase money in satisfaction of breach of bond to convey.* Where a vendee in a title bond, upon a tender of the purchase money, and a demand for a deed, which is refused, elects to cancel the contract, he can, as general rule, recover nothing from the vendor, if the latter offer to return the notes for the purchase money before suit is brought, and also bring them into court at the trial, and tender them

in satisfaction of the plaintiffs demand;
Herndon v. Harrison, 5 G. 486.

IV. Appropriation of Private Property to Public Use.

10c. *For the damages, a party is entitled to for such appropriation, and the general rules on this subject.* See CONSTITUTIONAL LAW, 22, 24 to 31a.

V. Mitigation and Aggravation of Damages.

See SLANDER, 17, et seq.

11. *Mitigation by punishment in a criminal proceeding.* It is not a matter in mitigation of damages in an action of assault and battery, that the defendant has been indicted and punished for the same act. The action is for civil redress, and the indictment is for the vindication of the public justice, and the one has no dependence on, or connection with the other; *Wheatly v. Thorn*, 1 C. 62.

12. *Mitigation: By new employment.* When a laborer has been prevented from carrying out his contract by the fault of the employer, it is no defence to his action for damages, that he could have gotten similar employment at the same price, during the remainder of the time; this is but in mitigation of the damages; *Armfield v. Nash*, 2 G. 361. See post, 26.

13. *Aggravation: Malice.* Damages in an action of trespass may be increased by proof, that the trespass was done with malice; *Williams v. Newberry*, 3 G. 256.

14. *Plea of justification in slander, matter of aggravation.* When justification is pleaded (though the plea be adjudged bad, and the trial is on the plea of the statute of limitations), the plaintiff may prove his good character in aggravation of the damages. Whether a different rule would prevail when the general issue alone is pleaded; *Quære?* This principle was applied where the slanderous words were "that plaintiff had negro blood in his veins;" *Scott v. Peebles*, 2 S. & M. 546.

VI. Exemplary Damages.

See RAILWAYS, 50 to 57.

15. *Against common carrier of passengers.* In an action against a railway company by a passenger, to recover damages on account of the company's agent having conveyed the plaintiff to a point beyond the place of his destination, and then compelling him to leave the cars against his remonstrance, and contrary to his request, the jury are authorized in assessing damages, to allow not only compensation for the injury, but to inflict punishment on the defendant for his disregard of public duty; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660. And the rule is the same when the action is against a common carrier, for his refusal to stop at a designated point to take in passengers, according to his previous public notice; *Heirn v. McCaughan*, 3 G. 17; see also *M. & C. R. R. Co. v. Whitfield*, digested in 44 and 57, RAILWAYS.

15a. *Rule: Instructions.* In an action against a railway company for an injury to a passenger, the following instruction was given: "In all actions against common carriers, the jury in their discretion are to weigh all the circumstances of the case, and are authorized to find exemplary damages when they consider the personal wrong and injury of such a character as in their judgment to call for the imposition of exemplary damages." *Held*, that the instruction was improper in not stating the rules of law to the jury, which are necessary, as guides in enabling them to determine what are the circumstances under which the law allows the infliction of exemplary damages; *M. & C. R. R. Co. v. Whitfield*, 44 M. 466.

15b. *Same.* The following instruction was refused: "Even though the jury believe plaintiff was without fault, &c., yet if they believe from the evidence there was no recklessness wantonness, wilfulness, or malice on the part of the defendant or their agent, the jury cannot find exemplary damages." *Held*, it was properly refused, because it is only a partial statement of the rules in reference to the allowance of exemplary damages; *Id.*

16. *In actions of trespass to the person and injury to character.* In actions of trespass for injuries to the person or character, a jury is not restricted to merely compensatory damages, but may give a further sum by way of punishment to the defendant, and to operate by way of example and as a warning to others; *Bell v. Morrisson*, 5 C. 68.

17. *In trespass to property.* A railroad company is liable for exemplary damages, if it appear that its agent, acting either with gross negligence, or wanton and wilful mischief, destroys the property of another, depasturing on its track; *Vicksburg & Jackson Railway Co. v. Patten*, 2 G. 156.

18. *May include plaintiff's cost of litigation.* In cases proper for the allowance of exemplary damages, the jury may include in the allowance the probable costs and expenses to which the plaintiff has been subjected, in order to obtain redress for the defendant's wrongful act; *N. O. J. & G. N. R. R. Co. v. Allbritton*, 9 G. 242.

19. *Wealth of defendant taken into consideration.* As exemplary damages are allowed in the way of punishment to the defendant, for his wrongful act, and as such punishment would be unequal if the same sum were imposed on a poor and on a rich man, for the same offence, since what would ruin the former would be a matter of no consequence to, and therefore no punishment of, the latter, it is proper in that class of cases to allow evidence to go to the jury of the wealth of the defendant; *Bell v. Morrisson* 5 C. 68; *N. O. J. & G. N. R. Co. v. Hurst*, 7 G. 660.

20. *When not allowed against common carrier.* Punitive damages are not allowed as a matter of course, against a common carrier for every breach of duty, with reference to a passenger. The law never imposes it as a duty on the jury to allow them in any case,

but leaves it to their discretion to allow them in proper cases, or not, as they see proper. The jury would not be authorized to allow them when the neglect of duty was slight and was unattended by circumstances of insult, aggravation of feelings, or injury to the person or property, or mental or bodily suffering; *Southern R. R. Co. v. Kendrick*, 40 M. 374; *M. & C. R. R. Co. v. Whitfield*, 44 M. 466.

21. *Liability of principal in exemplary damages for acts of agent.* The principal, on grounds of public policy, is held civilly liable for the acts, torts, misfeasances, and non-feasances of the agent, committed in the scope of his employment, to the same extent in every respect as if done by himself; and hence the principal is liable to be punished by the infliction of exemplary damages for the tort of the agent, in a case where, if the act had been done by the principal, he would have been liable; *N. O. J. & G. N. R. R. Co. v. Bailey*, 40 M. 393; *S. P., Vicksburg & J. R. R. Co. v. Patton*, 2 G. 156; *N. O. J. & G. N. R. R. Co. v. Albritton*, 9 G. 242; *Same v. Hurst*, 7 G. 660. And in an action for the tort of the agent, the plaintiff may show that the agent was reckless and untrustworthy; *Vicksburg & Jackson R. R. Co. v. Patton*, *supra*.

See PRINCIPAL AND AGENT, 31 to 38.

22. *New trial in case of.* In actions sounding in damages, where the law furnishes no legal rule of measurement, save the discretion of the jury, upon the evidence before them, courts will not disturb the verdict on the ground of excessive damages, unless the verdict be so flagrantly improper as to evince passion, prejudice, or corruption in the jury. And in this case, where the jury gave damages to the amount of \$4,500 on account of defendant's carrying the plaintiff four hundred yards beyond the station at which they had agreed to put him off, and then compelling him to leave the cars against his remonstrance, and contrary to his request that the cars should be backed to the station, the High Court express their regret that the jury had not acted with more leniency, but declined to disturb the verdict; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660; *S. P., M. & C. R. R. Co. v. Whitfield*, 44 M. 466; *N. O. J. & G. N. R. R. Co. v. Statham*, 42 M. 607.

See NEW TRIAL, 32, *et seq.*

VII. Miscellaneous.

23. *Liability on account of negligence.* It is not every negligence on the part of the defendant which will render him liable for damages. Though he were guilty of negligence, yet if the plaintiff, by the use of ordinary prudence, might have avoided the consequences of the defendant's negligence, he is the author of his own injury, and not entitled to recover therefor; *Dix v. Brown*, 41 M. 131.

24. *Same: Case in judgment.* The defendant, a steamboat owner, took the plaintiff's flat-boat, loaded with wood, and lying at his

wood-yard on the Mississippi river, and towed it up the river, with the view of taking on the wood, as they were proceeding up the river—the defendant being in possession of the flat, and consenting thereto. The defendant took a part of the wood, but not as much as was agreed on, leaving wood in the flat, which obstructed the working of the oars, and in this condition it was questionable whether the plaintiff could manage the flat in the current, so as to float it back to his landing. The plaintiff made no effort to reland the flat at his landing, but suffered it to drift a mile below, and in a few days thereafter the defendant's agent caused the flat to be towed and landed just above plaintiff's landing, and on the same side of the river, where it could easily be floated back to the landing; and the agent notified plaintiff of what he had done; but the plaintiff refused to have anything to do with the flat, and suffered it to be lost, and sued defendant for its value: *Held*, that if the act of the defendant in turning loose the flat without removing all the wood was wrongful, still it was the duty of the plaintiff to use ordinary care to reland it, as it floated down the current; and if by this care he could have done so, he was entitled to no damages; and if by ordinary care he could not have relanded the flat at his landing, it was then his duty to have caused it to be towed from the place where it was lodged; and, in that event, he would have been entitled to recover cost of doing so. That he had no right to abandon the flat, upon defendant's wrongful act, without using ordinary care to preserve it; and that the loss of the flat, under the circumstances, was his own fault, and he could not recover for his own wrong; *Ib.*

24a. *Same.* That in the above case the defendant was never out of possession of his flat, and that the rules of law applicable to a case where the defendant takes property from the possession of defendant, do not apply; *Ib.*

25. *Mutual fault.* Though there be negligence or fault on the part of the plaintiff remotely connected with the injury, yet if the defendant's fault or negligence be the immediate and proximate cause of the injury, the plaintiff may maintain his action for damages; *Vicksburg & Jackson R. R. Co. v. Patton*, 2 G. 156; *S. P., M. & C. R. R. Co. v. Whitfield*, 44 M. 466.

26. *For breach of contract with laborer.* The damages which a laborer employed for a specified time is entitled to for being discharged before his time has expired, and thereby prevented from performing his contract, are not the full wages for the specified time, but the difference between the wages and what he could have made in some suitable employment by the use of reasonable diligence. And if he failed to obtain employment, he must show that he used diligence in seeking it, in order to entitle him to recover full wages; *Hunt v. Crane*, 4 G. 669. See *ante*, 11.

26a. *Damages, when performance prevented.* The rule, where one party is prevented

from performing his contract, is not that the hindered party can recover the contract price without having done or performed the consideration therefor. The rule is that the just rights of the party hindered are satisfied when he is recompensed for the part he has performed, and for his actual loss in respect to the other part unperformed. Thus, where a merchant employed an auctioneer to sell \$20,000 worth of goods, and promised him 5 per cent. commission therefor, and the sale was stopped by the merchant after \$500 worth was sold, the auctioneer is not entitled to recover the 5 per cent. on the \$20,000, but only the commission on the amount actually sold, and such farther specific damages, as the auctioneer could prove he suffered by the non-performance; *Friedlander v. Pugh*, 43 M. 111.

See *CONTRACTS*, 65, 67, 71 to 77.

27. *Costs: Considered as damages.* The costs paid by a party are usually considered as a part of the damages occasioned by a suit, but a covenant to pay the damages occasioned by a suit, to be assessed by a jury, will not include the costs, as they are never assessed by a jury, but taxed by the clerk; *Gayden v. Marshall*, 8 S. & M. 489.

28. *Parol contract for the sale of land.* The vendee in a parol contract for the sale of land, if the vendor refuse to consummate the bargain, may recover damages from the vendor for his trouble, expense, loss of time, &c., incurred on the faith of the agreement, but nothing for the loss of the bargain; *Welch v. Lawson*, 3 G. 170.

29. *On injunction bond.* Where an injunction bond is given to restrain the sale of realty, conveyed in a deed in trust, on dissolution of the injunction, the damages entitled to be recovered is the depreciation in the cash value of the land between the date of granting the injunction and its dissolution, and interest on such depreciation; *Rubon v. Stephan*, 3 C. 253.

A person illegally restrained from taking possession of a farm from March till September, is not restricted in a suit on the injunction bond, to proof of the value of the mere use of the farm during that time, but may recover for loss of crops; *Fleming v. Baily*, 44 M. 132.

Counsel fees necessary to dissolving the injunction, and other costs, are recoverable; *Baggett v. Beard*, 43 M. 120.

30. *Damages on attachment bond.* Where an attachment was levied on cotton which depreciated in value, after seizure and before the quashal of the attachment, the jury are to allow the amount of the depreciation as damages. In trying an issue on the plea of abatement, the jury have as large a scope, as in trying an issue in a suit on the attachment bond; *Fleming v. Baily*, 44 M. 132.

31. *Generally for breach of contract.* The general rule as to the measure of damages, in actions *ex contractu*, is the actual damages resulting from the breach of the contract; if for the payment of money, then the principal sum and legal interest; if for non-delivery of

property, then its value at the time and place of delivery, and interest; if, for the price of property sold, with no special agreement as to price, then its market value and interest; *Jamison v. Moon*, 43 M. 598.

32. *Mutual fault.* Where the plaintiff has been guilty of negligence which contributed to the injury, he is not entitled to recover; *M. & C. R. R. Co. v. Whitfield*, 44 M. 466. *Sed. vide ante*, 25.

33. *Negligence a question for the jury.* The question of whether the defendant has been guilty of such negligence as to make him liable, is a question of fact for the jury, to be decided under instructions from the court; *Ib.*

34. *Excess of damages remitted.* When the judgment by default is for too much, the excess may be remitted; *Breck v. Smith*, 44 M. 690.

Dancing Rabbit Treaty.

1. *Article 14 of the treaty.* The 14th article of the treaty between the Choctaw Indians and the United States, concluded 28th September, 1830, at Dancing Rabbit Creek, is as follows: "Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of six hundred and forty acres of land, to be bounded by sectional lines of survey; and in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him, over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservations shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not entitled to any portion of the Choctaw annuity."

2. *Title of reservees: Case in judgment.* Hugh Foster, a half-breed Indian, and the head of a family, claimed two sections of land under this article. And his application was based on the following facts:

1. He read in evidence a copy of the register of the names of the Choctaws who wished to become citizens, as registered by the agent previous to the 24th August, 1831; which date was six months after the date of the ratification of the treaty, and on this register was his name. This copy was certified by the superintendent of Indian affairs, and approved by the secretary of war.

2. A letter written by Hugh Foster to Martin, the locating agent for Indian reservations, dated 13th October, 1834, in which he makes application for 1,280 acres of land, and specifying the lots and sections by United

States survey (including the land in controversy), to be located for him under the treaty, on which was endorsed the following: "Hugh Foster is registered for the within described land. The register is requested to reserve the same from sale, as per instructions from the War Department to me, to reserve lands for said Hugh Foster of — date. (Signed.) Geo. W. Martin." This was certified as above.

3. That in January, 1831, he settled on the land mentioned in the application and made a small improvement on it. In opposition to his claim it was shown.

4. A location and grant of the *locus in quo* to an assignee of Jefferson College, made under acts of Congress passed in 1832, the grant was direct from the register of the land office to the assignee, and was dated 21st October, 1833.

5. That Foster only resided on the land four years and eight months from the date of the ratification of the treaty, when he fled to avoid a prosecution for felony, leaving his brother, however, in possession.

6. That on 10th February, 1821, the Legislature had passed an act granting certain privileges to Foster upon his relinquishing by deed his Indian privileges, and that he made a deed of relinquishment accordingly. The Indian or his grantee was plaintiff, and the grantee under the Jefferson College was defendant, and on this the following principles were announced: That the register of the Choctaw names was an official act of the agent, and was legal evidence that the plaintiff, Foster, had signified his intention to become a citizen according to the treaty. Under the treaty it was necessary to identify the reservation, and that the application to Martin the agent, and his endorsement on it were competent and legal evidence of the location; *Newman v. Harris*, 4 H. 522.

3. *Same: Nature of reserves' title.* That the treaty conferred a legal title on the reservees whenever the land was located, and that no subsequent grant from the United States was necessary; but the title conferred was upon condition subsequent, that the reservee would reside on the land for five years from the date of the treaty, and if he voluntarily abandoned it before that time, his title was lost, and that an abandonment to avoid a prosecution for a felony was voluntary; *Newman v. Harris*, *supra*. S. P., *Hit-tuk-homi*, v. *Watts*, 7 S. & M. 363; *Coleman v. Doe*, 4 S. & M. 40. And that the treaty required actual residence for the five years, and that occupation by an agent would not do; and moreover, that the residence was lost as soon as Foster abandoned it without the intention of returning, even though he had not then acquired a new domicile; S. U., 3 S. & M. 565. And that it was unnecessary in such a case that there should be a judicial act declaring the forfeiture; and that though the grantor in such a case might waive the forfeiture, there was no evidence of the waiver here, since the United States had sold the land, and the grantee was in possession; S. C.,

S. & M. 565. But if the removal was caused by force and violence, the Indian will not lose his right; *Coleman v. Doe*, *supra*.

4. *Same: Residence at date of treaty unnecessary.* It is not necessary that the reservee should have a residence or improvement on the land claimed by him as a reservation at the time of the ratification of the treaty. It is sufficient if the residence and improvement be commenced within six months thereafter; *Newman v. Harris*, *supra*.

5. *How reservation located.* The reservation must be in one tract and by sectional lines, but it need not all be in one section, when only one section is claimed; but it may by legal sub-division of sections. But if not located according to this rule, it will be good if recognized by the government; *Ib*.

6. *Proof of agency.* The fact that Martin was agent can be proven by parol evidence that he acted as such; *Ib*.

6a. *Confirmation.* The confirmation of an irregular Indian reservation cannot be proven by parol; S. C., 3 S. & M. 565.

7. *Registration.* Actual registration of a Choctaw Indian head of a family by the United States agent, is not necessary to entitle him to a reservation under the 14th article of the Dancing Rabbit Creek Treaty. Such Indian becomes entitled to the reservation upon his signifying, within six months from the ratification of the treaty, to the agent of the United States, his intention to become a citizen, and his compliance in other respects with the treaty. The failure of the agent to register him cannot affect his right; *Coleman v. Tish-ho-mah*, 4 S. & M. 40.

11. *His title as against subsequent grant from United States.* An Indian who has brought himself within the provisions of the 14th article of the Dancing Rabbit Creek Treaty is clothed with a perfectly legal title, which will prevail in law and equity against a patent issued by the United States subsequent to the reservation of the Indian. The patent being illegal, is void at law and equity; *Ib*; S. P., *McAfee v. Keirn*, 7 S. & M. 780. And the principle that the reservation is the title, and no subsequent grant is necessary, is recognized in *Newman v. Harris*, 4 H. 522; S. C., 3 S. & M. 565; *Coleman v. Doe ex dem.*, &c., 4 S. & M. 40.

12. *Who is head of a family.* The 19th article of the treaty of Dancing Rabbit Creek reserves land to the heads of families of the Choctaws. This means "heads of families" in the sense and meaning of the Choctaws. Whether a white man marrying a Choctaw woman, and living with her in the Choctaw nation, would be regarded by them as the head of a family or not, can only be shown by proof, as other facts are established, of the tribal customs and usages of the Choctaws; and if there be no proof on that subject, the action of the United States Government in allowing the reservation to be made in the name of the white husband, and the President's approval of a sale made by him, according to the treaty, will be presumed lawful; *Turner v. Fish*, 6 C. 306.

Debtor and Creditor.

1. *Liability of personality of decedent.* The personal estate of a deceased debtor is liable in the hands of a distributee, to the satisfaction of a judgment against the administrator; *Brooks v. Lewis*, 1 H. 207.

See EXECUTION, 37.

2. *Liability of realty.* But realty cannot be sold under a judgment rendered against the administrator; nor can *sci. fa.* be sued out on such a judgment against the heir, to subject lands descended to him. In such a case the order to subject the realty must be made in the Probate Court. The rule is different, however, where the judgment was rendered against the ancestor in his lifetime (citing *Smith v. Winston*, 2 H. 601); *Foster v. Sumner*, 3 S. & M. 606.

See PROBATE COURT, 53.

3. *Collateral security: Usury.* If the debtor place in the hands of the creditor bills and notes on other parties, and authorize the creditor to have them discounted at an usurious rate of interest, so as to raise money to pay the debt, this does not authorize the creditor to retain the securities and charge the usurious discount; *Harris v. Halliday*, 4 H. 338.

4. *Chattels as collateral.* When the creditor receives a stock of goods as a security for his debt, he will not be liable for the invoice price, but only for what the goods were sold for in good faith and with reasonable care and skill; *Walker v. Brungard*, 13 S. & M. 723.

5. *Cotton as collateral: Shipment: Price.* Where a creditor receives cotton of his debtor, to be shipped to a specified market for sale, on account of the debtor, the latter is entitled, in the absence of proof of the price for which the cotton sold, to recover the value of the cotton in that market, about the time the cotton would likely, in the course of trade, have been sold; and to arrive at this, he may show that the quality of the cotton raised in the year, and in the neighborhood in which that was raised, was extra good; and he may also show the usual average weight of bales of cotton, in order to ascertain the weight. And in such a case, a paper in possession of the creditor, purporting to be an account of the sales of the cotton, rendered by the merchant to whom it was shipped for sale, is not *per se* admissible in evidence on behalf of the creditor, without proof that it is a true and correct account of the sale; *Com'l B'k of Manchester v. Chisholm*, 6 S. & M. 457.

6. *Liability of creditor collecting collateral paper.* A creditor having collected collateral paper in bank notes then current, declined to pay over the surplus to the assignee of his debtor; *Held*, that the refusal made him liable to pay it in specie, notwithstanding the bank notes he had collected had greatly depreciated; *Knight v. Yarborough*, 7 S. & M. 179.

7. *Right of judgment debtor to buy the judgment against him.* It is the duty of every

man having the means to apply them to his debts; and it is the right of every creditor to have his debtor's means (not exempt from execution and garnishment) so applied. Hence, it seems that if a defendant in a judgment purchase it at a sale made for the costs, when he has ample means to pay it, his purchase would not stand; *Buckingham v. Riggs*, 5 C. 751.

8. *Account stated.* For this see CONTRACT, 78 to 80.

9. *Whether a gift or a debt: Case in judgment.* G. in 1814, intermarried with the widow of C., who was also C.'s administratrix, and thereby G. became administrator of C. in right of his wife, till her death, three years afterwards. From the time of G.'s marriage till his death in 1833, he occupied and enjoyed C.'s estate (it did not appear how much) till his death, and supported and educated C.'s children. He also paid debts due by C. in his lifetime, but he made out no account against C.'s estate, either for debts paid or for maintaining the children, and preserved no vouchers. After G.'s death his administrator made out an account against C.'s estate for all these items: *Held*,

1st. That the fair presumption was, that G. never intended to make any charge on either account.

2d. That if he did, his claim was lost by his laches in enforcing it; *Carter v. Probate Judge*, 2 S. & M. 42.

10. *Sale of mortgagee's interest in the mortgaged land.* The interest of a creditor in land upon which he holds a deed in trust or mortgage, to secure a debt due him, may be subjected to the payment of a judgment against him; and a court of equity will, upon a return of *nulla bona* as to that judgment, order a sale of the mortgaged land sufficient to pay the debt secured on it, if so much be necessary to pay the judgment, and direct the proceeds to be applied to the satisfaction of the judgment against the mortgagee, or *cestui que trust*; *Cohen v. Carroll*, 5 S. & M. 545.

11. *Liability of equitable interest of mortgagor for his debt.* As to this see EXECUTION, 31, *et seq.*

12. *When condemnation of debtor's money is a payment.* Where a judgment creditor, in a controversy with his debtor, succeeds in getting a judgment of the court, condemning to the satisfaction of his judgment, money collected by the sheriff on an execution in favor of the debtor, such condemnation is of itself a *pro tanto* satisfaction of the creditor's judgment, whether he gets the money from the sheriff or not, unless he at once revest his debtor with the right to demand and recover the money from the sheriff; *Skinner v. Jayne*, 2 C. 567.

13. *Right of debtor to pay.* A debtor may always voluntarily discharge a debt under those circumstances, which impose on him a legal liability to a compulsory payment. Hence, if a client draw an order on an attorney in his own favor, and procure the attorney to accept it, to be paid out of money to be collected by the attorney for the client,

and at the same time inform the attorney that the object of the transaction is to assign the order to one of his creditors, the attorney, on collecting the money, may pay it to the client without a production of the acceptance, if he has received no notice that the order has been assigned. The absence of the order would be a circumstance to put the attorney on inquiry, but his duty to inquire would be discharged by an inquiry from his client alone, since the transaction disclosed to him no other person from whom he could make inquiry; *Shields v. Taylor*, 3 C. 13.

14. *Creditor bound by notice of unregistered deed.* Creditors, like purchasers, are bound by notice of an unregistered deed; *Dixon v. Doe*, 1 S. & M. 70.

15. *What creditors may complain of unregistered deed.* It seems that only creditors who gave credit on the faith that the grantor in an unregistered deed was the owner of the property conveyed in it, have a right to complain of its non-registration; *Dixon v. Doe*, *supra*.

See DEED, 53. REGISTRATION, 16. VENDOR AND VENDER, 64. HUSBAND AND WIFE, 38a.

16. *General creditors.* That unregistered deeds are not void as to general creditors, but only as to those recovering judgments without notice, see DEED, 53; and *Moss v. Davidson*, 1 S. & M. 112; and *Picket v. Banks*, 11 S. & M. 445.

See FRAUDULENT ASSIGNMENT. REGISTRATION. EXEMPT PROPERTY. GIFT. DEED. PAYMENT. ACCORD AND SATISFACTION.

Deceit.

See FRAUD AND FRAUDULENT REPRESENTATIONS, *ubique*, AND WARRANTY.

1. *Liability for false recommendation.* The defendants in an action for deceit had signed the following instrument: "We have personal and intimate acquaintance with G.; have known him for a number of years, and we can with pleasure testify to his strict adherence to truth, punctuality in contracts, and perseverance in business; that he is an unexceptionable member of the Baptist church; in a word, we look upon him as an honest and responsible man, and worthy of all credit;" and delivered it to G. to enable him to purchase goods in a neighboring town. The paper was not addressed to any one. On the faith of it G. bought goods at different times from C., the plaintiff, and left the country without paying for them; *Held*, that the word "responsible" in the recommendation, meant that G. had the means of making payment, and that the statement in the paper on that point was not a matter of opinion, but a positive assertion, and that as defendants knew that G. was not responsible, in this sense, they were liable for all the goods that G. bought of plaintiff, before he discovered that G. was not responsible; *Clopton v. Cozart*, 13 S. & M. 363.

2. *When party is deceived.* A party is not deceived by a false representation if he knew it to be false; *Ib*.

See FRAUD AND FRAUDULENT REPRESENTATIONS, 6, 7, 8.

3. *Scienter must be averred and proven.* A declaration against a vendor for deceit and fraud in relation to the qualities of the articles sold, should state that defendant knew the representation to be false; *Mizell v. Sims*, 10 G. 331; and he must also prove it; it is otherwise where the action is for a false warranty; *Taylor v. Frost*, 10 G. 328. *Sed vide* FRAUD AND FRAUDULENT REPRESENTATION, 10, 11, where it is held that it makes no difference if the false representation be material, whether the vendor knew it to be so or not.

4. *Same. Case in judgment.* The vendor warranted in writing, that the slave sold "was sound in body and mind and a slave for life;" at the same time he represented that the slave was not a runaway, but of good character, and was "A No. 1 boy." These representations were proven to be false, but it was not shown that the vendor knew it, and it was held that he was not liable for the misrepresentation; *Mizell v. Sims*, 10 G. 331.

Decree.

See CHANCERY AND PROBATE COURTS.

Dedication.

See ROADS AND HIGHWAYS.

Deed.

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I. What is, and Signing, Sealing and Delivery.

1. *Must be sealed.* An instrument although intended to operate as a deed, and purporting on its face to be a deed, and to be under seal, is, nevertheless, not a deed if it be without a seal or scroll; *Alexander v. Polk*, 10 G. 737; *Davis v. Brandon*, 1 H. 154. But such an instrument purporting to convey land, though inoperative as a deed, is yet valid in equity as an agreement, and the vendor will be compelled to execute a valid deed; *Nixon's Heirs v. Carco's Heirs*, 6 C. 414.

2. *Unsealed contract to sell land: Case in judgment.* And the following was held valid as a contract to convey: "I, the undersigned, declare that I, Jean Baptiste Carco, have sold to Messrs. B. & M., my plantation and two cabins situate thereon, with the enclosure and all rails; the plantation and all the clear-

ing from mark P to mark B, which were marked in presence of Jos. Ladner, and extending in depth to the bay; said plantation is situated at the Bay of Biloxi; for the sum of \$70, which I declare I have received in cash before witnesses—signed, Jean Baptiste Carco;" *Ib.*

3. *What is a good sealing.* The statute declares that any instrument to which the maker shall affix a scroll by way of a seal, "shall be held as duly sealed," and under this a scroll at the end of the maker's name with the word "seal" in it, makes it a sealed instrument, though there be no words in the body of the instrument indicating an intention to make it a specialty (overruling *Bohannon v. Hough*, W. 461); *McRaven v. McGuire*, 9 S. & M. 34; S. P., *Wright v. Steamer Vesta*, 5 H. 152. And so the word "seal" affixed to the name of the maker *in loco sigilli*, without any other scroll, is sufficient; *Whittington v. Clark*, 8 S. & M. 480; S. P., *Pierce v. Lacy*, 1 C. 193. And it makes no difference whether the seal be written or printed; *Whittington v. Clark*, *supra*; *Wright v. Steamer Vesta*, 5 H. 152.

4. *What is sufficient signing.* Anciently, sealing and delivery, but not signing, were essential to the validity of a deed, and the sealing was not required to be on any particular part of the deed. Afterwards, under the statute of frauds and the registration acts, the practice of signing grew up, and all that was required by the policy of these acts, was that the deed should be signed in such a manner as to show that the grantor intended it to be his deed. The most essential and efficacious act was delivery, for that showed it was his deed. Therefore, where immediately after the conclusion of a deed, made by the wife, is appended a writing, signed and sealed by the husband, "that he consents to the obligation of the wife," and he acknowledged the signing, sealing and delivery of the deed, this is the deed of the husband as well as of the wife. The writing which he appended will be considered as a part of the deed; *Armstrong v. Stovall*, 4 C. 275, S. P., *Stone v. Montgomery*, 6 G. 83.

See HUSBAND AND WIFE, 69.

5. *Delivery.* The most essential and efficacious act in making a deed is the delivery, for that shows it to be the grantor's deed; *Armstrong v. Stovall*, *supra*. And it can have no effect without proof of sealing and delivery, not even as color of title; *Bledsoe v. Little*, 4 H. 13.

6. *Manual tradition not necessary.* As between grantor and grantee actual manual delivery of a deed is not necessary, and its actual retention in the possession of the grantor, if he intend it to be considered as executed and delivered, will not invalidate it for want of delivery; *Wall v. Wall*, 1 G. 91.

7. *Same.* An actual delivery of a deed to a grantee is not necessary to its validity; it may be delivered to a third person for him, or if it be signed, sealed and declared by the grantor in the presence of subscribing witnesses

(or so acknowledged before a competent officer) to be delivered, this is, if there be nothing to qualify it, an effectual delivery. Hence, where a sheriff made a sale of land on 5th April, and on the 15th of same month, acknowledged before a justice of the peace, that he signed, sealed and delivered it on the day of its date, it was held that the deed was effective from its date; *Kane v. Mackin*, 9 S. & M. 387. And the delivery of a deed in trust to the trustee is equivalent to a delivery to the *cestui que trust*, and the recording of such a deed is *prima facie* evidence of edlivery; *Ingrahan v. Grigg*, 13 S. & M. 22.

8. *Delivery and acceptance essential.* But a deed is not valid until delivered to and accepted by grantee or some one for him; *McGehee v. White*, 2 G. 41; *Bullitt, Miller & Co. v. Taylor*, 5 G. 708. But if the deed be entirely for the benefit of the grantee, its acceptance will be presumed; *Wall v. Wall*, 1 G. 91. And the husband may accept a deed for the wife; but to enable him to do so he must have knowledge of its contents; *McGehee v. White*, *supra*.

9. *Joint grantors: Delivery by one.* The delivery to the husband of a joint deed in the name of himself and wife, to a justice of the peace, with instructions to get the signature and take the acknowledgment of the wife, is not a sufficient delivery as to the husband, if the wife refuse to execute the deed; *Johnson v. Brooks*, 2 G. 17. And when the right attempted to be conveyed is joint, and the deed purports to be made by the several joint owners, proof of execution by one alone will not authorize its admission in evidence to establish a right to the property; *Shirley v. Fearne*, 4 G. 653.

See CONTRACTS, 46.

10. *Possession by grantee evidence of delivery.* Possession by the grantee, or of a person claiming under him, of a deed, and its production by him on the trial, is presumptive evidence of delivery; *Morris v. Henderson*, 8 G. 492.

11. *Registration proof of delivery.* The acknowledgment, before a competent officer, of the execution of a deed, and its subsequent registration, is presumptive but not conclusive evidence of delivery; *Bullett, Miller & Co. v. Taylor*, 5 G. 708; S. P., *Ingrahan v. Grigg*, 13 S. & M. 22.

12. *Evidence as to delivery: Case in judgment.* In a case where the son resisted the application of his father's widow for dower, on the ground that he had bought the land for a valuable consideration, by an exchange of other lands therefor, the son produced his deed to the father, which was over three years old, and was unacknowledged and unrecorded, and the son testified that he did not have it recorded owing to the troubles in the country (this was in 1863); it was held that this tended strongly to show that the deed was never delivered, in the absence of any statement by the son in his testimony that the deed had been delivered; *Jiggits v. Jiggits*, 40 M. 718.

II. Consideration.

13. *Paid to a stranger.* If the deed show that the consideration was paid to a stranger, it will, nevertheless, be good. It will be understood that it was for the benefit of the grantor; *Doe v. Curtis*, 3 H. 230.

14. *Blood as a consideration.* A voluntary deed conveying a present interest in land to the brothers and sisters of the donor, though not to take effect in possession until after his death, is good, as a covenant, to stand seized to their use; *Wall v. Wall*, 1 G. 91.

15. *Love and affection and one dollar.* A deed of personality in consideration of love and affection, is not valid, without a delivery of possession of the property, nor is it good as an estoppel; *Fairly v. Fairly*, 5 G. 18. But if it be in consideration of "love and affection and one dollar," it is good, without delivery; *Ib.* (contra, *McWillie v. Van Vaele*, 6 G. 428). And so, it is good if the consideration of one dollar be shown not to have been paid; *Fairly v. Fairly*, 9 G. 280.

III. Distinction between Deed and Will.

16. *Test.* In determining whether an instrument be a deed or a will, the main question is, did the maker intend to convey any estate or interest whatever, to vest before his death, and upon the execution of the paper? or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed, if the latter, it is a will. And it is immaterial whether the instrument be called by the maker a deed or a will, it will have operation only according to its legal effect; *Wall v. Wall*, 1 G. 91.

17. *Same: Case in judgment.* A voluntary instrument, purporting on its face to be a deed, by which land and slaves are conveyed by terms in the present tense, but reserving the power of revocation to the maker, to be exercised in a certain specified manner, at any time during his life, and also declaring that it should not take effect as to a delivery of the property until after the maker's death, vests in the donees an estate in *presenti*, to be enjoyed in *futuro*, and is therefore, a deed and not a will; and as to the land, the donees being brothers and sisters of the donor, the instrument is a covenant to stand seized to their use; *Ib.*

18. *Same: Case in judgment.* An instrument which, in consideration of love and affection, and of past services rendered by the grantee to the grantor, and of future services to be rendered, and of future support for life, stipulates that the maker will stand seized of real and personal property for his own life, and then that a trustee will convey it to the beneficiaries, vests in them an estate in *presenti*, to take effect in possession after the maker's death, and is therefore a deed and not a will; *Exum v. Canty*, 5 G. 533.

19. *In doubtful cases the attendant facts to be considered.* Where it is doubtful on the face of an instrument whether it be a deed or will, the facts attending its execution, and

the declarations of the maker at the time, are admissible in evidence, to explain whether it be one or the other; *Herrington v. Bradford*, W. 520.

IV. Description in Deed of its Subject Matter: And Words of Quantity.

20. *Rule: Most certain marks followed.* In descriptions in deeds, that which is most certain and material, as fixed monuments, designated metes and bounds, shall control that which is less so, as courses, distance, and quantity; *Carmichael v. Foley*, 1 H. 591. But when quantity appears by the deed to be more certain and material than boundary, and to have been the leading object of the grant, it becomes a material part of the description; *Ib.*

21. *Cases of alleged uncertain description held good.* A tax collector's deed, which describes the land sold by sections, townships, and ranges, but omits the county and State in which it is located, is not void for uncertainty; the proper county and State may be proven by parol; *Hanna v. Renfro*, 3 G. 125. And a bond or deed describing land as lying and being in Oktibbeha county, on a branch called Cypress creek, described as follows: "Three-quarter sections in section 7, in section 5, one-eighth, in section 4, one-eighth," is a sufficiently certain description. The designation of the location as on Cypress creek is sufficient to identify the sections and their sub-divisions. The land conveyed is that number of quarters and eighths specified in the particular sections, and which sub-divisions lie on the creek. And if there be other lands answering the same description lying on Cypress creek, then there is a latent ambiguity, which may be removed by parol evidence; *Hazlip v. Noland*, 6 S. & M. 294. And so a deed conveying all the "vendor's lots" in a certain town, is not uncertain as to the property conveyed; it conveys all the vendor's lots in that town; *Harmon v. James*, 7 S. & M. 111.

22. *Same.* A deed conveyed 20 arpents of land; and one of its boundaries as mentioned in the deed was "on the west by the land of the seller." It was shown by parol, that the seller, when the sale was made, owned 25 arpents in the tract; that he resided at the time on that portion (western) of the tract, which would embrace 5 arpents taken on that side; that he resided there many years; that after the sale he had a line run with the knowledge of vendee, dividing the 5 arpents on which he resided from the 20 arpents sold: *Held*, that the evidence was competent to show boundary, and was sufficient to show that the words in the deed, "bounded on the west by the land of the seller," referred to the reserved 5 arpents, it being also shown that the seller had and claimed no other land on the west side of the tract, and the other three boundary lines being also sufficiently certain in the deed; *McCaleb v. Pradat*, 3 C. 257.

22a. *Admissible to identify subject.* As a

general rule, parol evidence is inadmissible to add a new term to an agreement, in order to have the agreement, so added to and qualified, specifically enforced; but this rule does not prevent the introduction of extrinsic evidence to identify persons and things referred to in the agreement. Hence, when the agreement was to convey the land in the town of B. on which the college is located, parol evidence is admissible to show what is embraced in the description, by showing on what land the college is located; *Whitworth v. Harris*, 40 M. 483.

23. *Same: Where land marks are lost.* A deed is not void for uncertainty, because from lapse of time it may be impossible to prove the boundaries or identify the land conveyed; *Nixon v. Porter*, 5 G. 697.

24. *Cases of uncertainty which makes the deed void.* A deed is void for uncertainty which describes the premises as "178 acres of land on the west side of Biloxi Bay, in Jackson county." There must be sufficient certainty in the description to point to its location and distinguish it from other tracts; *Doe v. Curtis*, 3 H. 230. So, a deed which conveys "412 acres of all of a certain tract of land purchased by the grantor of the United States, containing 1020 arpents, and known and distinguished as follows: Bounded on the north by lands of Mrs. Poole, on the south by lands of W. Shropshire, and on the east by public lands, and on the west by lands of James Neely; being the same which was improved in part by Mr. Herring;" is too vague to convey any specified lands. The boundaries set out are the boundaries of the whole tract and not of the 412 acres. Whether the deed was good at all, not decided; *Swayze v. McCrossin*, 13 S. & M. 317.

See FRAUDS, STATUTE OF.

25. *Falsa demonstratio.* If in a deed certain particulars are once sufficiently ascertained, designating the thing granted, if false or mistaken descriptive circumstances are added they will not frustrate the deed. Hence, where a deed otherwise sufficiently described the land granted, but erroneously added, that it was marked on a certain map as "swamp land," it was held that the mistaken reference did not vitiate the deed; *Morton v. Jackson*, 1 S. & M. 494; S. P., *McRaven v. McGuire*, 9 S. & M. 34. But where a deed calls for the N. E. $\frac{1}{4}$, it cannot be made to convey the S. E. $\frac{1}{4}$, merely because the S. E. $\frac{1}{4}$ adjoins the other lands conveyed and the N. E. $\frac{1}{4}$ does not; unless there be sufficient in the deed to show that all the land granted was in one body, or there be some other definite circumstance or cause to show that the S. E. $\frac{1}{4}$ was intended to be conveyed instead of the N. E. $\frac{1}{4}$; *McRaven v. McGuire*, *supra*.

25a. *What is a section of land?* Six hundred and forty acres is the strict complement of a section of land; but it is a matter of notoriety, that not one section in ten contains that number of acres; yet a tract of land surveyed by the United States as a section and so marked and sold, is a section, though it contain more or less than six hundred and

forty acres; *Fulton v. McAfee*, 5 H. 751; *Kerr v. Kuykendall*, 44 M. 137.

See LAND LAWS OF UNITED STATES, 33.

25b. *Sale of a section.* The bond for title contained this description of the land: "The grantee has this day purchased of the obligor section 32, T. 8, R. 2, west, and agreed to pay therefor \$1920." Held, that this was a sale of said section 32; as a tract or designated parcel of land, and in the absence of all fraud on the part of the vendor, the fact that the section only contained 458 acres, did not entitle the vendee to an abatement of the price; *Kerr v. Kuykendall*, 44 M. 137.

25c. *Sale of fractional section.* A contract was made to sell land to B. by delivering possession and transferring certain land office certificates, to wit, "No. 879, for fractional section No. 10, T. 16, R. 4, E., in a named land district, &c., "containing 572 acres," and also "the N. E. $\frac{1}{4}$, No. 892, of section 17, T. 16, R. 4, E., &c., also the west half of the last named section;" fractional section No. 10 contained only 464 acres, and west half of section 17 contained only 272 acres: Held, that the vendor was not bound to make good the deficit; *Moore v. Vick*, 2 H. 746.

See VENDOR AND VENDEE, 41 *et seq.*

V. Parol Evidence to explain and aid a Deed.

26. *Where description certain, parol evidence not admissible.* Where the deed designated specific metes and bounds, and expressly granted 240 acres, and the boundaries did not correspond with the description in the deed, parol evidence was held inadmissible to show that a particular tract, containing only 150 acres and embraced within the designated boundaries, was intended alone to be conveyed. The boundaries being imperfect, the quantity became material; *Carmichael v. Foley*, 1 H. 591.

27. *Latent ambiguity.* Latent ambiguities relate to the subject of the deed, and can only be made to appear by something extrinsic arising in the application of an instrument of clear and definite intrinsic meaning to a doubtful subject matter, and, although they can only be raised by extrinsic evidence, yet they must be clearly shown before they become the subject of explanation. And parol evidence is never admitted when the deed can have operation without it; *Id.*

28. *Same.* If one-eighth of land in a named section, and lying on a certain creek, be granted, and there be two-eighths in that section lying on the creek, this is a latent ambiguity, and parol evidence is admissible to explain which eighth was meant; *Hazlip v. Noland*, 6 S. & M. 294.

29. *Not admissible to show mistake.* When the description of land conveyed in a deed mentions as a starting point of the boundaries the corner of another tract, which is referred to only by the name of its owner or supposed owner, it is not competent in an action of ejectment for the grantee, in order to identify the land conveyed in the deed, with the *locus in quo*, to show a mistake in the deed, as to the name of the owner of that tract referred

to as a starting point. But the evidence must show that the land so referred to was owned, or at least claimed by the person named in the deed: *Nixon v. Porter*, 9 G. 401; *Peques v. Mosby*, 7 S. & M. 340; *Landerdale v. Hallock*, 1b. 622; *Ross v. Wilson*, 1b. 753. The mistake can be shown only in equity; same cases.

30. *Nor to contradict.* A deed was made conveying all the land in a certain town, "except the lots which had been previously sold in said town, and which would more fully appear by a reference to a map of said town." *Held.* in controversy between the grantee in the deed and another vendee of the grantor, and whose deed was subsequent to this deed, in reference to the title of one of the lots, that the reference to the map made it the sole guide to determine the extent of the conveyance made by the first deed, and that all the land was conveyed in the first deed, which the map did not show had been sold, and that parol evidence was inadmissible to show that the lot in controversy had been; before that time, sold; *Pool v. Myers*, 13 S. & M. 466.

31. *Time of performance enlarged by parol.* It is said that a deed cannot be revoked or discharged by parol, but the time of performance may be enlarged, or acts which amount to performance may be shown by parol; *Barnes v. Lloyd*, 1 H. 584.

32. *As to consideration.* Parol proof of a consideration different from that stated in a deed is inadmissible; *Kerr v. Calvit*, W. 115. But the rule excluding parol proof does not extend to the rejection of evidence, which shows that the deed was without consideration, or had an illegal consideration; *Wren v. Hoffman*, 41 M. 616.

See EVIDENCE, 137 to 172.

VI. Proof of Deeds as Evidence.

33. *Subscribing witness must be produced.* In proving a deed the subscribing witness must be produced, or his absence satisfactorily accounted for, by showing him to be dead, or that he cannot be found, or that he has gone beyond the jurisdiction of the court; *Downs v. Downs*, 2 H. 915; S. P., *Chaplain v. Briscoe*, 11 S. & M. 372.

When his absence is accounted for, the deed may be established by proof of the handwriting of the subscribing witness, or of the acknowledgment of the maker that he owed the debt, or had executed the deed, or by proof of his handwriting. Hence, where it was shown that the subscribing witness had absconded—was reported to be dead, and had not been heard from—proof of the maker's signature and acknowledgment of the sale was admitted; *Downs v. Downs*, *supra*.

34. *Proof by one sufficient.* Only one subscribing witness is required to a deed; and if there be more, proof by one is sufficient; *Shirly v. Fearné*, 4 G. 653.

35. *Who is a subscribing witness.* Where the names of persons not parties to nor interested in a deed are found subscribed to the deed, at the place where subscribing wit-

nesses usually sign their names, they will be considered as subscribing witnesses, though it does not so appear, otherwise than from the place at which their names are subscribed; *Chaplain v. Briscoe*, 11 S. & M. 372.

36. *Deed must be produced.* The deed itself must be produced, or its absence accounted for; *Randolph v. Doss*, 3 H. 205.

37. *Reading without objection.* If the deed be read in evidence without proof of its execution, and without objection, its due execution will be considered as established on writ of error or appeal; *Ib.*

38. *Unrecorded.* Whether an unrecorded original deed, though regularly acknowledged by the grantor, and so certified by a competent officer, is admissible in evidence, without due proof *aliunde* of its execution; *Quere?* *Morris v. Henderson*, 8 G. 492. It is not, unless it has been duly recorded; *Lock v. Jayne*, 10 G. 157.

39. *When certified copies, evidence.* See EVIDENCE, 94, *et seq.*

40. *Proof of handwriting.* Where *non est factum* is pleaded to a deed, and the proof offered in support of it be uncertain and doubtful, the failure of the grantee to introduce any proof of the genuineness of the signature of the alleged grantor, where it is presumable that such proof could be obtained, is a circumstance against the genuineness of the deed; *Lock v. Jayne*, 10 G. 157.

VII. Acknowledgment and Probate for Registration.

See CERTIFICATE OF ACKNOWLEDGMENT.

41. *Deputy of probate clerk.* The taking and certifying of an acknowledgment to a deed is an official act of the probate clerk, and may be performed by his deputy; *McRaven v. McGuire*, 9 S. & M. 34. And it is no objection to the certificate of acknowledgment, that it is made in the name of the deputy as such, if the official seal be annexed, though it would be more regular if the certificate be in the name of the clerk; S. C. 1 C. 100. This is a *quere* in *Hundley v. Buckner*, 6 S. & M. 70.

42. *Power of justice of the peace where land lies out of his county.* In 1833 an act was passed giving notaries public the right to take and certify acknowledgments to deeds, conveying property situated outside of their counties. In 1836 it was enacted, that "all powers heretofore belonging to notaries public shall *ex officio* be and vest in justices of the peace in their respective counties:" *Held.* that these acts authorized a justice of the peace to take and certify acknowledgments of deeds conveying land situated out of his county; *Dennistoun v. Potts*, 4 C. 13; *Love v. Taylor*, 1b. 567; and such certificate is good, though made under the justice's common seal, which is a mere scroll; *Ib.* But previous to this act of 1836, a justice of the peace could not take and certify the acknowledgment to a deed, unless the lands conveyed by it were wholly or in part situated in his county; *Hughes v. Wilkinson's Lessee*, 8 G. 482. By Rev. Code of 1857, p. 311, art. 27,

sect. 5, all the officers authorized by law to take and certify acknowledgments of deeds, may do so where the land conveyed is situated in any part of the State.

43. *Probate judge.* In 1836 a probate judge had no power to take and certify an acknowledgment to an instrument embracing a contract for the sale of land, unless the same were under seal; *Alexander v. Polk*, 10 G. 737. But now, under Rev. Code of 1857, p. 311, art. 27, sect. 5, all officers who can take acknowledgment of deeds, may take and certify to the acknowledgment of any "contract or agreement necessary to be recorded."

44. *How official character certified.* A certificate of the acknowledgment of a grantor in a deed or mortgage, need not contain a description of the officer before whom it is made. It is sufficient if his official character appear by additions and descriptions attached to his signature; and abbreviations may be used for this purpose, if in general understanding their import be known. And the letters J. P. affixed to the signature of such an officer is sufficient to show that he is a justice of the peace; *Russ v. Wingate*, 1 G. 440.

44a. *Certificates liberally construed.* Certificates of acknowledgments to deeds and instruments of like character being frequently, from necessity, made by inexperienced and illiterate officers, should not be construed by the application of technical rules, but should be received with great indulgence and liberality, and sustained as valid whenever it can be done by fair legal intendment; *Russ v. Wingate*, *supra*. And they are to be maintained if substantially right. If they are to the effect and substance of the statute, they are good without following its precise form; *Morse v. Clayton*, 13 S. & M. 373; *Pickett v. Doe*, 5 S. & M. 470.

44b. *Same: Instances.* Thus, a certificate of acknowledgment to a deed made by a sheriff, in these words: "Personally appeared before me, G. C., probate clerk in and for the said county, whose name is subscribed to the within deed," and then pursuing the form of the statute in other respects, but omitting the name of the sheriff, is sufficient for the reference to the name subscribed, made in the words printed in italics, sufficiently shows who the acknowledging party was; *Pickett v. Doe*, *supra*. So, if the certificate shows that the grantor acknowledged that it was his "act and deed," this is equivalent to acknowledging that he signed, sealed, and delivered it; *Halls v. Thompson*, 1 S. & M. 443. And if the certificate be that the wife acknowledged that she "executed" the deed freely, &c., it will be good, since the word "execution" means signing, sealing, and delivering; *Smith v. Williams*, 9 G. 48. But the following was held bad as to the wife, "Personally appeared, J. L. & W. C., who acknowledged that they signed, sealed, and delivered the foregoing deed, as their voluntary act and deed, and for the purposes therein mentioned; and the said J. L. on a private examination, apart from her husband,

acknowledged that she signed the same, &c., for it did not appear upon her private examination that she acknowledged "sealing and delivering" which was essential; *Toulmin v. Heidelberg*, 3 G. 268.

44c. *Same.* And under our statute, which requires the subscribing witness making probate of a deed for record, to swear "that he saw the grantor sign, seal, and deliver the deed to the grantee, that he subscribed his name thereto as a witness in the presence of the grantor, and that he saw the other subscribing witnesses (naming them) sign the same in the presence of the grantor, and in the presence of each other, on the day and year therein named;" it was held, that a certificate of the proof of the execution of the deed, which stated that a subscribing witness swore, "that the deed was signed, sealed, and delivered in his presence, and also in the presence of R. E., the other subscribing witness thereto," was sufficient; for the statement that he (affiant) and R. E. are subscribing witnesses, is a statement that they attested according to law, *i. e.*, that they subscribed it as witnesses in the presence of the grantor, and in the presence of each other; *Morse v. Clayton*, 13 S. & M. 373.

See REGISTRATION, 12.

44d *Foreign certificate of acknowledgment.* Under the statute of this State, which declares that "when the parties or witnesses to a deed, reside in a foreign State, kingdom, nation, or colony, the acknowledgment or proof may be made before any court of law, or mayor, &c., certified by said court or mayor, in such manner as such acts are usually authenticated by him or them, shall be sufficient," &c.; it was held that a certificate of acknowledgment to a deed, purporting to be taken before the Mayor of Liverpool, in England, and to be his official certificate, and bearing the corporate seal of that city, but which is not signed by the mayor, but only by the city clerk, "by order of the mayor," is sufficient; for it will be presumed that the certificate is in due form, and according to the law of England, the certificate itself being *prima facie* evidence of that fact, until the contrary is shown; *Sessions v. Reynolds*, 7 S. & M. 130.

See REGISTRATION, 11; and HUSBAND AND WIFE, 63 to 73.

VIII. Registration of Deeds.

44e. *Only necessary against subsequent conveyance by same grantor.* The statute of the Mississippi Territory providing for the registration of deeds, which declared that a deed which was not registered within twelve months from its date, should be void as to subsequent purchasers and mortgagees without notice, makes the unregistered deed void only as to purchasers and mortgagees from the same grantor; and the statute does not at all affect the validity of the deed, as against purchasers and incumbrancers from a distinct and independent source. Hence, the failure to register a deed made in the year 1806 (by

a grantee under a Spanish grant), till the year 1841, does not at all affect its validity as against a patent granted by the United States Government in 1823. The object of registration laws is to require deeds to be put on record, so that the same grantor may not have the power to commit a fraud on another purchaser, by making a new sale, and a new deed; *Sessions v. Reynolds*, 7 S. & M. 130.

44f. *Same*. The purchaser of the legal title is not bound to take notice of a registered lien or incumbrance on the estate, created by any person other than those through whom he is compelled to deraign title. S. purchased the land in controversy from the State, and received a certificate which entitled him to a patent when the purchase money was paid; a judgment was recovered against S., and after the purchase money was paid his equity in the land was sold thereunder. S. after the judgment became a lien on the land, sold it to M., who procured a patent from the State directly to himself. B. & H. purchased the land from M. for a valuable consideration, without any actual notice of the judgment lien: *Held*, that as B. & H. could make out their title through the patent from the State to M.—the name of S. not being connected therewith—they were not chargeable with notice of the registered lien of the judgment against S.; *Harper v. Bibb*, 5 G. 472.

45. *Notice of unregistered deed*. An unregistered deed is good between the parties, and also against subsequent purchasers and creditors having notice; *McAnulty v. Bingham*, 6 H. 382; *Dixon v. Doe*, 1 S. & M. 70; *Cohea v. Carroll*, 5 S. & M. 545. But the notice to bind the creditor should be given at least before the rendition of his judgment; if he have no notice, then his judgment will operate as a lien, which will not be defeated by notice of the unregistered deed before levy and sale. And the right of any purchaser at the sale will be as good as that of the creditor under whose judgment the sale takes place; and the purchaser will not be defeated though he have notice of the unregistered deed, if the judgment creditor had no notice; *Henderson v. Downing*, 2 C. 106; S. P., *Barker v. Stacey*, 3 C. 471; *Lindsey v. Henderson*, 5 C. 502; *Kelly v. Mills*, 41 M. 267; *Work v. Harper*, 2 C. 519; *Walker v. Gilbert*, 7 S. & M. 456. But this was a *quære* in *Clement v. Reid*, 9 S. & M. 535.

See JUDGMENT, 113. VENDOR AND VENDEE, 64. HUSBAND AND WIFE, 38a.

46. *Possession equivalent to notice*. Possession by the grantee of the land conveyed in an unregistered deed, is equivalent to notice; *Dixon v. Doe*, 1 S. & M. 70; *Halls v. Thompson*, 1b. 443; *Willy v. Hightower*, 6 S. & M. 345; *Walker v. Gilbert*, 7 S. & M. 456; *Humphries v. Partee*, 10 S. & M. 282; *Jones v. Loggins*, 8 G. 546; *Perkins v. Swank*, 43 M. 349.

47. *Deed not registered within time prescribed by statute*. Under the statute of this State, a deed acknowledged and recorded

within three months of its delivery, is good against all persons whatsoever; but if not recorded within three months, then it is good from its date as between vendor and vendee, and purchasers and creditors of vendor having notice; but as to creditors and purchasers, and creditors without notice, it takes effect only from the date of filing it for record; *McRaven v. McGuire*, 9 S. & M. 34.

48. *Register of deed not properly authenticated*. The registration of a deed not properly acknowledged or proven, is a nullity, and conveys no notice of it; *Work v. Harper*, 2 C. 517; *Tillman v. Coward*, 12 S. & M. 262.

49. *Certificate of registration*. Whether a certificate of the recording of a deed signed in the name of the deputy clerk is good; *Quære?* *Hundley v. Buckner*, 6 S. & M. 70. But it seems it would be good; see *ante*, 41. The certificate need not be placed on the deed when it is recorded; such certificate, if put on the deed five years after its registration, is sufficient to show it was filed for record at the date specified in the certificate; *Hundley v. Buckner*, *supra*.

50. *Land must be registered in the county where it lies*. A deed conveying lands situated in several counties must be registered in all the counties in which any part of the land is situated; its registration in one or more of the counties is no notice to the creditors and purchasers of the grantor of the conveyance of the land situated in the counties in which the deed has not been registered; *Harper v. Tapley*, 6 G. 506.

51. *When certified copies of registered deeds evidence*. Whether a certified copy of a deed conveying lands situated in several counties made by the register in a county in which the deed has been recorded, is evidence under the statute Rev. Code of 1857, p. 516, art. 228, in a suit respecting that portion of the land which is situated in a county in which it has not been registered; *Quære?* It is admissible upon proof of loss of the original and independent proof that it is a correct copy; *Ib*.

52. *Same*: Art. 228, p. 516, of Rev. Code of 1857. This act provides that "copies of the record of a deed, bond, or other writing, required or permitted by the laws of this State, or of another State or Territory of the United States, to be recorded, &c., shall, when certified by the clerk in whose office the record is made, under his seal of office, be received in evidence in all the courts of this State without accounting for the absence of the original; but if the execution of such deed, bond, or other writing, shall be disputed by the other party under oath, the original shall be produced or its absence accounted for, before such copy shall be read, and such original, when acknowledged or proven according to the laws of the State or Territory where executed, so as to entitle it to be recorded there, shall be evidence in this State without further proof of execution;" this does not authorize the introduction in evidence of an unrecorded original deed, though acknowledged or proven, and entitled to be recorded

according to the law of the State, where it was executed; *Lock v. Jayne*, 10 G. 157; and that article allows as evidence authenticated copies of such foreign deeds as have been duly recorded in the proper office of the State where they are made; *Davis v. Rhodes*, 10 G. 152. In *Morris v. Henderson*, 8 G. 492, it was left undecided whether a certificate of acknowledgment of an unrecorded deed is competent evidence of its execution and delivery; but it was held that possession of an unrecorded deed by the grantee was evidence of its delivery.

53. *Marriage settlements required to be registered.* The statute of 1822 (H. & H. 344, § 34), provides that, "Every deed respecting the title to personal property, *** which by law ought to be recorded, shall be recorded in that county in which such property shall remain; and, if afterwards the person claiming title under such deed, shall permit any person in whose possession such property may be, to remove with the same out of the county in which such deed shall be recorded, and shall not within twelve months after such removal" cause the deed to be delivered for record in the county to which the property shall be removed, "shall be void in law, as to all purchases for a valuable consideration, without notice, and as to all creditors." This applies to marriage settlements, in which personal property is secured to the wife; and a removal of the property by the husband, without registration as required, makes it subject to his sales and debts; *Moss v. Davidson*, 1 S. & M. 112; *Pickett v. Banks*, 11 S. & M. 445. But by the term "all creditors," used in that act, judgment creditors, or those having a lien on the property, alone are included; general creditors are not embraced, unless, perhaps, those who have been induced to deal and give credit to the husband, on the faith of his apparent ownership. And if it be proven that the creditor had notice, before he recovers his judgment, of the wife's rights, he cannot subject the property, though the credit was given after the removal, and before notice or registration; *Pickett v. Banks*, *supra*. See *ante*, 45, and REGISTRATION, 15, 16.

54. *Registration of foreign deeds.* As to registration of foreign deeds, see REGISTRATION, 3, 4, 5.

55. *Improper registration.* A power of attorney to sell land, registered upon an acknowledgment taken by a justice of the peace, who had no power to take it, because the land was situated out of his county, though not admissible in evidence as a legally recorded instrument, is yet, after the lapse of thirty years, in which the principal has set up no claim to the land conveyed under it, admissible as a circumstance to show the authority of the agent to execute a deed conveying the land; *Hughes v. Wilkinson's Lessee*, 8 G. 482.

The registration of a deed not authenticated according to law is no notice; the registration is a simple nullity; *Ti'man v. Coward*, 12 S. & M. 262; *Work v. Harper*, 2 C. 517.

56. *Registration evidence of delivery.* The acknowledgment and registration of a deed is presumptive, but not conclusive evidence of delivery; *Bullitt, Miller & Co. v. Taylor*, 5 G. 708.

57. *Both parties claiming under same deed.* When both parties claim under a deed, the question of its registration is immaterial; *Butler v. Hicks*, 11 S. & M. 78.

See REGISTRATION generally.

IX. ESCROWS.

58. *Plea of escrow.* To an action on a deed or bond, if it be pleaded that the instrument sued on is an escrow, the plea should aver upon what condition it was executed; such an averment is indispensable; *Graves v. Tucker*, 10 S. & M. 9.

59. *What is an escrow?* To constitute an escrow, the instrument must be delivered to a stranger to it (and not to one of the parties), to be held by him until certain conditions be performed, and then to be delivered to the party to whom it is made, and to take effect as the deed or bond of the grantor or obligor; *Ib.*

X. ESTOPPEL BY DEED.

See ESTOPPELS.

60. *By recitals: Mutuality.* Recitals in a deed estop the party making them, and those claiming under him; but the estoppel must be mutual; that is, a recital is not binding on one party as an estoppel, unless they are binding on his adversary; therefore, where the heirs of an intestate refused to recognize a deed made by the administrator, attempting to convey realty sold by him, and brought ejectment to invalidate the sale, it was held that the purchaser was not estopped by a recital in the deed, which excepted the widow's right of dower from the warranty, from denying that there was a widow, or, from proving the illegitimacy of the plaintiffs claiming to be heirs; *Stevenson's Heirs v. McReary*, 12 S. & M. 9.

61. *Parties and privies bound by recitals.* The rule is well settled that all parties to a deed are bound by the recitals in it, legitimately appertaining to its subject matter; and this applies not only to the parties immediately, but to those claiming under them, to privies in blood,—privies in estate, and privies in law. Therefore, when a father made a deed, assigning his interest in a deceased brother's estate, in which he recited that the brother died without lawful issue, and afterwards a child of the deceased brother died without issue, and the children of the assignor claimed this deceased child's estate, upon the ground that they were next of kin through their father, and which claim would have been true if the deceased child had been legitimate; it was held that the recital in the father's deed, that this deceased child of his brother was illegitimate, estopped his children from claiming the estate; *Robbins v. McMillan*, 4 C. 434.

62. *Recital must be certain.* In order to create an estoppel by a recital in a deed, the matter must be directly and precisely alleged, and with certainty to every intent; if it be repugnant and contradictory, it will not have that effect. Hence, when the deed was dated 30th April, and recited that the sale was made on a credit payable in three annual instalment, "commencing from 12th inst."; and at another place recited that the instalments were due respectively on 12th February, in the years named; it was held, that the deed created no estoppel to prevent the introduction of evidence to show that there was a mistake in the date of the deed; *McComb v. Gilkey*, 7 C. 146.

63. *Warranty, an estoppel.* A covenant of warranty of title, in fee, contained in a deed made by an administratrix conveying land sold by her under an order of the Probate Court, is an estoppel to her to claim dower in the land; *Magee v. Mellon*, 1 C. 585.

64. *Recital no estoppel to show the deed void.* A recital in a void bond cannot operate as an estoppel; nor can a recital operate to estop the obligor from showing the contrary, when that would show the bond to be void; *Thomas v. Burrus*, 1 C. 570.

65. *Conveyance not under seal.* A conveyance of land not under seal, will be treated in equity as valid, and the vendor be compelled to execute a deed, and the heirs of vendor will be estopped by it, from setting up against vendee any after acquired title; *Nixon's Heirs v. Carco's Heirs*, 6 C. 414.

66. *Voluntary deed of personalty.* A deed of personalty in consideration of love and affection, is not valid without a delivery of possession; nor good as an estoppel; *Fairly v. Fairly*, 5 G. 18. But when the donor acknowledges, under his hand and seal, that a delivery was in fact made, he will be estopped to deny it, especially when the deed has been recorded; *Newell v. Newell*, 5 G. 385.

67. *Infant not estopped.* An infant is not bound or estopped by his deed; *Cook v. Tounbs*, 7 G. 685.

68. *Agent estopped by.* A deed made by an agent estops him from setting up title to the land thus conveyed; *Harney v. Morton*, 7 G. 411.

68a. *Warranty an estoppel.* A covenant of warranty of title in a deed made by an administratrix, conveying land sold by her under order of the Probate Court, is an estoppel to her to claim dower in the land; *Magee v. Mellon*, 1 C. 585.

68b. *Substituted purchaser at chancery sale estopped.* A person, who by agreement with the person to whom a slave was knocked off, at a chancery sale, gave his own bond and security for the purchase money, in which it is recited that he was the purchaser, is estopped thereby to deny that he was the purchaser; *Redus v. Haydn*, 43 M. 614.

XI. Construction of Deeds.

69. *The whole deed must be considered.* A construction is to be made on the entire

deed; every part ought, if possible, to have effect. And if certainty once appears in a deed, that must be referred to as explanatory of what is indefinite; *Williams v. Claiborne*, 7 S. & M. 488.

70. *Main object: Repugnant proviso.* The main object of a deed is to be gathered from its provisions, and when that is ascertained, it must prevail. A proviso or condition repugnant to the grant is void, provided the thing be specially granted. A proviso which is only explanatory is good; *Ib.*

71. *Recital in premises.* A recital in the premises of a deed, showing the motive and reasons on which it is founded, is important to be considered in construing the deed; *Ib.*

72. *Repugnant provision.* Where one of the declarations of trust in a deed was in conflict with the recitals in the premises, the *habendum*, and every other declaration of trust in the deed, it must be rejected; *Ib.*

73. *Same: Case in judgment.* A marriage settlement, in the premises, recited, that it was the intention of the parties to secure all the property of the wife to her sole and separate use, and it then proceeded to convey all the property of the wife to a trustee; *Habendum*:

1st. For the use of husband and wife for their natural lives, subject, however, to the disposal of the wife by will.

2d. That the wife should at all times have full control of the property, and that the husband would not intermeddle therewith; and that the same should not be liable to his debts, or contracts, or disposal.

3d. That the trustees should sell any of the property, upon the appointment of husband and wife, and of the wife alone.

4th. And the husband warranted that the whole property, and its proceeds and income, should belong to the wife, as her sole and separate estate, and that it should not be subject to his debts, control or disposition.

Held, that the first declaration of trust in the *habendum*, viz., "for the use of husband and wife, during their natural lives," was repugnant to the other parts of the deed, and was void; and that the husband took no interest whatever under the deed; *Ib.*

74. *Restrictions inconsistent with the estate granted.* If the import of the previous provisions in a deed be such as to vest an absolute estate in fee, in the first taker, subsequent restrictions inconsistent with such an estate, are void; *Carradine v. Carradine*, 4 G. 698.

75. *Construction of words "give, grant, and release."* The words "give, grant, and release," are words of transfer and conveyance, and are sufficient to invest the grantee in a deed, with the title of the grantor; *Fairly v. Fairly*, 5 G. 18.

75a. *As to subject matter included in the deed.* A deed in trust by P., to secure the payment of all judgments against P., and then all judgments against B. and P., does not include within it a judgment against L. and P.; *Lauderdale v. Hallock*, 7 S. & M. 622.

XII. Extrinsic Writings.

75b. *Map referred to in deed.* As to effect of reference in a deed to a map, see *ante*, 30.

76. *Endorsement of agreement on deed.* An agreement endorsed on a deed at the time of its execution, if so designed, is a part of the deed itself, as much as if incorporated in it; *Baldwin v. Jenkins*, 1 C. 206; *Armstrong v. Stovall*, 4 O. 275.

77. *Order of Probate Court referred to.* When land is purchased by a guardian for his ward, the order of the Probate Court, authorizing the purchase, if incorporated in the deed, may be resorted to to remove an uncertainty or ambiguity as to the estate conveyed in the deed; *Craft v. Germany*, 5 G. 118.

78. *Cotemporaneous writings.* Where two writings refer to each other, being contemporaneous, and also a part of the same transaction, they will be construed as one instrument. Hence, if a deed absolute on its face be made, and the grantee execute at the same time, a paper showing that he holds the land in trust for the grantor, the two instruments will be construed together, as if they were one writing; *Doe v. Barnard*, 7 S. & M. 319.

XIII. Deeds by Agents.

79. *In agent's name.* Whether a deed by an attorney in fact, duly authorized, which is in his name as "attorney in fact" for the principal, and is signed with the agent's name, as "attorney in fact" for the principal, passes the legal title to the land, and whether the registry of such a deed is notice to a subsequent purchaser from the principal; *Quære?* But if such a deed be not good, as a conveyance of the legal title, it is a binding contract on the principal in equity, and a subsequent purchaser with notice, will be enjoined from bringing ejectment against the grantee; *Edmonson v. Orr*, 12 S. & M. 541; *S. P., McCaleb v. Pradat*, 3 O. 257; *Curtis v. Blair*, 4 C. 309.

80. *Agent's authority need not be in writing.* The authority of an agent to make a deed, or a valid contract to sell land, need not be in writing; *Curtis v. Blair*, *supra*.

See **PRINCIPAL AND AGENT**, 3, 5.

XIV. Voluntary Deeds.

81. *What is.* A deed in consideration of love and affection, is voluntary, and does not convey personality without a delivery of possession, but if it be in consideration of love and affection and one dollar, it will be a valuable consideration, and operate as a conveyance of personality without delivery; *Fairly v. Fairly*, 5 G. 18; *S. C.*, 9 G. 280. And this is so though it be shown that the "one dollar" recited was never in fact paid; *S. C.*, 9 G. 280; *sed contra*, per Smith, C. J., as to recital of one dollar as a consideration making a deed of personality valid, in *McWillie v. Van Varter*, 6 G. 428.

82. *When good as a covenant to stand seized.* A voluntary deed, conveying a present interest in land to brothers and sisters, and reserving possession by the grantor until his

death, is good as a covenant to stand seized; *Wall v. Wall*, 1 G. 91.

82a. *As to effect of voluntary deeds generally, as against creditors of grantor, see FRAUDULENT ASSIGNMENTS.*

XV. Alteration and Interlineation of Deeds.

83. *Immaterial alterations.* Where words of description are interlined in one portion of a deed, and the same words are embraced in another part of the deed, so that upon the whole deed the description of the property conveyed is perfect, without reference to the interlineation, the words will be presumed to have been interlined either before the execution of the deed, or afterwards by consent of parties, for the words interlined had no effect to change the terms or meaning of the deed, and they are immaterial and do not invalidate the deed; *Gordon v. Sizer*, 10 G. 803.

84. *Whether interlineations affect deeds.* Whether the rules of law in relation to interlineations in negotiable instruments are applicable to other writings; *Quære? Ib.*

See further on this subject, **ALTERATION OF WRITINGS**.

XVI. Quit claim Deeds and Release.

See **QUIT CLAIM**.

85. *Effect of deed of release.* A deed which remises, releases, and quit claims title to land, is competent evidence, conceding that it does not pass the entire estate in the land, for it is sufficient to perfect title in one having a claim of title, and it will enlarge an estate in the releasee by giving him some new interest, and will perfect an imperfect and defeasible title already in him. And it seems any interest in the releasee, either by possession, or by deed, either in his own or another's right, or any vested interest in him without possession, will be a sufficient foundation to support the release and make it a valid conveyance of the title. And in a country abounding in wild and unoccupied land, a deed or grant of such land is constructive possession of itself in the grantee, and sufficient to uphold a deed of release to him, from one having the true title. Where, therefore, the Spanish government granted the same land (wild and uncultivated) first to R. and afterwards to F., the constructive possession in F. under his grant, is sufficient to uphold a release of the title to him by R., in whom it was vested. And so a grant of the whole of a tract of land, with actual possession of a part by the releasee, is a sufficient possession of the whole to support a release made to the possessor, yet it will not pass the title of another than the releasee, if he be in the actual visible possession of the land; *Sessions v. Reynolds*, 7 S. & M. 130.

86. *Same: Presumption as to possession.* Where a release was thirty-five years old, it was held that its age drew to its support the favorable presumption of law, that it was operative at the time it was made, which presumption is strengthened by proof of possession in the releasee as far back as there is any evidence of possession by any one. And in order to defeat such a release, it seems there should be proof of an actual possession under

claim or right adverse to the releasee, at the time it was made; and hence, where the releasee was in possession long before any adverse claim was set up and it was not shown that he was not in possession when the release was made, it was held that the release was operative.

87. *Effect of release at common law, and under our statute.* At common law a quit claim deed, unless the releasee was in possession at the time, was not a technical conveyance of the title, but its sole operation was merely as an enlargement of the estate of the releasee. But it is now effectual to convey the whole interest of the grantor to the grantee under the statute, which provides, "By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to the use, or by deed operating by way of covenant to stand seized to use, the possession of bargainor, releasor, or covenantor, shall be deemed heretofore to have been, and thereafter to be, transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest, which such person hath or shall have in the use, as perfectly as if the bargainee releasee, or person entitled to the use had been enfeoffed with livery of seisin, of the land intended to be conveyed by such deed or covenant (H. C. p 610, sect. 28); *Kerr v. Freeman*, 4 G. 292. This statute is re-enacted in Rev. Code of 1857, p. 308, art. 11. And it is also provided (art. 17, p. 309, of Rev. Code of 1857), that "a deed of quit claim and release, shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and shall estop the grantor and his heirs from asserting a subsequent acquired adverse title to the land conveyed."

88. *What quit claim deed implies.* A quit claim deed implies *per se* a doubtful title, and it cannot, therefore, be made the foundation of a bill in equity, to remove cloud on titles; *Kerr v. Freeman*, 4 G. 292; S. P., *Smith v. Winston*, 2 H. 601.

XVII. Warranty.

See VENDOR AND VENDEE, 217, *et seq.*

88a. *Warranty does not pass title.* A warranty does not pass title, but is indemnity merely against a defective title or incumbrance; and hence, when a vendor in a title bond has obligated himself to make a good title to the land sold, he has complied with his bond if he has made a deed actually conveying a good title, though it contain no covenant of warranty; *Hazlip v. Nolan*, 6 S. & M. 294. But a covenant to "make a good and perfect deed," means to convey a good title, and is not complied with by making a good deed, with warranty of title, there being an outstanding incumbrance not extinguished; *Greenwood v. Ligon*, 10 S. & M. 603; *Feemster v. May*, 13 S. & M. 275.

89. *Statutory warranty, by the words "grant, bargain and sell."* Whether the force of the words, "grant, bargain and sell," importing by statute a warranty of an indefeasible title in fee, and seisin in the grantor, is qualified by the introduction in the deed of

an express special warranty only against the claim of the grantor, and those claiming under him: *Quere? Hazlip v. Nolan*, 6 S. & M. 294. This statutory warranty is only intended to operate when the parties have omitted to insert in the deed express covenants; and hence, where there is an express covenant of warranty, that is the extent of the warrantor's obligation, notwithstanding he also uses the words, "grant, bargain and sell;" *Weems v. McCaughan*, 7 S. & M. 422. The statutory covenant arising from the use of these words, under the Rev. Code of 1857, extends only to a "covenant that the grantor was seized of an estate, free from incumbrances, made or suffered by the grantor, and for quiet enjoyment;" See Code of 1857, p. 309, art. 16.

XVIII. Champerty and Maintenance.

See CHAMPERTY AND MAINTENANCE.

90. *Deed void where land held adversely.* A deed to land held adversely to the grantor, under color of title, is void for maintenance; *Bledsoe v. Little*, 4 H. 13. Whether a deed made by a tenant in common, after he has been ousted by his co-tenant, is void for champerty; *Quere? Harmon v. James*, 7 S. & M. 111.

XIX. Miscellaneous.

91. *When deed color of title.* A deed from one claiming title, and in possession by himself or tenant, is color of title; *Bledsoe v. Little*, 4 H. 13. A void deed is color of title; *Welborn v. Anderson*, 8 G. 155. So a deed made by an administrator in pursuance of a void order of sale, is color of title in the vendee setting up the statute of limitations against the heirs; *Root v. McFerrin*, 8 G. 17. And so a deed, fraudulent as to the creditors of the grantor, is color of title in the grantee; *Harper v. Tapley*, 6 G. 506. But a deed not delivered can have no effect whatever, and is not color of title; *Bledsoe v. Little*, *supra*.

See ADVERSER POSSESSION.

92. *Ancient deed.* A power of attorney to sell lands acknowledged before a justice of the peace who had no authority to take the acknowledgment, by reason of the land being outside of his county, though not admissible in evidence as a legally recorded instrument, is yet, after the lapse of thirty years, in which there was no claim set up to the land by the principal, admissible to show the proper execution of the deed by the agent; *Hughes v. Wilkinson, Lessee*, 8 G. 482.

92a. *Same: Case in judgment.* L. conveyed to A., B. & C., land, upon condition that the grantees should have two years in which to complete the purchase, or rescind the trade at their election, and in case of rescission that the land should revert to the grantor. Soon after the expiration of the time limited, L. conveyed the land to A. alone, reciting that soon after the contract was made, B. had died without completing the purchase, and that C. had within the two years

released his interest to A. For thirty years thereafter no claim was set up to the land in opposition to the lost conveyance to A.: *Held*, that it would be presumed that the recitals in the deed were true, and that A.'s title was good; *Ib.*

See EVIDENCE, 58, 59, 60.

93. *Uncertainty in grantee.* A deed to an unincorporated company may be void; but if so, it would be on account of uncertainty as to the grantee. Hence, if a trustee be named as grantee, the uncertainty will be removed. and the trust will be enforced and a conveyance to D., as the president of such a company, and his successors in office, in trust, for the use and benefit of the stockholders and their heirs in proportion to the number of shares owned by each is good; *City of Nat-chez v. Minor*, 9 S. & M. 544.

94. *Grantor may allege his incapacity to make a deed.* The old common law rule, that a man cannot stultify himself and allege his own incapacity to make a deed, has been properly exploded, and now a grantee may show his incapacity to make a deed, as a ground for vacating it, and this may be done at law in an action of ejectment by the grantor to recover possession of the land from the grantee, *Doe v. Dignowitty*, 4 S. & M. 57.

95. *Words in past tense.* A deed of bargain and sale in which all the operative words of conveyance are in the past tense, as "have, given, granted," &c., is nevertheless good to convey title; *Harmon v. James*, 7 S. M. 111.

96. *Words necessary.* The words "give, grant and release" are sufficient to convey grantor's interest in the land to grantee; *Fairly v. Fairly*, 5 G. 18.

97. *Deed bearing date before issuance of patent.* It is no objection to a deed that it bears date previous to the issuance of a patent by the United States for the same land; *Bledsoe v. Little*, 4 H. 13.

98. *Cancellation and destruction of deed.* The destruction of a deed does not destroy the title conveyed by it; and if a new deed be made by the grantor to another, it will be void as to all who had notice of the destroyed deed. And hence, if a father paying the purchase money for land, take the deed in the name of his son, and subsequently sell the land and cause the old deed to be destroyed, and take a new one to his vendee, averring that the first was made to his son by mistake, the transaction will be void, unless there be proof independent of the father's statement that the mistake existed; *Lisloff v. Hart*, 3 C. 245; *S. P.*, *Burton v. Wells*, 1 G. 638.

See CANCELLATION, 2. VENDOR AND VENDEE, 56.

99. *Deed providing for title to revert in grantor on a contingency.* Where a deed provides that the grantee may within a stipulated time, rescind, and in that event, that the land shall revert to the grantor, a rescission may be proven by parol, and then the title will revert in the grantor, without any formal act of conveyance; *Hughes v. Wilkinson's Lessee*, 8 G. 482.

100. *Possession co-extensive with boundaries.* Possession under a deed is presumed till the contrary appears to be co-extensive with the boundaries in it; *Bledsoe v. Little*, 4 H. 13.

101. *Right of administrator of vendee to object to deed.* Whether the administrator of a vendee sued for the purchase money, under an executory agreement to convey title on payment of the price, can object that the deed tendered in performance of the title bond is imperfect; *Quære? Hazlip v. No-land*, 6 S. & M. 294.

102. *Second deed by grantor.* As an abstract proposition, it is true that a grantor who has disposed of his land by a valid deed, in fee simple, cannot subsequently dispose of the same land by a valid operative deed to another, for there is nothing on which the last deed can operate, since the entire estate passed from the grantor by the first conveyance. But if the first deed were inherently defective, then the second deed if valid, would convey the title. Where, however, the right under the two deeds from the same grantor to different persons, centres in the same person, and are not arrayed against each other, his title is perfect, and it need not be decided which is the superior grant; *Sessions v. Reynolds*, 7 S. & M. 130.

103. *Recitals notice.* A recital in a deed that the grantor may have previously conveyed an alley on a part of the demised premises, is sufficient to put the grantee on inquiry as to the nature and character of the title of the person who is then using the alley as a pass-way; *Gordon v. Sizer*, 10 G. 805.

104. *Where there are several grantors.* Where there are several joint grantors, execution of the deed by all must be proven, to entitle it to be read in evidence; *Shirly v. Fearne*, 4 G. 653.

105. *As to vendor's obligation to make a deed,* see VENDOR AND VENDEE, 10 to 19.

Deed of Gift.

See GIFT.

Deed in Trust.

See TRUSTS AND TRUSTEES AND MORTGAGES.

Delivery.

1. *As to delivery of deeds,* see DEED, 5 to 12.

2. *As to delivery of personalty under a gift,* see GIFT, 9 to 12.

3. *As to delivery of chattels under a sale,* see SALES, 8 to 11b.

4. *Delivery by manufacturer.* If a manufacturer complete an article ordered by the purchaser, according to the terms of the contract and by the time specified, and have it ready for delivery, and set it apart for the purchaser, he can recover the price therefor without an offer to deliver, if the purchaser have notice of its readiness and completion and make no objection; *McIntyre v. Kline*, 1 G. 361.

Demand.

1. *As to demand of payment of bills and notes*, see *BILLS OF EXCHANGE*, 29 to 38a.

2. *As to demand of possession of a chattel before suit brought*, see *REPLEVIN*, 7; *DETINUE*, 8.

3. *Demand of delivery of onerous articles*. When onerous property is by contract to be delivered on demand generally, without any place being specified, a specific demand of delivery is necessary to put the donor in default; *Minor v. Michie*, W. 24.

4. *Demand of payment: Where payment is contingent*. Where an instrument contains a direct promise to pay a certain sum at a certain time, and then points out the manner of paying it, and concludes by declaring that "the above is to be valid in every respect in case B. & M. (who are strangers to the contract) do not pay over the amount to the payee at the time specified for payment;" it is unnecessary that a demand should be made of B. & M. to entitle the promisee to recover of the promisor; *Baughan v. Graham*, 1 H. 220.

Demurrex.

See *PLEADING AND PRACTICE*.

Demurrer to Evidence.

1. *When allowable: Practice*. A demurrer is allowable only to the evidence of the adverse party holding the affirmative of the issue; when the plaintiff has offered evidence in support of his declaration, it is not allowable for him to demur to the negative evidence of the defendant, introduced to overturn plaintiff's evidence. To allow this would involve a comparison by the court of the evidence offered by the respective parties. The court, on a demurrer to evidence, can only determine upon the legal effect of the facts which the evidence demurred to conduces to prove; these facts being admitted on the demurrer. And if negative evidence be demurred to, and the court decide against the demurrant, he may insist on the irregularity of the proceeding; because, though the court acted at his instance, yet it did what was beyond its power and constitution to do; *Goodman v. Ford*, 1 C. 592.

2. *Judgment on*. A demurrer to evidence with joinder therein presents an issue in law to the court, and if it be overruled, it will be error then to submit the cause to a jury; the adverse party to the demurrant is entitled to judgment on overruling the demurrer; *Hallyv. Browder*, 4 H. 224.

3. *What inferences the court draws*. Where there is a demurrer to evidence, the court will infer such facts as a jury might have reasonably found from the evidence; and hence, if the evidence state a demand of payment of a note at the proper time and place, and personal notice given to the endorser, the court will infer that both the demand and notice were regular in all respects; *Chewning v. Gatewood*, 5 H. 552.

4. *There must be joinder in demurrer*. If,

after issue joined, and the cause has been submitted to a jury, the defendant demurs to evidence in a matter of writing, it is necessary that the plaintiff should join in it; and if the court, without the defendant's joining in the demurrer, withdraw the case from the jury and render judgment on the demurrer, it will be error, for which the judgment will be reversed. And a recital in the record that a joinder exists, will not be sufficient; the joinder itself must appear; *Dozier v. Anstill*, 8 S. & M. 528.

4a. *Compelling the other party to join in the demurrer*. The plaintiff should not be compelled to join in the defendant's demurrer to his evidence, when it is entirely circumstantial, unless the demurrer admit the facts which the evidence is offered to prove; *Waul v. Kirkman*, 5 C. 823. See *post*, 7, 8.

5. *Not error to refuse to compel him to join*. It is not assignable as error, that the court refused to compel the plaintiff to join in a demurrer to his evidence; *Ib*.

6. *When defendant should demur to evidence*. Where the plaintiff's evidence is wholly insufficient to sustain the material allegations in his declaration, the defendant should demur to the evidence; *N. O. J. & G. N. R. R. Co. v. Enochs*, 42 M. 603.

7. *Office of the demurrer: What it admits*. It is the peculiar office of the jury to find the truth of facts, and to determine the credibility of witnesses, and it would, therefore be a misapplication of a demurrer to evidence, for it to refer questions of fact to the court. The demurrer admits all the facts which the evidence tends to prove, and which the jury might infer from it; *M. & O. R. R. Co. v. McArthur*, 43 M. 180.

8. *When proper, and when joinder compelled*. If the evidence be vague, loose, uncertain, and existing in parol, it is an improper case for a demurrer to evidence, and the adverse party ought not to be compelled to join in it; and the demurrer ought not to be permitted, unless the demurrant state the evidence in the form of facts proven by it, so as to limit the court to a mere application of the law to those facts; *Ib*.

9. *Judgment on overruling the demurrer*. Where a writ of inquiry would be necessary, in case a judgment by default is taken for want of a plea, a writ of inquiry will also be necessary on overruling a demurrer to the evidence; when the judgment by default would be final, then the judgment on the demurrer may also be final; *Ib*.

Deposition.

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I. Statutes.

1. *When depositions of resident witnesses may be taken*. By the Rev. Code of 1857, pp. 513, 514, art. 209, depositions in actions at common law may be taken in the following

cases, where the witnesses are resident in the State :—

1. When the witness is about to depart from the State, or by reason of age, sickness, or other cause, is likely to be unable to attend court.

2. When the claim or defence, or a material part thereof, shall depend on the testimony of a single witness.

3. When the witness is a judge, or any other officer of the State or United States, who, on account of his official duties, cannot attend.

4. When the witness is a clerk of a court of record, sheriff, or justice of the peace, and his testimony is required beyond the limits of his county.

5. When the witness is a female. But after her deposition is taken either party may compel her attendance by swearing that her attendance is necessary to the ends of justice.

6. When the witness resides more than sixty miles from the place of trial.

But in all these cases the party applying to take it must file an affidavit, to the materiality of the witness, which must state also the reason for taking it, and then the clerk shall issue a commission to take it; *Ib.* art. 210.

2. *The notice.* In all the above cases ten days' notice of the time and place is to be given to the opposite party, with an additional day for every twenty miles of travel to the place; provided, that in case of emergency, to be judged of by the commissioner, depositions may be taken on shorter notice, so that the opposite party shall have opportunity to be present; and in the case of a non-resident witness, by filing the interrogatories in the clerk's office for ten days. See *post*, 3, for the notice, where the opposite party is a non-resident.

3. *Deposition of non-resident witnesses.* When the witness is absent from, or non-resident of the State, the party desiring his deposition shall file interrogatories in the clerk's office, and serve his opponent or his attorney, with a copy, and a notice of the day on which the commission will issue, ten days before issuing the same; and if the opposite party is a non-resident, and has no attorney of record in the State, on whom notice can be served, notice may be given in case of a resident witness, by filing it in the clerk's office for ten days; and this applies to all courts in the State.

4. *The commissioner.* The commission may be directed to one or several commissioners in the alternative by name, or to any judge of a court of record, justice of the peace, mayor, or chief magistrate of any city or town, commissioner appointed by the governor of the State, or other person, authorized to administer oaths by the law of the place where taken; and the certificate of such officer shall be *prima facie* evidence of his official character, and of his authority to administer oaths; art. 214.

5. *Exceptions to deposition.* No exception to any deposition other than for incompe-

tency or irrelevancy shall be regarded, unless made in writing and filed before the commencement of the trial; provided the deposition shall be filed at least one day before the trial. The court shall determine the exceptions before trial, and if they are sustained, may, in a proper case, allow time to retake the deposition; art. 221.

6. *The certificate.* Under the statute prior to 1857, the deposition of a non-resident witness was to be certified, according to the law of the place where it was taken. Under the code of 1857 the commissioner is required to certify all his proceedings, but no form is set out or required.

II. Caption and Certificate.

7. *The certificate.* By statute the certificate to a deposition must be according to the law of the place where it is taken; *Coopwood v. Foster*, 12 S. & M., 718; *Henderson v. Cargill*, 2 G. 367. But if there be no proof of these laws, the certificate will be judged by our laws; *Coopwood v. Foster*, *supra*.

8. *As to swearing of witness.* If the commissioner certify that the witness was "duly sworn," it will be presumed that he was sworn properly, and according to law; *Doe v. King*, 3 H. 125. And it will be good if it certify that the witness "was duly sworn true answers to make to the interrogatories and cross-interrogatories;" *Baker v. Kelly*, 41 M. 696. And so if it appear from the caption and certificate that the witness swore to the answers as written out, it will be presumed that the oath was administered according to law, and that the answers were read over to and approved by the witness; *Henderson v. Cargill*, 2 G. 367.

9. *As to seal of commissioner.* If the certificate be under the private seal of the commissioner, he having no official seal, it will do; *Baker v. Kelly*, 41 M. 696. And under the statute, as it existed before the code of 1857, it was unnecessary for the commissioner to certify the deposition of a non-resident witness under seal, though the commission required him to do it, if there were no statute in the State where the deposition was taken requiring the certificate to be under seal; *Henderson v. Cargill*, 2 G. 367.

10. *Clerical error in caption.* A clerical misprision, by which the caption of a deposition is made to state that the commission issued out of the Probate Court, instead of the Circuit Court, will not vitiate the deposition, if it also appear, either from the caption or commission, that it was issued out of the proper court; *Henderson v. Cargill*, 2 G. 367; See *post*, 16, 34.

III. The Commission.

11. *Commission in blank and in the alternative.* The commission should, when it is issued, contain the name of the commissioner, as he derives his authority to act from the authority therein conveyed; otherwise the deposition will be irregular and not admissible in evidence; *Rupert v. Grant*, 6 S. & M. 438.

But the commission may issue to A. or B. in the alternative, and the deposition may be taken by either; *Doe v. King*, 3 H. 125; and this is the rule by express provision of the statute; see *ante*, 4.

12. *Majority of several commissioners may act.* If the commission be directed to three commissioners, and the deposition be taken and certified by two it will be sufficient under the statute; H. & H. 603, § 17; *Stone v. Cannon*, 9 S. & M. 595.

13. *Alteration of commission.* A commission issued to one commissioner is vitiated by the insertion afterwards of the names of two other commissioners; and a deposition taken and certified by the commissioner properly appointed, and the other two whose names were improperly inserted, is irregular, and not admissible in evidence; *Hemphill v. McBride*, 12 S. & M. 620.

14. *Misdescription of suit in a commission.* A misdescription of the suit under which a deposition is taken will not be ground for excluding it, if it be shown that it could not have misled the opposite party; *McRaven's Heirs v. McGuire*, 1 C. 100.

15. *Necessity for a commission.* Depositions in chancery may be taken before a justice of the peace without a commission issued to him, as is settled by long practice in that court; but the rule is different in the Circuit Court. A justice of the peace has no power to take depositions to be used in that court without a commission issued to him for that purpose. And this rule applies where an issue is sent from the Probate Court to the Circuit Court for trial (citing *Rupert v. Grant*, *ante*, 11); *Ragan v. Cargill*, 2 C. 540. And if a deposition be thus taken before the cause is sent to the Circuit Court, the opposite party may there object to it, though he made no objection in the Probate Court; *Ragan v. Cargill*, *supra*. The rule is the same under Rev. Code, p. 514, art. 210.

16. *Misnomer of witness in commission.* A misnomer of a witness in a commission to take a deposition is fatal. If the commission direct the deposition of Nancy *Griffin* to be taken, it will not authorize the taking of the deposition of Nancy *Griffith*, the two being separate and distinct names; *Henderson v. Cargill*, 2 G. 367. See *ante*, 10; and *post*, 34.

17. *Statement of the suit.* If in any part of a deposition it appear in what cause it was taken, and from what court the commission issued, it will be sufficient. These facts need not be stated in the caption or certificate. In this case the cause and the court appeared only from the interrogatories, and it was held sufficient; *Ib.*

IV. Deposition de bene esse.

18. *Is a statutory right: And statute must be followed.* By the common law, a deposition *de bene esse* could be taken only by consent of parties. The right to take it is derived solely from the statute, and exists only on the conditions prescribed in the statute. This right is given by statute (H. C. 861, §§ 113, 114,) in certain cases upon giving notice,

and filing the necessary affidavit, and suing out a commission to take it, and it can be exercised only on the performance of these conditions. Nor will the appearance of the opposite party, and his cross-examination of the witness, be a waiver of any of these conditions, except the notice; and a deposition taken without affidavit and commission will be irregular, and cannot be read in evidence; *Ragan v. Cargill*, 2 C. 540. And wherever the statute requires an affidavit as the ground of taking a deposition, it must be made and filed, as the statute will be strictly construed; *Saunders v. Erwin*, 2 H. 732. The Rev. Code requires commissions in all cases, and affidavits where the witnesses reside in the State—i. e., in the Circuit Court; see *ante*, 1.

19. *Witness must be produced if possible.* Where the deposition of a witness is taken *de bene esse*, in pursuance of the statute allowing it—when there is but a single witness to a material part of the claim or defence—it cannot be read if the attendance of the witness can be had. It is the duty of the party taking it to use all legal means to procure the attendance of the witness; and the temporary absence of the witness from the State at the time of the trial, if he be a resident, is not sufficient to authorize it to be read, unless the party has taken out a subpoena, and endeavored to procure his attendance; *Ellis v. Planters' Bank*, 7 H. 235. But if the party taking the deposition has had the witness regularly subpoenaed, and he voluntarily leave the State without the connivance of that party, the deposition may be read, though it be shown that the witness stated that he left the State to prevent his being examined in any case in which he had been subpoenaed, and would return as soon as court was adjourned; *Rowan v. Odenheimer*, 5 S. & M. 44. And if the deposition be taken on the ground of the witness' inability to attend court, the inability must be proven before the deposition can be read, if objection be made; *Neely v. Planters' Bank*, 4 S. & M. 113.

And so if a non-resident witness, whose deposition had been taken, come within the State, he must be produced, if his attendance can be secured; *Brewer v. Beckwith*, 6 G. 467.

20. *Notice to take.* Under the statute (H. C. 861, § 113,) notice of the taking of a deposition *de bene esse* must be given to the opposite party. Notice to his attorney will not be sufficient; but if the attorney appear and cross-examine, this would be a waiver of notice to the client. But if the notice were not reasonable, this would not be a waiver on that point unless expressly so made. And in order to make such a notice served on the attorney reasonable, he should have time after service, and before taking the deposition, of communicating with his client. Notice to the attorney at 1 o'clock to take deposition at 3 o'clock on same day, was held unreasonable, it not being shown that his client was then in the village where the notice was served and the deposition taken; *Hunt v. Crane*, 4 G. 669. See *post*, 26.

V. When Deposition taken in another Suit is Evidence.

21. *Rules in relation to.* To render a deposition taken in one case admissible in another, it must appear: 1. That the parties are the same, or in privity. 2. That the question in controversy is the same. 3. That had the testimony been different, it would have been prejudicial to the party introducing it. 4. That the verdict and judgment rendered in one case would be evidence in the other. 5. That the first suit being the one in which the deposition was taken, had a legal existence; *Harrington v. Harrington* 2 H. 701.

22. *Same: Case in judgment.* H. Harrington, as executor, sued Jephtha Harrington individually, and at law, for the recovery of certain slaves. Jephtha, in his own right and as administrator, and John Harrington, afterwards instituted a suit in equity against H. Harrington, the plaintiff in the first suit, and all the other legatees under the will of which he was executor, to recover the same slaves: *Held*, that the depositions taken in the action at law were not admissible in the chancery suit, because John Harrington was not interested in the action at law, and because his rights were not in litigation, and though he acted as defendant under the same instrument as Jephtha, defendant in the action at law, and his co-complainant in equity, yet he claimed different property; *Ib.*

23. *Same: Another instance.* An action was brought by a depositor of money, upon an agreement that it should be returned, whenever he should prove before a court of competent jurisdiction, that he had paid a certain debt to a decedent. A proceeding was had by him in the Probate Court against the administrator of the decedent, in which he took depositions proving the payment: *Held*, that these depositions were not competent in this action against the bailee; *Morrill v. Bell*, 6 S. & M. 730.

VI. Miscellaneous.

24. *In handwriting of attorney.* A deposition will not be excluded because it is in the handwriting of the party at whose instance it was taken; *Donoho v. Petit*, W. 440; but under art. 215, p. 515 of Rev. Code of 1857, the answers are required to be written down either by the witness, the commissioner, or some disinterested party in the commissioner's presence.

25. *Statute allowing depositions at law, strictly construed.* The statute allowing the taking of depositions at law, must be strictly construed, and every condition,—affidavit, issuing of commission and notice,—must be complied with; and an affidavit will be irregular and insufficient unless it show on its face the cause in which the deposition is to be taken, and also that it was sworn to before a proper officer and in the district or county in which the officer is authorized to act; *Saunders v. Erwin*, 2 H. 732; and defects of non-compliance with the statute cannot be cured by parol proof; *Ib.* See *ante*, 18.

26. *Notice.* Deposition must be taken on notice to adverse party; *Picket v. Ford*, 4 H. 246. But where due notice of interrogatories filed to take a deposition has been once given, and for any cause, the deposition is not taken under the first commission, a new commission may issue without further service of notice; it is otherwise where notice is given to take a deposition at a specified time and place; *Copeland v. Mears*, 2 S. & M. 519. And if the adverse party on being served with interrogatories to take a deposition, sign a waiver of the privilege of filing cross-interrogatories, a commission may issue *instantly*, without waiting for the lapse of ten days required by the statute; *Cook v. Martin*, 5 S. & M. 379. See *ante*, 20.

27. *Agreement as to notice: Case in judgment.* If counsel agree that notice of the taking of a deposition in an another State shall be given to a person residing there, the agreement is valid, and the notice must be given; and if the agreement be to give notice to Thos. R. Lee & Co., and it be given to Henry R. Lee & Co., a member of which latter firm attended and cross-examined, it will be bad, unless it be shown by other evidence that Henry R. Lee & Co. was the firm intended; *Bohr v. St'r Baton Rouge*, 7 S. & M. 715.

28. *Effect of amendment of pleading in deposition.* A deposition is not rendered incompetent by a subsequent amendment of the declaration as to the subject matter of the suit; *Cooper v. Granberry*, 4 G. 117.

29. *Depositions in Probate Court no part of record.* Depositions taken in the Probate Court are not necessarily a part of the record, except upon appeal to the High Court; *Lipscomb v. Postell*, 9 G. 476.

30. *Consent to take deposition as ground of continuance.* Where the court granted a continuance to a party, upon the condition that he would consent to the taking of the deposition of a witness, whose deposition could not otherwise have been taken, the condition is binding, and a deposition taken in pursuance of it is competent evidence; *Hamilton v. Cooper*, W. 542.

31. *Objections to deposition: Waiver.* Where a deposition is taken in presence of both parties, objections not then made to the deposition upon the ground that the answers are not responsive to the questions, will not be noticed; *Smith v. Williams*, 9 G. 48. But a deposition read on one trial without objection may nevertheless be ruled out on another trial, if taken irregularly; *Smith v. Natchez St. Boat Co.*, 1 H. 479.

32. *Same.* If exceptions be filed to a deposition but a few moments before the trial commences, it is the duty of the exceptor to bring them to the notice of the adverse party, and have them disposed of before the trial commences, or else he will be held to have waived them; *Herndon v. Bryant*, 10 G. 335. See *ante* 5.

33. *Leading questions: Rule: Instance.* Interrogatories for a deposition are not liable to the objection of being leading when they

only suggest to the witness so much as may be necessary to call his attention to the points on which his answers are desired; *Coopwood v. Foster*, 12 S. & M. 718; and under this rule, the following questions were held to be proper; 1. "Were you a notary public in New Orleans, and so acting in 1837? 2. Did you as such notary protest the annexed bill of exchange, and did you give notice of said protest, &c., to the drawers? If yea, declare at what time, and in what manner you gave such notice, to whom and to what place were the notices directed; and state particularly whether said notices were forwarded in time to go by the first mail that left on the day after protest;" *Saddler v. Murrah*, 3 H. 195.

See EVIDENCE, 275, *et seq.*

34. *Clerical error in describing bill referred to in interrogatory.* Where an action was brought on a bill of exchange due five days after sight, and the interrogatories to take the deposition of the notary who protested it, described the bill as due five months after sight; but the notary in giving his deposition corrects this misdescription, and proves legal demand and notice of the bill actually sued on, of which he gave a copy in his answers; it was held that the clerical error in describing the bill in the interrogatory did not vitiate the deposition, and the error should have been disregarded by the jury; *Prescott v. Francis*, 4 S. & M. 633. And a misdescription in an immaterial matter is itself immaterial: Hence, where the object of a deposition was to prove that the drawer of a bill had no funds in the hands of the drawee at a certain date, a misdescription of the bill in the interrogatories is immaterial; *Cook v. Martin*, 5 S. & M. 379. See *ante*, 10 to 16.

35. *Irregularity in, as ground for continuance and new trial.* Where a deposition is excluded from evidence on the ground that the commission issued in blank as to the name of the commissioner, this is no ground for granting a new trial to the party taking it, as it was his own fault and negligence that the deposition was irregularly taken; *Rupert v. Grant*, 6 S. & M. 433. See *ante*, 5.

See NEW TRIAL, 41.

Descent and Distributions.

See EXECUTOR AND ADMINISTRATOR, 265 to 270; PROBATE COURT, 116 to 120.

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I. Statutes.

1. *Act of 1821, H. C., ch. 44, p. 623 § 50.* By this statute, lands were to descend in the following order: 1st. To the children of the

intestate and their descendants, the children of a deceased child or grandchild to take his parents' share. 2d. To the brothers and sisters of the intestate, with right of representation to their children, as in case of children of the intestate. 3d. To the father. 4th. To the mother. 5th. To the next of kin, computing according to the rules of the civil law.

And it was provided that there should be no representation among collaterals, except with the descendants of the brothers and sisters of the intestate; and there should be no distinction between the whole and half blood, except that the whole blood in equal degrees should be preferred.

2. *Rev. Code of 1857, p. 452, sect. 14,* provides the same rule of descent, except that when the estate devolves on the father and mother, they take equally, the father having no preference.

3. *Same acts as to personalty.* Both of the acts provided that the personalty shall descend to and be distributed among the heirs in the same way and manner that realty descends.

4. *Same acts as to advancements.* The provision on this subject was: "When any of the children of a person dying intestate, or their issue, shall have received from such intestate, in his lifetime, any real or personal estate by way of advancement, and shall choose to come into partition and distribution of the estate, with the other parceners and distributees, such advancement, both real and personal, shall be brought into hotchpot with the whole estate, real and personal, descended; and such party returning such advancement, shall thereupon be entitled to his, her, or their proper portion of the whole estate so descended, both real and personal." The act of 1857 contained this added proviso: "That such advancement shall be valued according to its value at the time that said distributees received it."

5. *Same acts as to widows' share.* Both acts gave the widow dower in a third of the lands for life, and in case there were no issue or descendants of the husband, she was entitled to dower of one-half of the lands under the act of 1821, for life; and under the act of 1857, in fee. Under the last act, she was entitled to the whole estate, in preference to collateral relatives of the husband of the 5th degree, and those more remote; by the act of 1829 (H. C. 624, art. 3), she took the whole only when there were no heirs of the husband.

6. *Same: Acts as to intestate infants.* Both acts provided that in case of intestate infants, their personal estate shall descend as if they were of full age.

7. *As to bastards.* Both acts provided that "If any man shall have a child or children by a woman whom he shall afterwards marry, such child or children if acknowledged by the man, shall in virtue of such marriage and acknowledgment, be legitimate and capable in law to inherit and transmit inheritance as if born in wedlock." And the Act of 1857,

contains also the following: "And illegitimates shall inherit from their mother and from her other children, and from her kindred according to the statute of descents and distributions. By the Act of 1846 (H. C. 501, art. 2, § 4), it was provided on this subject, that "Hereafter all illegitimate children, shall inherit the property of their mothers, and from each other as children of the half-blood; according to the statutes of descent and distribution now in force in this State.

8. *Statute giving the remedy for distribution.* By the Act of 1821, H. C. 665, § 91, it is provided that, "Any person entitled to distribution in an intestate's estate may, at any time after the expiration of twelve months from the granting of letters of administration, petition the Orphans' (Probate) Court of the proper county, setting forth his claim, whereupon it shall be the duty of said court to grant a rule on the administrator to make distribution agreeably to law; but no administrator shall be compelled to make distribution at any time, until bond and security be given by the person entitled to distribution, to refund a due proportion of any debts or demands which may afterwards appear against the intestate and the costs attendant on the recovery of such debts." And by section 92, the above was applied to legatees having legacies, and the distributee was exempted from giving a refunding bond after final settlement. The Rev. Code of 1857, p. 454, art. 118, is substantially the same, except that it provides that the court shall make the rule on the administrator or executor "if in its opinion the same would be just and proper, and for the best interest of all concerned."

9. *Remedy for division of realty.* The two acts (H. C. 670, § 112 and Rev. Code 454, art. 117) made the same provisions for dividing realty, devised to two or more jointly, by petition to the Probate Court, and the appointment of commissioners also for dividing lands descended, where one or more of the heirs was under age. The Act of 1821, required notice to be given to the other heirs or devisees of the time and place of the meeting of the commissioners to make the division, but the Act of 1857, required them to be made parties to the petition for division, and to have notice before any decree was rendered. And the Act of 1822, H. C. p. 673, art. 2, § 2, directed that the division of personalty should be made "in the same manner and subject to the same regulations as are prescribed for the partition of real estate, and the commissioners appointed for that purpose shall be commissioners to divide both real and personal estate." And the Act of 1857 (Rev. Code; *Ib.*) contained the same provisions as to the manner of decreeing and making a division of personalty, and provided that "the commissioners appointed to divide the land, may also divide the personalty."

II. Who are Heirs and Distributees.

11. *Half-blood.* The brothers and sisters of the half-blood are entitled to inherit the es-

tate of an intestate leaving no wife or descendants or brethren of the whole blood; *Fatheree v. Fatheree*, W. 311: but the brothers and sisters of the whole blood are entitled in preference to those of the half-blood; *Hulme v. Montgomery*, 2 G. 105. And when all the brothers and sisters of the whole blood are dead, leaving, however, children, such children are, by right of representation, entitled in preference to the brothers and sisters of the half-blood; *Scott v. Terry*, 8 G. 65.

12. *What point of time determines the relationship.* The personal estate of a person dying intestate will go to those who are his next of kin at the time of his death, and not to those who by the death of others may become next of kin at the time of distribution. The right of a distributee is a vested interest at the time of the death of the intestate, and if he die before distribution his share will go to the next of kin, and not to those who by reason of his death have become next of kin to the original intestate; *Thompson v. Thomas*, 1 G. 152.

13. *Blood of first purchaser.* The Statute of Descents and Distributions gives no preference to the relations of one side over those of another; nor is there anything in the statute to authorize the opinion that the more remote relations of the blood of the first purchaser shall inherit before nearer relations of another stock. Therefore when H. died possessed of real estate, leaving no children nor descendants of them, nor father or mother, it was held that his collateral relations of the maternal line were entitled to inherit the estate, though derived from his father, in preference to the more remote relations of the paternal line; *Doe ex dem. Hickey v. Gilbert*, 1 H. 32.

14. *Computation of degrees.* The brothers and sisters of the mother of a *propositus* are in the third degree, and take in preference to a son of a brother of the grandmother, who is in the fifth degree; *Ib.*

15. *Whether descent or purchase: Case in judgment.* H. died in December, 1803, being entitled under an Act of Congress of that year, to a section of land as a donation claim, which was recognized by a certificate issued by the Board of Land Commissioners to his heirs and representatives in 1806, and confirmed by a patent to them in 1819: *Held*, that the heirs of H. took by descent and not by purchase and that H.'s widow was entitled to dower; *Hackler v. Cabel*, W. 91.

16. *Descent cast.* Though the ancestor hold possession under a deed which conveys no title, yet on his death the descent is cast on the heir, who may assert whatever rights the ancestor had; *McClannahan v. Barrow*, 5 C. 664.

See EJECTMENT, 16.

17. *Imperfect seizin of ancestor.* The imperfect seizin of the ancestor under an equitable title, if perfected into a legal title in the hands of the heir, is sufficient to make the land liable to be sold for the ancestor's debts under a decree of the court ordering a sale of the lands of which the ancestor died

seized: *Doe ex dem. Stark v. Gildart*, 5 H. 606.

18. *Covenant against taking as heir.* A covenant by the husband in articles of separation between him and the wife that he and his heirs would never claim any interest in the wife's estate, even if good for any purpose, will not prevent the children of the husband from inheriting from their half-brother, the heir of the wife, his estate which descended to him from the wife; *Richards v. Mills*, 2 G. 450.

See BASTARDY.

III. Remedies for Partition and Distribution.

1. The Petition.

See PROBATE COURT, 116 to 120.

19. *Is informal.* A petition for distribution is an informal proceeding and not governed by technical rules, and under it either party may introduce such evidence as may be necessary to show what judgment should be rendered, without regular and formal proceedings; and hence the administrator is not entitled to make his answer thereto a cross-petition, such course being unnecessary to enable him to make any defence he may have; *French v. Davis*, 9 G. 167; S. P., *Mundy v. Calvert*, 40 M. 181; *Anderson v. Gregg*, 44 M. 170. And the object of such a proceeding being to ascertain the amount subject to distribution, an account should be ordered; *Mundy v. Calvert*, *supra*; *Crowder v. Shackelford*, 6 G. 321. And the petition need not allege that administration was granted in the court in which the petition is filed—that will be presumed until the contrary is shown; *Frisby v. Harrison*, 1 G. 452. See *post*, 23. And it is no ground of demurrer to the petition, that it describes the defendant as administrator instead of administrator c. t. a.; *Quinn v. Moss*, 12 S. & M. 365. A petition for distribution, which neither avers a final settlement nor tenders a refunding bond, will be bad, but if it seek to have questions concerning advancements settled, it will be good for that; *Crosby v. Covington*, 2 C. 619.

See DOWER, 28.

19a. *Jurisdiction.* The Probate Court alone has jurisdiction to order distribution where there is administration; *Ragland v. Green*, 14 S. & M. 194.

2. Parties.

20. *Other distributees not necessary parties.* One of the distributees or legatees may, under the Act of 1821 (see *ante*, 8), petition for his share in the personalty, without making the others parties, but they are entitled, if within the State, to notice of the time and place of the division, just as in cases of partition of realty (see *ante*, 9). And after final settlement, the petition may be *ex parte*, without even making the administrator a party; *Pringle v. Hunt*, 2 G. 351. But if the petitioner ask for a sale of slaves, in order to a division, the other distributees must be made parties; *Shattuck v. Young*, 2 S. & M. 30. The widow and heir may proceed jointly in such a petition; *Smith v. Hurd*, 7 H. 188.

21. *All necessary parties under Rev. Code of 1857.* Under the Rev. Code of 1857 (see *ante*, 8, 9), all the distributees or heirs are necessary parties to a petition for distribution or partition of real or personal estate, and a decree for a division or partition without all the heirs being served with notice, is void; *Mundy v. Calvert*, 40 M. 181; *Murff v. Frazier*, 41 M. 408; S. P., *Porter's Heirs v. Porter*, 7 H. 106.

21a. *When administrator c. t. a. a necessary party.* A petition was filed by the heirs to set aside the probate of a nuncupative will, and for distribution, as in case of intestacy. The administrator who was appointed before the probate of the will (there being no new appointment of an administrator c. t. a. after probate), and who had administered the estate to a final settlement, was made defendant, in his character as administrator, and personally. The court set aside the probate, and decreed distribution to the heirs: *Held*, that the only proper party to the petition so far as it related to the validity of the will, was an administrator with the will annexed, and that the original administrator, in his capacity as such, ought to have been joined, and that another administrator should be appointed before a decree should be made for distribution. *Lansford v. Garner*, 12 S. & M. 559.

21b. *The administrator a necessary party.* The administrator of the estate sought to be distributed, is a necessary party to a petition for distribution. The administrator of the deceased administrator will not alone do, even where he has settled the demands, and there is a balance due by the first administrator in his hands; *Porter's Heirs v. Porter*, 7 H. 106.

21c. *Widow and heirs may join.* The widow and heirs may join in a petition for distribution; *Smith v. Hurd*, 7 H. 188.

3. Practice and Proceedings generally.

See PROBATE COURT, 116, 120. EXECUTOR AND ADMINISTRATOR, 27, 261b.

22. *Time for compelling distribution.* Distribution of an intestate's estate, though he be a minor, cannot be compelled till after the lapse of twelve months from the grant of letters of administration; *Young v. Ross*, 2 G. 556. But after that time, the distributee is entitled to have his share of the estate, and to this end may surcharge and falsify the accounts of the administrator as on final settlement; *Crowder v. Shackelford*, 6 G. 321. Whether the statute is imperative to compel distribution whenever after that time the distributee demands it; *Quære*. But however this may be, it was held no reason for refusing distribution, that a claim against the estate had been in litigation for five years and was still undetermined, it not being shown when or how, in all probability, it would terminate, since to allow administrators to retain the estate for that reason, would have a tendency to make them protract litigation unnecessarily; *Keith v. Jolly*, 4 C. 131. The statute is imperative, and the court has no right to allow the administrator to retain the property even to gather an ungathered crop;

Murdock v. Washburn, 1 S. & M. 546; *Game v. Noble*, 2 C. 156. Nor can distribution, after that time, be enjoined by a creditor; *Fort v. Battle*, 13 S. & M. 133. But if the estate be mortgaged and it be necessary for the administrator to retain it in order to pay the mortgage debt, distribution will not be ordered until that necessity ceases; *Grant v. Spann*, 4 G. 134. So, if the assets consist entirely of choses in action, distribution cannot be ordered unless all the distributees agree to receive them in that condition; *Murff v. Frazier*, 41 M. 408; S. P., *Allison v. Abrams*, 40 M. 747. The statute of 1857 is not imperative on this point; See *ante*, 8. But whilst the statute is not imperative, yet, after the lapse of twelve months, the distributee is *prima facie* entitled to distribution on executing a refunding bond; and it is the policy of the statute that distribution should be made as soon as it conveniently may be done. If there be any special reasons why distribution, or the payment of a legacy should not then be made, it is incumbent on the administrator to show it; *Packwood v. Elliott*, 43 M. 504.

23. *Petitioner may have a full settlement to ascertain his share.* The petitioner for distribution may compel the administrator to return an inventory, appraisement and account, in order to ascertain his share; *Billingale v. Young*, 4 G. 95; and may surcharge and falsify his accounts as on final settlement, and the court may order an account stated, without any formal charge in the petition of mal-administration; *Crowder v. Shackelford*, 6 G. 321. And the petitioner may also bring before the court the private individual indebtedness of the administrator to the intestate, and cause it to be brought in as assets for distribution; *Cole v. Leake*, 5 C. 767; See *ante*, 19.

24. *Petition may embrace prayer for final settlement.* If the distributee file a petition against the administrator, averring that the debts are all paid and there is a balance for distribution, this is a *prima facie* showing that the administrator should make a final account, and it will be error for the court to dismiss it on motion of the administrator, without an answer from him. The motion in such a case is an admission of the truth of the petition; *Treadwell v. Sorrell*, 1 C. 563.

25. *Account necessary. Pro confesso.* In a proceeding for distribution it will be error to render a judgment for a sum of money against the administrator, merely upon *pro confesso*, entered on the petition, without an account being taken, or any proof introduced to show the amount in his hands; *Mundy v. Calvert*, 40 M. 181. But when the petition is for a pecuniary legacy for a sum certain, no account is necessary, unless it appears that from deficiency of assets there must be an abatement or apportionment of the legacy; *Packwood v. Elliott*, 43 M. 504.

26. *Plea to the petition, overruled by answer.* When the administrator pleads to a petition of an alleged distributee, denying that

he is a distributee, and afterwards answers to the merits, the answer will overrule, and be an abandonment of the plea; *Price v. Mitchell*, 10 S. & M. 179.

27. *Answer and proof must not be inconsistent.* An administrator cannot, at the hearing, set up a defence to a petition for distribution inconsistent with his answer; and hence, if the answer rely upon a delivery of the distributee's share to the commissioner appointed to make division of the personalty, he cannot, at the hearing, show that the delivery was made to the distributee himself; *Bradley v. Byrd*, 12 S. & M. 269.

28. *Set off of distributee's debt against his share.* Where a distributee of an estate is also indebted to the estate, for property purchased from the administrator, and the debt has been reduced to judgment, the probate court will order his distributive share to be set off against the indebtedness; *McGee v. Ford*, 5 S. & M. 769; S. P., *Anderson v. Gregg*, 44 M. 170.

Where the account of an administrator is contested by one of the distributees, who seeks to hold him liable for the price of a slave not embraced in his accounts, and the administrator seeks to set off against that the board, maintenance, and education of the distributee; and the parties agree to the jurisdiction of the court, it is a case peculiarly fitted for the consideration of a jury under the statute H. & H. 472, §§ 17, 18. But if the parties agree to the trial by the court, it will be correct; *Price v. Mitchell*, 10 S. & M. 179.

29. *Commissioners to divide realty and personalty.* The statutes (H. C. p. 670, § 112, and *ib.* 673, § 2, *ante*, 9), provide that the real and personal estate of a decedent shall be divided among the heirs by the same commissioners, but it does not require the division of both estates to be made and reported to the court at the same time. The statute is designed alone to save expense; and if one kind of estate (as personal), be divided, and the division be otherwise unobjectionable, it should not be set aside because the realty was not divided; for this would be to increase the expense contrary to the design of the statute; *Calhoun v. Rail*, 4 C. 414.

29a. *Power of commissioners.* Commissioners appointed by the probate court to make a distribution of personalty, are entitled to view and examine it, but they have no legal power over it, or custody of it, which still remains with the administrator, whose duty it is to make distribution according to the order of the court; and it is no answer to a petition by a distributee for a delivery of the property, for the administrator to set up that it has been delivered to the commissioners; *Bradley v. Byrd*, 12 S. & M. 269.

30. *A decree to distribute, without order of execution.* A decree which merely directs an administrator to pay over a sum ascertained to be due, without ordering execution to issue therefor, is in effect an order "to make distribution according to law;" and if made before final settlement, cannot be enforced

until a refunding bond is given. *French v. Davis*, 9 G. 167.

31. *Decree of choses in action to distributee.* Where in a decree for distribution of the wife's share in an estate, the note of the husband to the administrator then in process of collection by suit, is adjudged to be delivered to the wife, as a part of her share, it should also be provided by the decree, that the costs which have accrued in that suit should not be cast on the estate; *Ib.*

32. *Money allowable to make shares equal.* In making a division of personalty, the commissioners may require distributees getting the most valuable lots to equalize them with the others, by paying the difference to those getting lots less valuable, where an equal division cannot otherwise be made; and the Probate Court has jurisdiction to decree that such difference shall be paid, and to cause it to be a charge on the lot of that distributee who is directed to pay it; *Calhoun v. Rail*, 4 C. 414.

33. *When distribution final and complete.* A division of the personal property of a decedent by commissioners appointed by the Probate Court, although possession be given to each distributee in severalty, is not final until reported to and confirmed by the court; and if any of the personalty thus divided be destroyed, without the fault of the distributee, before confirmation, this is good ground for a refusal to confirm, and for a new division of the remainder; *Ib.*

34. *Effect of distribution.* Distribution confers no new title, but merely fixes and ascertains the share which the distributee shall hold in severalty under his own title; *Thompson v. Thomas*, 1 G. 152.

34a. *Decree in Probate Court necessary.* An action cannot be maintained on an executor's bond by a residuary legatee for his legacy, until the residuum has been ascertained and fixed by decree in the Probate Court; and the same rule applies to an action by a distributee for his share in the general balance of the estate; *Jones v. Irvine's Ex'or*, 1 C. 361; *Steen v. Steen*, 3 C. 513.

34b. *The ten per cent. damages.* The ten per cent. damages allowed by the Act of 1839 to a distributee against an administrator, when he is compelled to sue on the bond for his distributive share, is not allowable, when the bond was executed before the date of the act; *Steen v. Finley*, 3 C. 535.

34c. *Form of decree.* A decree in the Probate Court for a pecuniary legacy may be enforced by execution *de bonis testatoris*, but not against the land; *Packwood v. Elliott*, 43 M. 504.

34d. *Distribution of choses in action.* The administrator cannot distribute the choses in action of the estate, unless the distributees will consent to receive them; *Murff v. Frazier*, 41 M. 408; *Anderson v. Gregg*, 44 M. 70. But the fact that there are choses in action for distribution does not prevent the distribution of the money and other property on hand; the law contemplates a distribution whenever there are assets ready for distribution; and

as often as that may occur; *Anderson v. Gregg*, *supra*.

34e. *For distribution in chancery*, see EXECUTOR AND ADMINISTRATOR, 269.

4. Advancement and Hotch-pot.

See ADVANCEMENT.

35. *Widow not affected by.* The widow of a person dying intestate is not affected by advancements made to the children, or to a portion of them, in the life-time of her husband, but her share is a third part of all the personalty which shall remain after the payment of her husband's debts; *Whitley v. Stephenson*, 9 G. 113; S. P., *Jackson v. Jackson*, 6 C. 674.

36. *How advancement brought into hotch-pot to be charged.* In a decree ordering distribution, an advancement made to one of the children, and brought into hotch-pot, should be charged to the distributee receiving it; but it will be improper to charge it to the administrator, and thus increase the balance in his hands subject to distribution; *French v. Davis*, 9 G. 167.

37. *Same: Title to the property.* When property is brought into hotch-pot, under the statute, by a distributee who has received an advancement, it does not thereby become a part of the actual *corpus* of the estate to be distributed; but its value at the time of the advancement is added to the *corpus* of the estate before division; and when the share of each is thus ascertained, the value of this property is deducted from the share of the distributee to whom it belongs, and he receives property for the balance; his title to the property is not at all affected by the bringing it into hotch-pot, and the valuation of the property advanced is to be charged as at the date of the advancement; no increase, or profits, or interest, is allowed against the party advanced, who is considered from the time of the advancement as the true owner, and entitled to the gains, and liable also for the loss, destruction, or deterioration in the property; *Jackson v. Jackson*, 6 C. 674.

38. *When all distributees advanced equally.* When it is shown that all the distributees have been advanced equally, it is unnecessary to bring the advancements into hotch-pot; but distribution may be made of the estate as if no advancements had been made; *Cole v. Leake*, 5 C. 767.

39. *Power of Probate Court to bring realty into hotch-pot.* A petition was filed in the Probate Court against an administrator asking for distribution of personalty in his hands, and that the advancements of realty and personalty made by the ancestor be brought into hotch-pot; and it was stated by the court, *arguendo*, that it was not competent for the Probate Court to take cognizance of the realty given to the heirs and to bring it into hotch-pot; *Ib.*

39a. *Jury trial.* When the advancements have been made in cattle which cannot be returned, or in trivial sums, the transactions taking place many years before the trial, an issue to a jury will be proper; *Crosby v. Covington*, 2 C. 619.

5. Sale for Partition and Distribution.

40. *Sale of slaves for division.* Under the statute of 1822, Poindexter's Code p. 50, § 82, which provides for the sale of slaves for a division among the distributees, it is immaterial whether the petition for the sale be filed by the administrator or the distributees; so that all the parties in interest be made parties, either plaintiffs or defendants, and all have notice; *Nabors v. McKay*, 5 C. 799; S. P., *Hutchins v. Brooks*, 2 G. 430; *Shattuck v. Young*, 2 S. & M. 30.

41. *Same: Petition: Case in judgment.* Where the petition of a distributee for the sale of a slave for distribution, did not state the condition of the estate, nor the time when administration was granted, nor show the necessity for a sale on account of inability to divide the property of the estate in specie, by dividing other personalty with the slave; it was held that it was doubtful whether a decree for sale could be rendered on so vague a petition; *Shattuck v. Young*, *supra*.

6. The Refunding Bond.

42. *Object and extent of refunding bond.* The statute requires the court to order distribution, after the lapse of twelve months from the grant of letters, upon the distributee executing a refunding bond, with good security. This bond is designed not only to protect creditors, but also the claims of distributees, whose rights have been pretermitted in the decree. Hence it is no objection to granting a decree distributing the whole estate to one who is apparently sole heir, that the administrator suggests that there are others claiming to be heirs; *Benoit v. Brill*, 7 S. & M. 32.

43. *Same.* A refunding bond is intended to protect the administrator against debts which may be thereafter established against the estate, whether such debts were at the time of distribution known to the administrator or not; *Keith v. Jolly*, 4 C. 131. But such bond will not cover debts due to the administrator at the time of distribution; it was his duty, if any then existed, to have presented them for allowance in that proceeding; *Cole v. Leake*, 2 G. 131.

44. *When there is a breach of the bond, and how ascertained.* Whether there is a deficiency of assets to pay debts thereafter established, and the extent of it, can only be ascertained by a settlement in the Probate Court; and, therefore, a court of equity will not, where a refunding bond has been given, set off against a claim which the obligor in the bond has against the administrator, the obligor's *pro rata* share of a debt established against the estate until a deficiency of assets, and the obligor's consequent liability to refund, has been first established by the Court of Probate; *Ratliff v. Davis*, 9 G. 107.

45. *Before final settlement, refunding bond necessary.* Distributees are not entitled to distribution until a final settlement has been made, unless they first execute, or offer to execute, a refunding bond, and the same

rule applies to legatees; *Cannon v. Benson*, 4 C. 395; S. P., *Harmon v. Thompson*, 2 H. 808; *Carmichael v. Browder*, 3 H. 252; *Berry v. Parks*, 3 S. & M. 625; *Murdock v. Washburn*, 1 S. & M. 546; *Crosby v. Covington*, 2 C. 619. But the offer to execute it may be made in the petition, as the administrator would not be bound to make distribution until the bond is made; *Keith v. Jolly*, 4 C. 131. The offer in the petition is sufficient; the bond need not be filed with it; *Richmond v. Delay*, 5 G. 83. And even a decree may be made, ordering distribution, and fixing the amount to be distributed, without ordering in the decree a refunding bond to be executed, if no execution on the decree be awarded; for in such a case an execution of the decree would not be allowed, until the bond was executed; *Mundy v. Calvert*, 40 M. 181; S. P., *French v. Davis*, 9 G. 167.

A specific legatee is entitled to recover his legacy before final settlement, without giving a refunding-bond, if it be shown affirmatively that there are no debts chargeable on the legacy; and hence, in a suit at law to recover the legacy, it is a proper question to propound to the witness, to ask if there be any debts of testator still unpaid; *Magee v. Gregg*, 11 S. & M. 70; confirmed in *Magee v. Harrington*, 13 S. & M. 403.

See EXECUTOR AND ADMINISTRATOR, 90.

45a. *Bond no release for heir.* A recital in a refunding bond, given by the specific legatee of a slave, upon delivery of the legacy to him, "that the executor is thereby discharged from all liability and claim on account of such legacy," is no discharge to the executor of liability to account for hire of the slave, which he had received; *Fonte v. Horton*, 7 G. 350.

IV. Distribution to Life Tenant.

45b. *Effect of.* A distribution by the executor, to the tenant for life of a chattel bequeathed to the distributee for life, remainder to another, is a full and complete act of administration and distribution of the chattel, both as to the first taker and the remainder man; *Judge of Probate v. Alexander*, 2 G. 297; *Andrews v. Brumfield*, 3 G. 107.

46. *Delivery to distributee under agreement.* A delivery, by the administrator, of a personal chattel to one of the distributees, under an agreement among the heirs, that the distributee is to hold the chattel for life, remainder to them in fee, is a full and complete act of administration as to the chattel, and is distribution of it to all the distributees; *Lusk v. Swayze*, 6 G. 155.

As to jurisdiction of Probate Court to order distribution to remainder man, see PROBATE COURT, 21.

46a. *Same.* When a specific legacy is given to one for life, remainder to another, a delivery by the executor of the legacy to the life tenant, is an assent to the legacy, and enures to the remainder man; and such delivery is also a full administration of the legacy, and it no longer remains unadminis-

tered assets, and is not included in an order to the administrator *de bonis non* to sell the unadministered estate; and moreover, on the death of the tenant for life, it will go to the remainder man, and if he be then dead, will go to his executor, whose right is superior to all others: *Magee v. Gregg*, 11 S. & M. 70; S. P., *Hall v. Hall*, 5 C. 458.

V. Pretermitted Distributees.

47. *Effect of pretermission on administrator.* When the Probate Court has decided in the decree for distribution, who are the distributees, the administrator acting in good faith and distributing the assets according to the decree, will not be responsible to a distributee who has been pretermitted in the decree. *Aliter*, where the administrator decides for himself who are the distributees; *Loury v. McMillan*, 6 G. 147.

48. *Refunding bond covers claim of.* A refunding bond given by one who got distribution as sole distributee, covers the claim of any distributee who may be pretermitted; and the court will not therefore refuse distribution to one apparently the sole distributee, upon a mere suggestion that there are others claiming to be distributees; *Benoit v. Brill*, 7 S. & M. 32.

49. *Jurisdiction of Probate Court as to such distributee.* The Probate Court, and not chancery, has jurisdiction to relieve a distributee entirely omitted in the distribution of the estate; *Gaines v. Smiley*, 7 S. & M. 53.

VI. Widows' Distributive Rights.

See WIDOW, and *post*, 60.

50. *Her rights the same as other distributees.* The widows' right to compel distribution is the same in all respects as the rights of the other distributees; *Grant v. Spann*, 4 G. 134.

51. *She need not renounce will making no provision for her.* If there be no provision for the widow in the husband's will, she need not renounce it to entitle her to distribution, just as in case he died intestate; *Roberts v. Roberts*, 5 G. 322. But if provision be made for her, she must renounce before the expiration of six months from the probate of the will; she is not entitled to renounce at the sixth monthly term of the Probate Court, after probate, if it be after the full expiration of six months; *Ex parte Moore*, 7 H. 665.

See DOWER, 6, 7, 8.

52. *Effect of her separate estate on her rights.* Her distributive share in the personality of her deceased husband is not affected by her owning separate estate, but it seems her right to dower in the realty is. See Rev. Code of 1857, p. 357, art. 30; *Whitley v. Stephenson*, 9 G. 113.

See DOWER, 16.

53. *Exempt property.* She is entitled to the exempt personal property of her husband in addition to her distributive share; *Ib.* See *post*, 60. DOWER, 28.

VII. Miscellaneous.

54. *Heir may sue for, without administration.* If an infant die so young that he could not possibly owe debts, his heir may sue for and recover his personality, without the appointment of an administrator; *Hargroves v. Thompson*, 2 G. 211. And so if an adult die without owing debts, his heirs may sue for and recover his personal estate, without an administrator; *Maxwell v. Craft*, 3 G. 307; S. P., *Manly v. Kidd*, 4 G. 141; and in such a case the statute of limitations will run against the heirs in favor of an adverse possessor, though no administrator was ever appointed; *Manly v. Kidd*, *supra*.

55. *Voluntary distribution.* A voluntary distribution made by the distributees—all being *sui juris*—is binding on all, but if some be infants, it is invalid as to them, and may be disaffirmed by them, and upon such disaffirmance the distribution will be annulled *in toto*, and the rights of each, both adult and infant, will remain choses in action until a valid distribution be made; *Kilcrease v. Shelby*, 1 C. 161.

When a voluntary distribution is made among the heirs by their consent, they will, in the absence of proof to the contrary, be presumed capable of consenting to it; *Henderson v. Clark*, 5 C. 436.

56. *Jurisdiction of Probate Court, as to.* The Probate Court cannot take jurisdiction of disputed titles to property, and decree an adverse holder to surrender it to a distributee; nor can it decree distribution of an estate when there is no administration, the property being in the hands of a stranger; *McRea v. Walker*, 4 H. 455.

57. *Same: As to assignments of distributee's shares.* The probate court has no jurisdiction to enforce an assignment made by a distributee of his share in the estate; *Hill v. Hardy*, 5 G. 289. And a decree directing such share to be paid to the assignee is void; *Portevant v. Neylans*, 9 G. 104.

58. *Levy of execution upon distributee's share.* A judgment creditor of a distributee, cannot levy his execution upon a portion of the undistributed personality of the estate, merely because the interest of his debtor in the estate is of greater value than the property seized; *Hancock v. Titus*, 10 G. 224.

59. *Election as to hire or profits.* Where an administrator carries on the plantation of deceased, without an order of court, he is liable for hire and rent, or net profits, at the election of the distributees; and the election when once made is irrevocable. And if the distributee does not expressly elect in his petition to take hire and rent, it will be considered that he has elected to take the profits. He must make the election in his petition; *French v. Davis*, 9 G. 167; *Billingslea v. Young*, 4 G. 95. And it seems he is not entitled to an account and discovery from the administrator before he is compelled to make his election; *Billingslea v. Young*, *supra*.

60. *Widow's right under Revised Code of 1857, p. 452, art. 110, when husband was domiciled in another State.* The statute

Rev. Code of 1857, p. 452, art. 110, which enacts that "all personal property situated in this State, shall descend and be distributed according to the laws of this State, regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other States, and notwithstanding the domicile of the deceased may have been in another State, and whether the heirs or persons entitled to distribution be in this State or not, and the widow of such deceased person shall take her share in the personal estate according to the laws of this State," applies only to cases of descent and distribution, technically; that is, where the ancestor or husband died intestate. Hence, if the husband, domiciled in another State, made a will, and the widow renounce it, this not being a case of intestacy, is not within the statute, and such renunciation will not give the widow a right to share in the decedent's personalty in this State, otherwise than according to the law of the husband's domicile; *Slaughter v. Garland*, 40 M. 172.

61. *Nature of title: Statute.* That provision of the statute of distributions, which enacts that personal estate shall "descend in the same way and manner," as real estate, was intended to regulate the course of descent, rather than the nature of the title conferred; *Cable v. Martin*, 1 H. 558. But where there are no debts, and no administration, the distributees, without any act of distribution, are so far invested with the title to personalty, as to enable them to sue for and recover it (in equity), and the statute of limitations will run against them; *Manly v. Kidd*, 4 G. 141; *Wood v. Ford*, 7 C. 57.

62. *Levy: Distributees' share.* A judgment against an administrator, before distribution, is a lien on all the personalty in his hands; and an execution emanating therefrom, may be levied on any of it, and entirely on the share of one distributee whose remedy, if he has any, is by suit in chancery against his co-distributees for contribution; *Vanhouten v. Reily*, 6 S. & M. 440; *S. P., Brooks v. Lewis*, 1 H. 207. These two cases, confirmed in *Smith v. The State*, 13 S. & M. 140; and *Turner v. Chambers*, 10 S. & M. 308, which held that the creditor's remedy was in equity, overruled.

63. *Same.* But an execution against a distributee cannot be levied on a portion of the undistributed personalty of the estate, merely because the interest of the debtor is greater than the portion levied on; *Hancock v. Titus*, 10 G. 224.

See DOWER, 32. See EXECUTOR AND ADMINISTRATOR, 262, et seq. See CONFLICT OF LAWS, 29, et seq. PROBATE COURT, 116, et seq.

Detainer.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER.

Detinue.

See REPLEVIN. TRIAL OF RIGHT TO PROPERTY.

1. *Where it lies: Possessory title.* Possession by the plaintiff is alone a sufficient title to maintain an action of detinue against a party who has dispossessed the holder, until a right to dispossess be shown; *Berry v. Hale*, 1 H. 315.

2. *Same: Defendant must be in possession.* In an action of detinue possession by the defendant must be proven, but it is not necessary that it should continue until the commencement of the suit. The old possession will do unless it has been lawfully discontinued. Thus where an administrator of one who is entitled to a slave only for his life, gets possession of the slave and before the commencement of the suit was dispossessed by a wrongful levy on the slave under an execution against him as administrator, it was held that this did not defeat the right of the remainder man to sue the administrator in detinue for the slave; *Lowry v. Houston*, 3 H. 394. But in the later case of *Davis v. Herndon*, 10 G. 484, it was decided that the defendant must be in possession when the suit was commenced. The rule is the same in replevin.

See REPLEVIN, 2.

3. *Payment or release of assessed value: Obligation of plaintiff to take it.* If the specific property recovered in detinue cannot be had, the plaintiff must take the alternate value assessed, and if that, under a mistake of law, be partially released by the plaintiff, this does not enable him to bring a new action of detinue in another State, for the same property; *Jennings v. Gibson*, W. 234. And such new action cannot be sustained, whether the judgment for the assessed value be paid or not; *Ib.* And so, if a female slave be recovered in detinue, and the plaintiff cannot get her, but must take her assessed value, a new action cannot be maintained to recover her issue born subsequent to the rendition of the judgment; *Ib.* But the defendant has no right to retain the property by paying the assessed value, but may be forced to give it up; *Jordan v. Thomas*, 5 G. 72.

4. *Assessment of alternate value: Evidence and amount.* The *descriptio rei* contained in the declaration in an action of detinue for a slave, is sufficient, without any evidence as to value, to enable the jury to assess some value for the slave; and if the defendant has power to deliver the slave it is immaterial how much may be assessed; *Jennings v. Gibson*, W. 234. But in *Parr v. Gibbons*, 5 C. 375, it was said that slaves are a species of property, to which in the estimation of the public, there is always some value attached; and that therefore the court would not be prepared to set aside a verdict assessing value in an action of detinue if it be in the power of defendant to surrender the slave, when there is such a *descriptio rei* in the testimony as to enable the jury, from their knowledge of such values, to assess the value from the description, there being no other evidence of value. The court said however, that *Jennings v. Gibson*, *supra*, in holding that the assessment might be made from the *descriptio rei* in the declaration had gone further than any other precedent, and

further than they were disposed to follow: *Parr v. Gibbons, supra.*

5. *Same: Form of verdict, separate value of each article.* The verdict, if for the plaintiff, in an action of detinue, for several distinct kinds of articles, should state the separate value of each, but it will be a sufficient compliance with this rule if five horses be valued together at a sum in gross; and so of "100 head of hogs," and "100 head of cattle," "1 lot of pork," "lot of cows," "25 bales of cotton," "lot of fodder," "lot of oats," "sheep," "goats," "8 mules;" all these being embraced in the suit. And trials of the right of property levied on under an execution, where a third party is claimant, are by statute regulated by the rules governing actions of detinue; *Walker v. Commissioners of Sinking Fund*, 1 S. & M. 372.

6. *Same.* But the rule does not extend so as to exclude from a valuation in gross, articles which, though distinct, are necessary parts of a whole; and hence it will not be error to assess the value of a "sawmill, irons and the apparatus for running the same," as a single article; and so of the "hopper and apparatus" of a mill; *Kibble v. Buller*, 14 S. & M. 207. And "a carriage and harness" may be assessed as one article, but the horses must not be assessed with the carriage and harness; *Drane v. Hiltzheim*, 13 S. & M. 336.

6a. *Same: Case in judgment.* The declaration described most of the slaves by name and age, and one of them by name and complexion, and one by name, age and complexion; the mules, by their color; one animal was mentioned as a bay mare five years old, while "two yoke of oxen, one wagon, six head of cattle and nineteen hogs" are named without other description. The verdict was for the slaves by name; the mules by their color; one bay mare; one ox-wagon; one milch cow; five head of yearlings at \$16.20 each; nineteen hogs at \$8.10 each; and the judgment followed the verdict: *Held*, that the description and finding were sufficient; *Whitfield v. Whitfield*, 44 M. 254. See REPLEVIN, 18, 23.

7. *Correction of erroneous assessment in gross.* Where the jury find an assessment in gross only, the court cannot, without their consent, amend the verdict so as to show a separate assessment, but must call a new jury for that purpose; *Walker v. Commissioners of Sinking Fund, supra*; *Carraway v. McNeice*, W. 538; *Merrill v. Melchior*, 1 G. 516; S. P., *Dearing v. Ford*, 13 S. & M. 269; *Drane v. Hiltzheim*, 13 S. & M. 336. These two last cases were in replevin.

8. *The writ is a demand.* In an action of detinue the service of the writ is a sufficient demand for the property, where a demand is necessary; *Carraway v. McNeice*, W. 538.

9. *Jeofails.* After verdict in detinue for several chattels, it cannot be objected that the declaration is insufficient in not stating the separate value of each; *Jordan v. Thomas*, 2 G. 557.

10. *Revivor of.* Whether an action of detinue could at common law, on the death of the plaintiff be revived in the name of his execu-

tor; *Quere?* But it is clear that it can be revived under the statute (H. & H. 414, § 95,) which declares that all actions for or against an intestate or testator (except actions of slander, and for injuries or torts done to the person) shall survive for and against the executor and administrator; *Worten v. Howard*, 2 S. & M. 527.

11. *Use in action of detinue.* In this action the legal title alone is in controversy. The court takes no notice of equities, and hence the introduction in the declaration of the name of a usee is unwarranted, and if it be inserted it will be treated as surplusage; *Hundley v. Buckner*, 6 S. & M. 70.

12. *Increase of slave recovered:* In detinue for a slave, her increase born pending the suit may be recovered; *Jordan v. Thomas*, 2 G. 557.

13. *Divestiture of title after suit brought.* Where after suit brought the title of the plaintiff, which was for a limited time, expires, and thereupon the plaintiff and defendant and others, became entitled jointly under the limitation over, this will be a good defence to the recovery of the chattel; but it must be pleaded *puis direin* continuance; in such case the plaintiff can recover nothing but damages for the detention till the time of the expiration of his right, and costs; *Whitfield v. Whitfield*, 44 M. 254.

14. *As to rule when property is destroyed after suit brought.* See DAMAGES, 98.

15. *Legal eviction pending suit.* If the defendant be legally dispossessed, it is a defence to the action; *Whitfield v. Whitfield, supra.*

16. *Sale of the chattel pending suit.* If the plaintiff sell the chattel sued for, pending the action, it is a good defence, for he must not only have the title when the suit commenced, but also at the trial; *Ib.*

Devisavit vel non.

See WILLS, 124 to 126. PROBATE COURT, 121 to 128.

Discontinuance.

See PRACTICE, sub-division Discontinuance.

1. *Right of plaintiff to discontinue:* As to one of several joint and several debtors. Where service of process has been had on all the makers of a joint and several promissory note, the plaintiff may discontinue as to a part, and proceed to judgment against the others; *Peyton v. Scott*, 2 H. 870; *Lynch v. Commissioners of Sinking Fund*, 4 H. 377; *Montgomery v. Commissioners of Sinking Fund*, 7 H. 13; *Nevitt v. Natchez Steamboat Co.*, 5 H. 196; *Lyons v. Gilmore*, 1 H. 474. And the suit may be dismissed as to the principal of a note, and prosecuted against the surety if they be joint makers; *Wilkinson v. Flowers*, 8 G. 579.

2. *Same: Where makers and endorsers are sued.* But where there is a joint action against makers and endorsers, under the statute, it will be error, after service of process on all, to discontinue as to the makers, and take judgment against the endorsers; *Wilkin*

son v. Tiffany, 5 H. 411; *Brunson v. Lea*, 5 S. & M. 149; *Boush v. Smith*, 2 S. & M. 512. And so if the maker die, it will be error to discontinue as to him, since the suit can be revived against his administrator; *Smith v. Crutcher*, 5 C. 455; *Duncan v. McNeill*, 2 G. 704. But if the process be returned not found as to a maker, this creates a presumption of non-residence as to him, and the plaintiff may, if the defendant do not rebut this presumption by proof, discontinue as to him and proceed to judgment against the others; *Harrison v. Agricultural Bank*, 2 S. & M. 307. Yet the suit may be discontinued as to one or more of the endorers, if no party be retained who is liable secondarily to the party as to whom the discontinuance was entered; *Kirk v. Seawell*, 2 S. & M. 571; S. P., *McGrath v. Hoopes*, 4 C. 496; *contra*, *Wells v. Patterson*, 7 H. 32, now overruled. But if no process can be served on the party, as to whom a discontinuance is entered, it is correct; *Smith v. Crutcher* and *Duncan v. McNeill*, *supra*. In *Vickery v. Restor*, 4 H. 293, it was held that the plaintiff could discontinue as to a prior endorser, and take judgment against the maker and subsequent endorser; but this is now overruled.

See *BILLS OF EXCHANGE*, &c., 164c, *et seq.*

3. *Where one of several joint makers dies.* Where one of several joint makers of a note sued in the same action dies, the plaintiff may either revive against his representatives or discontinue as to him; and he may also discontinue as to the survivors and proceed to judgment against the representatives of the decedent; *Woodhouse v. Lee*, 6 S. & M. 161.

4. *Discontinuance after verdict in trover.* The plaintiff, in an action of trover, has the right to discontinue after verdict, as to one or more of the defendants, against the objections of the others; but what effect this will have upon the liability of the others, will not be determined upon a writ of error from that proceeding; *Baldwin v. McKay*, 41 M. 358. In all actions of tort, the plaintiff, after verdict against all though they joined in the plea, may discontinue as to part, and take judgments as to the others; *Hardy v. Thomas*, 1 C. 544.

5. *Discontinuance in scire facias.* The entry of a discontinuance as to one defendant in a *scire facias*, to revive a judgment against two or more, is ordinarily a discontinuance as to the others; but if the others do not object, and do not insist on the entry of a discontinuance as to them, but go to trial on a plea to the merits, and there be a verdict against them, the error will be cured by the statute of jeofails; *McAfee v. Patterson*, 2 S. & M. 593.

6. *Discontinuance by failure to enter judgment on verdict.* When a verdict is rendered and no judgment entered thereon at that term, the court must at that term give a day at which it will render judgment, which day must not be beyond the next term; and if this be not done, and the cause goes off the docket, it is a discontinuance of the suit, and judgment cannot afterwards be rendered on

it; nor is such a case within the statute of 1822 (H. C., p. 877, § 96), allowing parties on notice to amend judgments. *Ralph v. Preston*, 6 C. 744. And even if in such case the rendition of a judgment, without giving such day, was a matter in the discretion of the court, it would not be allowed after the lapse of seven years,—the time in which an execution would be barred, if a judgment had been entered when the verdict was returned; *Ralph v. Preston*, *supra*.

7. *Taking judgment against a part of the defendants and continuing as to the others.* Though it be error for the plaintiff to take judgment final by default against a part of the defendants, and continue as to the others, yet this does not authorize the court to enter a discontinuance as to those against whom judgment was not entered. *Prewett v. Caruthers*, 7 H. 304. And in an action commenced against the makers and endorers of a note a judgment final, by default was entered against two of the parties and the cause continued as to the plaintiff in error; at the next term the cause was dismissed as to the two against whom judgment by default had been rendered, and a trial was had and judgment against the plaintiff in error. No exceptions was taken in the court below to either judgment; it was held that the verdict and judgment against plaintiff in error would not be set aside; *Hunt v. Nugent*, 10 S. & M. 541.

See *PRACTICE*, 11.

8. *When discontinuance necessary.* When several are sued and there is no service on one, it will be error to proceed to trial and judgment as to those served, without entering a discontinuance as to the others not served; *Davis v. Tiernan*, 2 H. 786; *Hughes v. Evans*, 4 S. & M. 737.

See *PRACTICE*, 12.

9. *Discontinuance by failure to enter judgment nil dicit.* An old rule of practice was, that when the defendant's plea professed to answer a part only of the declaration and was in fact an answer only of a part of the plaintiff's demand, if the plaintiff demurred, or replied without taking judgment *nil dicit* for the part unanswered, that this operated as a discontinuance of the whole action. But this rule is technical, and if in force now, will only be recognized to the extent of allowing the failure to take judgment *nil dicit* to operate as a discontinuance when a motion is made on that ground for a discontinuance, and upon that, the plaintiff still neglects to enter judgment *nil dicit*; *Harrison v. Balfour*, 5 S. & M. 301.

See *PRACTICE*, 9.

10. *Discontinuance when judgment by default is entered on one count.* Judgment by default on a special count without entry of a discontinuance as to the common counts is not error; *Soria v. Planter's Bank*, 3 H. 46.

11. *Discontinuance from failure to reply.* The failure of the plaintiff to reply to a plea of confession and avoidance amounts to a discontinuance which may be taken advantage of by defendant at any time before verdict; *Hogue v. Lewellen*, 42 M. 302.

Discovery at Law.

See BILL OF DISCOVERY AT LAW.

Disseisin.

See ADVERSE POSSESSION.

1. *Heir may disseise co-heir.* An heir may disseise his co-heirs and hold adversely to them; and notwithstanding he entered originally as heir, he may afterwards disseise his co-heirs and acquire exclusive adverse possession, on which the statute of limitations will run against his co-heirs in his favor; *Iler v. Routh*, 3 H. 276. And a sale of the whole interest in the land and putting his vendee in possession, who claims the whole interest, is a disseisin; *Ib.*

Distress.

See LANDLORD AND TENANT.

1. *Nature of a distress for rent.* A distress for rent is not the commencement of a suit; it is a mandate authorized by law to be issued in a proper case, to seize and sell the tenant's goods for the satisfaction of the rent, just as if a judgment had been previously rendered therefor, and it is not returnable into any court; *Towns v. Boorman*, 1 C. 186; *Canterberry v. Jordan*, 5 C. 96. And if returned into court as other attachments and a judgment be rendered in that proceeding, it will be void; but the void judgment will not vitiate the distress warrant; and the lien created by a seizure under it and a sale under it will be good; *Canterberry v. Jordan*, *supra*. If the tenant disputes that there is rent due he has an action of replevin upon giving the proper bond, which is the commencement of the suit: *Towns v. Boorman*, *supra*.

1a. *Same: Lien of landlord.* At common law the distress was a dormant right of the landlord to seize the tenant's goods as a means of compelling payment of the rent. The right was a mere right to seize for rent, and was utterly impotent and in no wise encumbered the title of the tenant till it was exercised; and the right of distress under the statute is no greater, and exists not because of any lien at the common law or by statute, but because of rent in arrear, or threatened removal of the goods, by the tenant. Subject to this right of seizure under a distress, to be made active only by its exercise, the tenant is as completely the owner of his goods on the demised premises as any other debtor, and excepting this privilege of seizure, the landlord has no advantage over other creditors; *Stamps v. Gilman*, 42 M. 456.

See LANDLORD AND TENANT, 7 and *post*, 17.

2. *Where a distress for rent lies.* A distress for rent under our statute, is allowable only when there is a special contract fixing the amount of the rent and the relation of landlord and tenant. If the lease be shown, still the price or amount of the rent must also be shown, and the landlord will not, on the trial of an action of replevin by the tenant, be allowed to prove the reasonable value of

the rent. But the avowant, or landlord, may, in order to show a lease, prove that on a prior distress for rent of the same premises, the tenant executed a three months' bond under the statute, conditioned for the payment of the rent. But the giving of the bond alone will not do to sustain the distress. And so, if the bond be lost, its contents must be shown so as to fix the amount of the rent agreed on; *Tift v. Verden*, 11 S. & M. 153.

2a. *No distress when there is no fixed price, or where rent is payable in services.* There is no distress for rent, where there has been no fixed price for rent, nor where the rent is to be paid for in services, and there is no fixed price for the services. The remedy will lie, though the rent be payable in grain or other produce, or in shares or labor, if the price of these be fixed and stipulated in the contract; *Briscoe v. McElween*, 43 M. 556.

2b. *Distress before rent due.* A landlord may not lawfully distrain the goods of his tenant for rent not due, upon his mere belief, that the tenant will remove his property from the demised premises, before the rent will become due; but he must have evidence upon which to base his belief. Without such evidence the distress is wrongful, and the landlord will be liable for such damages as may result therefrom; *Ib.*

2c. *Distress for removal of goods before rent due.* It is not every contemplated removal of goods from the demised premises that will justify a distress for rent before it is due. The removal must be such as would endanger or defeat a distress for rent; *Stamps v. Gilman*, 43 M. 456.

3. *Lies against executor of tenant.* By the common law, and by the statute 32 Henry VIII., c. 37, the remedy by distress for rent was confined to the lessor himself and his representatives, against the tenant for life, or in tail, and his representatives, but did not extend to the executors of tenants for years; but our statute, H. C. 812, § 22, extends the remedy expressly against representatives of tenants for years, *Smith v. Bobb*, 12 S. & M. 322.

4. *Distress of cattle damage feasant.* The owner of land may distrain cattle *damage feasant* thereon, if it be enclosed by a lawful fence, and keep them as a pledge for the payment of the damages occasioned by the trespass—the owner of the cattle in such case being liable. But the right of distress does not exist, where the owner of the cattle is not liable for the damages, as when the fence is insufficient, and if in the latter case, a distress be made, and the animal in its effort to escape be killed, the distrainer will be liable for its value; *Dickson v. Parker*, 3 H. 219.

5. *Affidavit for distress.* An affidavit for a distress warrant, which charges that "A. administrator of B." is indebted, &c., is good to charge A. in his representative capacity; the words, "administrator of B." being not merely a *descriptio personae*, but showing in what capacity the rent is due; *Smith v. Bobb*, 12 S. & M. 322; see *post*, 19.

6. *Bond and security necessary.* The les-

nor must give bond and security, as in other cases of attachment, in order to procure a distress for rent. A bond without security will not do; *Cornell v. Rulon*, 3 H. 54.

7. *The replevy bond to pay rent in three months.* The statute allows the tenant to replevy the property distrained, on giving bond and security to pay the rent in three months. This bond may be taken payable to the sheriff or to the landlord; *Tooley v. Culbertson*, 5 H. 267; *Robinson v. White*, 7 S. & M. 39; *Critchlow v. Peck*, 7 H. 243. But in such case to enable the lessor to maintain a motion on it, the sheriff must assign it to the lessor; *Phillips v. Chaney*, 7 H. 250; *Lazarus v. Trille*, 1 S. & M. 575. The motion must be in the name of the sheriff or his assigns; *Lazarus v. Trille*, *supra*. Such bond has the force and effect of a judgment when forfeited; *Vannerson v. Staunton*, W. 358.

8. *Same.* And such a bond, payable to the sheriff (or constable) is good, though it do not recite to whom the rent is due. For payment of it to the sheriff before assignment to the landlord would be good, and payment after assignment, if made to the landlord, would be good; *Robinson v. White*, 7 S. & M. 39.

9. *Same: Clerical error: Variance.* A variance in the bond from the statute, in stating, by clerical error, that the property distrained, is "restrained" instead of "restored" to the tenant, is immaterial; *Critchlow v. Peck*, 7 H. 243. And so if there be a variance as to the description of the property, between the bond and the distress warrant, the recital in the bond being unnecessary; *Critchlow v. Peck*, *supra*.

10. *Same: Effect of such a bond.* The giving of such a bond is an acknowledgment of the landlord's claim, and a waiver of irregularities in the previous proceedings. If the tenant wishes to contest his liability, he should sue out a writ of replevin; *Tooley v. Culbertson*, 5 H. 267. It is also an acknowledgment of the tenancy; *Tift v. Verden*, 11 S. & M. 153.

11. *Same: Proceedings on, by motion.* The statute provides that, if such a bond be not paid at maturity, the lessor may lodge it in the proper court, and proceed by motion to get a judgment on it, and have execution. This is an extraordinary proceeding, and must strictly conform to the statute. Hence if the bond be lost, so that it cannot be lodged in court as required, the motion cannot be maintained; *Tift v. Verden*, 7 S. & M. 91. And so if the notice of the motion, given to the obligor in the bond, recite that the motion will be made on the first day of the term of the court, the motion must be entered on that day; but if made on a subsequent day, and the obligor appear and defend, the defect will be cured; *Phillips v. Chaney*, 7 H. 250. If on such motion judgment by default be entered on the bond, the error must be very clear before the High Court will interfere; *Robinson v. White*, 7 S. & M. 39.

12. *The distress no part of the proceedings to enforce replevy bond.* An action was

brought by the landlord, on a bond given by the tenant to pay the rent, after a distress had been issued and levied; and the tenant pleaded payment, and after this moved to quash the distress warrant: *Held*, that the distress was no part of the suit, and its quashal would be no bar to a trial on the pleadings; and that no writ of error would lie from the judgment quashing it; *Carr v. Coopwood*, 2 C. 256.

13. *Contest of landlord's right by action of replevin.* If the tenant wishes to contest the landlord's right to distrain, he must bring his action of replevin in the proper court, when the proceedings for the first time become a suit in court, in which the tenant is plaintiff, and the issue is whether the rent be owing to the landlord or not: *Towns v. Boorman*, 1 C. 186. And if in such action a demurrer be sustained to the declaration, and plaintiff refuses to amend, the judgment of the court on this refusal, should be for double the amount of the rent due, to be ascertained by a jury. And the declaration and pleadings should be according to the forms, and requisites in actions of replevin generally; *Towns v. Boorman*, *supra*. It is not necessary to file a declaration in such a case, though that would be regular; the issue may be made up on the writ of replevin; *Parkhurst v. Dunlap*, 6 H. 57.

14. *Replevy by stranger.* If a stranger replevy property distrained for rent under the provisions of the Act of 1822 (H. C. 811, § 16), the landlord must allege in his avowry and establish by proof on the trial that the rent distrained for is due and in arrear; *Lavinge v. Russ*, 7 G. 326.

15. *Same: Rule as to allowing double damages.* But in proceedings by replevin, the court is not authorized to allow double damages against the tenant, if the jury find that less rent was due than the amount claimed in the distress; *Terrel v. Ligon*, W. 170.

16. *Double damages against third party claiming the property.* To authorize a judgment against a third party under the statute claiming the property distrained, he must have actually replevied the property distrained; *Punchard v. Rundell*, 1 H. 508.

16a. *Damages.* An action of trespass was brought against a landlord for making a distress, where the rent was payable in repairs (see *ante*, 2a, 2b), and the distress was made before the rent was due. The amount distrained for was \$309. The jury found damages for the defendant to the amount of \$1,300, and the court refused to set it aside; *Briscoe v. McElween*, 43 M. 556.

17. *Landlord's priority.* The landlord's distress for rent, when levied at the same time with another attachment for an ordinary debt, will be entitled to prior payment out of the proceeds of the goods attached; *Canterberry v. Jordan*, 5 C. 96. See *ante*, 1a. LANDLORD AND TENANT, 7.

18. *What goods may be distrained.* The goods of a tenant cannot be distrained for rent, unless they are or have been on the demised premises; *Bradley v. Peggott*, W. 348.

18a. *Exempt property.* Personal property exempt from execution, on the death of the husband descends to the widow and children, and vests absolutely in them and without any condition, limitation, or restriction, as to their right, and is free from sale under attachment for rent: *Mason v. O'Brien*, 42 M. 420.

19. *Right of mayor of Natchez, to issue distress warrant.* The city magistrate of Natchez, is not a justice of the peace of Adams county, and cannot take an affidavit for a distress warrant, against a tenant of demised premises outside of the city; *Van-nerston v. Staunton*, W. 358.

20. *Right of third person claiming goods distrained to go into equity.* A person who has a mortgage on the goods of the tenant, may go into equity to enforce his rights against the landlord who has distrained them, and the tenant; but if he claims the property absolutely he must proceed at law; *Marye v. Dyche*, 42 M. 347.

District Attorney.

See CRIMINAL LAW.

Domicile.

See ATTACHMENT. 16a.

1. *Meaning of.* In its ordinary acceptation, the term "domicile," means the place where a person lives and has his home, but in a strict and legal sense, that place is properly the domicile of a person where he has his true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Two things must concur to constitute domicile: residence, and the intention of making that the permanent home of the party; *Hairston v. Hairston*, 5 C. 704.

2. *Same: Intention: Term of residence.* It is impracticable to lay down any very definite rule by which either the fact of a permanent residence, or the intention of a permanent residence is to be ascertained. No definite period of time is recognized as necessary to create a domicile, but the time may be longer or shorter, according to circumstances. The question in all cases whether a person has acquired a new domicile, is dependent mainly upon his actual or presumed intention; *Ib.*

3. *Same: Intention: Long residence.* The apparent or avowed intention of residence, not the manner of it, constitutes domicile; and in the absence of any avowed intention and of acts which indicate a contrary intention, a long continued residence is regarded as a controlling circumstance in determining the question of domicile, and in most cases it is unavoidably conclusive. *Ib.*

4. *Declaration: Evidence.* The declarations of the party himself, when he can have no object or inducement to falsify the truth, or to deceive those to whom the declarations are made, are the best evidence of his intention to make his actual residence his permanent residence also. *S. P., Brown v. State*, 5 G. 688. *Ib.*

5. *Case in judgment.* H. was a native of Virginia, and married there a lady, also a native, and continued to reside there till 1841. He was then the owner of a large estate in Virginia, consisting of land and slaves, and which he continued to own till his death. In 1841, he conceived a great aversion to his wife, and he abandoned his home in Virginia, visiting Europe, whence he returned in 1842, to this State, where he had already a large plantation and many slaves, and where he resided with occasional absences till 1852, when he died. His wife remained all the time in Virginia at the family mansion, which H. kept up in a style suitable to his wealth, and he also continued his plantation in that State. After 1842, he added largely to his landed and slave property in this State, by purchases, and in 1845, he purchased a healthy locality in this State, which he called "Choctaw Spring," and built on it an indifferent house, in which he afterwards resided. He repeatedly voted for State and county officers in this State, and sold many tracts of land which he had bought on speculation, describing himself in the deed as "of Lowndes County," in this State: *Held*, that these facts showed that he was domiciled here; *Ib.*

6. *Expatriation: Case in judgment.* W., who was a native of the United States, was appointed, in 1835, consul at one of the ports in the republic of Texas. He went to the port soon afterwards and died there in 1836. At the time of his departure from the United States he declared it was his intention to resign his office and settle in Texas and practice law there. There was no proof that this intention was carried into effect: *Held*, that the facts did not constitute expatriation; *Woldridge v. Wilkins*, 3 H. 360.

7. *Removal by an invalid.* If an invalid sell his mansion house and other property at the domicile of his birth, and leave that domicile for the purpose of travelling, in order to regain his health or prolong his life, and shortly afterwards die on his travels, without having acquired any permanent abode at any place, he has not thereby lost the domicile of his birth, notwithstanding he may have had no intention of returning to it; *Still v. Corporation of Woodville*, 9 G. 646.

Dower.

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I. Nature of Husband's Estate, and his Seizin essential to Dower.

1. *Term for years.* The wife is not endowable (as of his realty) of the husband's term for years in land, however long the term may be. She can have dower, technically, only in his freehold estate; *Ware v. Washington*, 6 S. & M. 737.

2. *Lands bought of United States and patented after husband's death.* The widow is entitled to dower in land patented to the heirs of the husband after his death, in virtue of a claim of right to it, vested in the husband in his lifetime; *Hackler v. Cabel*, W. 91. And so she is entitled to dower in land held by the husband under a certificate of entry from the United States government. And she is by express statute (H. C. p. 232, §6) entitled to dower in land bought by the husband from the United States, though he has not paid for it, as against the administrator of the husband, who had paid the balance due the United States out of the personal assets, though the estate be insolvent; and in such case the administrator has no right to be substituted to the lien of the United States, so as to be reimbursed for the estate, the amount he has paid out to remove the lien; *Torrence v. Carbry*, 5 C. 697.

By Rev. Code of 1857, p. 468, art. 166, the widow is entitled to dower in lands purchased by the husband, and to which he has received no title, and the whole or a part of the purchase money is unpaid, upon her contributing her proportion of the purchase money to complete the payment.

3. *Entitled to dower on seizin of the husband.* It is sufficient to entitle the widow to dower, that the husband was seized of it during coverture, and that she has not aliened or conveyed her right, in the manner prescribed by law; *Caru'hers v. Wilson*, 1 S. & M. 527; *Wooldridge v. Wilkins*, 3 H. 360; *Wyatt v. Brown*, 8 S. & M. 365; *James v. Rowan*, 6 S. & M. 393; *Markham v. Merritt*, 7 H. 437. But she must prove seizin, either actual or constructive; *Ware v. Washington*, 6 S. & M. 737; S. P., *Randolph v. Doss*, 3 H. 205. And seizin in fact, during the coverture, is sufficient to give her dower, against the heirs of, or those claiming under the husband, and against all the world except those claiming under a title paramount to that of the husband; *Wooldridge v. Wilkins*, *supra*. Instantaneous seizin is sufficient. Thus when the husband bought land, and immediately reconveyed the land to the vendor, by mortgage in fee, to secure the purchase money, she is entitled to dower as against all the world except the mortgagee; *Whitehead v. Middleton*, 2 H. 692; *Wooldridge v. Wilkins*, 3 H. 360. In the first case it was said she was not entitled as against the mortgagee, and in the latter there was a *quære* as to that point.

Seizin in fact, however, is not necessary if there be a seizin in law. Thus where the husband has the legal title, that is a sufficient seizin, without actual *possessio pedis*, if there be no possession adverse to him. And the possession of a co-joint tenant is the possession of the husband, without actual ouster; *James v. Rowan*, 6 S. & M. 393. She takes her dower subordinate to the lien of the vendor of her husband; *Cocke v. Bailey*, 42 M. 81.

4. *Trust estate of husband.* By statute H. & H. 353, § 47, the wife is endowable out

of a trust estate held for the use of the husband. Hence, where a party executes a deed to another in trust to hold for the use of the grantor, but charged with the payment of the grantor's just debts, the grantor has such an interest and estate in the land as entitles his wife, if he subsequently marry, to dower in the same; *Doe v. Bernard*, 7 S. & M. 319. And so the wife of a mortgagor is endowable in an equity of redemption belonging to the husband; *Rutherford v. Munce*, W. 370.

5. *Her right to dower in partnership lands.* Lands purchased by partners under an agreement that they shall be sold for the benefit of the firm, are regarded as joint stock; and so, if there be no such express agreement, if there be such a use of them as evinces an understanding between them that the land was to be treated as joint stock, and not as an estate in common; and in such cases the wife of a deceased partner is not entitled to dower (as against the alienees of the firm). *Wooldridge v. Wilkins*, 3 H. 360. But if the partnership did not embrace the buying and selling of land in the first instance, but afterwards it is so extended as to embrace that business, the wives of the partners will be entitled to dower in all the lands purchased by them when the deeds are taken in their individual names, as tenants in common or joint tenants, unless the land be essential to the purposes and objects of the partnership, or it be expressly agreed between the partners that it shall be treated as joint stock, and that it shall be sold, if necessary, to pay debts; *Markham v. Merritt*, 7 H. 437. This last case was also a contest between the widow of a deceased partner and the alienee of the two partners. See PARTNERSHIP, 5, *et seq.*

II. How Dower is lost or barred.

1. By Will of the Husband.

6. *Effect of bequest of personality to widow.* A legacy of personal estate left by the husband to the wife can only operate to bar her claim for dower in the realty, when it appears expressly by the will itself that such legacy is expressly given in lieu of dower (see H. C. 620, § 45, 46, 47, 48); *Fulton v. Fulton*, 1 G. 586. On this subject the provision of the Rev. Code of 1857, p. 468, art. 168, is as follows: "Every devise of lands, or any estate therein, or bequest of personal estate, to the wife of the testator, shall be construed to be intended in bar of her dower in land, or share of the personal estate respectively, unless it be otherwise expressed in the will."

7. *Renunciation of will by widow.* The failure of a widow to renounce a provision made for her in her husband's will, in lieu of dower, is an election by her to take the provision instead of the dower; but as in other cases of election, if it turn out that she fails to get the provision made for her, the election will be considered as having been made under a mistake, and will not be binding on her; and this rule is also recognized by the statute, Rev. Code of 1857, art. 170, which provides that, if in effect nothing shall pass

by that devise; she shall not be barred thereby, it being the intent of this act that a widow accepting or abiding by a devise, in lieu of her legal right, shall be considered as a purchaser for a fair consideration. Hence, where the husband in 1860 bequeathed to the wife six slaves, and devised to her a life estate in his lands in lieu of dower, and after the war, by virtue of emancipation, the estate became insolvent, whereby it was necessary to sell the land in order to pay the husband's debts, and the widow had failed to renounce the will, it was held that she might then claim her dower upon her restoring to the estate the personality which had been actually allotted to her, and accounting for such as she had used; *Collins v. Mellon*, 40 M. 242.

8. *Same.* When no provision is made for the widow. If there be no provision in the husband's will, she is entitled to dower in his estate, as in case of intestacy; and in such a case it is unnecessary for her to renounce the will within six months from the date of its probate, in order to entitle her to her share in the estate; *Roberts v. Roberts*, 5 G. 322.

See DESCENT AND DISTRIBUTION, 50, 51, 52.

2. By Conveyance.

9. *By her own act.* The widow, as administratrix of her husband, sold his land under an order of court, and made a covenant of warranty of title, in fee, and afterwards applied for dower in the land: *Held*, that she was estopped by her covenant of warranty; that though she was not bound to make the covenant, yet having made it the covenant must have its legal operation; *Magee v. Mellon*, 1 C. 585. But she is not estopped by her relinquishment of dower made while she was an infant; *Markham v. Merritt*, 7 H. 487.

10. *Husband's right to bar dower under Revised Code of '57.* By the statute (Rev. Code of 1857, p. 467, art. 162), the widow is not entitled to dower in lands which her deceased husband owned during the marriage, and sold in good faith and for a valuable consideration; but this statute is in derogation of the common law rights of the widow, and should receive such a construction as will fully protect the rights of the wife as they exist, with the restrictions imposed in the statute on the husband's power of alienation; and if it appear that the alienation was under circumstances of suspicion in respect to the good faith of the parties to it, or the consideration, it is incumbent on the party seeking to defeat her dower by the alienation, to remove the suspicion and to prove affirmatively the good faith and the valuable consideration. And the provision of the statute requiring an alienation for a valuable consideration, in order to bar the widow's dower, contemplates that the husband is to acquire property which may be an equivalent to the widow for the right she loses by the conveyance; and if the conveyance be voluntary, or for the most part voluntary, it will not bar her dower; *Jiggitts v. Jiggitts*, 40 M. 718.

11. *Same. Case in judgment.* The husband made a voluntary conveyance of the

tract of land M., to his son, and afterwards the son exchanged the tract M. with his father, and received in lieu thereof tract N., the latter being 33 per cent. more valuable than the former: *Held*, that the widow was entitled to dower in the tract N. as the consideration for the conveyance by the father of that tract was, for the greater part, the tract M., which the son claimed by donation from the father. And it was also held that the exchange being made after the separation of the husband and wife, coupled with the facts that the father had deeded away all his other lands to his children by a former wife, and that he had a will, giving his wife \$10, and leaving to his children by her, property, on the express condition that the legacy to them should be void if the widow claimed dower in his lands, and that he, after the exchange, still continued to occupy tract N., showed that the alienation of N. was not in good faith; *Id.*

11a. *Sale under execution.* A sale of his land, under execution against the husband, does not divest the wife's right to dower; *Fleeson v. Nicholson*, W. 247. But it seems if the sale be made under a judgment at law, in favor of the vendor, against the husband as vendee, for the purchase money of the land, the dower would be divested; *Bisland v. Hewett*, 11 S. & M. 164.

3. By other means.

12. *Effect of marriage contract.* If a marriage contract between husband and wife, amount to no more than to reserve to each party, the right to dispose of his or her property, at the time of his or her death; and if the husband die without making such disposition, the wife is entitled to dower in his estate. Such a contract is not a jointure, and is no bar to dower; *Whitehead v. Middleton*, 2 H. 692.

13. *Reception of personal assets of husband no bar.* The reception and appropriation by the widow, of personal assets of her husband, exceeding in value her dower, does not affect the rights of the administrator, or creditors, and is no legal bar to her claim for dower; *Caruthers v. Wilson*, 1 S. & M. 527.

14. *Receiving purchase money of land sold by the husband.* Nor is it a bar to her claim for dower, in land sold by the husband in his lifetime, by title bond, and to which title had been made after his death, by order of the probate court, that she had received her distributive share of the purchase money of the land, paid by the vendee to the administrator. Her right to dower depends on the seizin of the husband, and her non-relinquishment of her interest; *Wyatt v. Brown*, 8 S. & M. 365. See *post*, 35.

15. *Lost by bar of statute of limitations.* The widow's right to dower, is subject to the bar of the statute of limitations, and her remedy for its recovery as against a purchaser of the husband, will be barred by the lapse, after her coverture has ceased, of that period prescribed by the statute for bringing an action of ejectment; *Moody v. Harper*, 9 G.

599. And a court of equity will, at the instance of a purchaser from the husband, enjoin her from proceeding to have her dower assigned in the probate court, where it is barred by limitation; *Ib.*

16. *Lost by wife's having separate estate.* By Rev. Code of 1857, p. 337, art. 3, and p. 470, art. 176, the widow is not entitled to dower in her husband's real estate, where she owns in her separate right an estate equal in value to what would otherwise have been her portion of her husband's real and personal estate (citing *Whitley v. Stephenson*, 9 G. 113); *Magee v. Young*, 40 M. 164.

See DESCENT AND DISTRIBUTION. 52.

16a. *As to her dower in personality*, see post, 28, 28a.

III. Nature and Extent of her Dower Interest.

17. *Her right before husband's death a contingent interest.* The widow's right to dower before the death of the husband is not a vested interest, but a mere incipient and inchoate title, contingent upon her surviving her husband, which event alone gives her a vested title to dower; nor has she any right to dower before the husband's death, in virtue of the contract of marriage; for it is a mere incident of the fact of marriage, and not a part of the contract itself. Hence, a law abridging or depriving her entirely of her dower, passed after the marriage, and before the death of the husband, is not subject to the constitutional objection of impairing vested rights, or the obligation of a contract; *Magee v. Young*, 40 M. 164.

18. *Dower only a life estate.* The interest of a widow in her dower estate in lands expires with her life, and if after death her administrator, under an order of the Probate Court sell her dower land, the sale conveys no title, and is no obstacle to a petition by the heirs to have the land sold for a division; *Holmes v. McGee*, 12 S. & M. 411.

19. *How much she is entitled to.* Where the husband leaves no descendants, she is entitled to be endowed of one-half his lands, in fee; *Bridgeforth v. Maxwell*, 42 M. 743. But if he have children by a former marriage, she is not entitled to any more than if they had been her own issue, viz., one-third for life; *Whitehead v. Middleton*, 2 H. 692. But by Rev. Code of 1857, p. 468, art. 164, if her husband's estate be insolvent, she is entitled, in case there be no children, only to one-third for life, as in other cases; *Quinn v. Coleman*, 42 M. 386.

20. *Her rights against alienees of the husband.* Where several tracts of land have been aliened by the husband during the coverture, the widow's dower in all ought not to be taken from one tract alone, but she ought to take her dower in each of the tracts; *Cook v. Fisk*, W. 423. And she is not entitled, as against an alienee, to be endowed of one-third of the value of the land at the time of assignment, if the alienee has increased its value by improvements; in such cases she

ought to take her dower according to its value, at the time of the alienation by the husband; *Woodridge v. Wilkins*, 3 H. 360; *Markham v. Merritt*, 7 H. 47; S. P., *McGehee v. McGehee*, 42 M. 747.

21. *Her right to the dwelling house of husband.* The widow is entitled to have assigned to her as a part of her dower, the dwelling house in which her husband lived at the time of his death, together with the out-houses, unless manifest injustice would be done to the children by assigning all to her; *Jiggitts v. Jiggitts*, 40 M. 718.

22. *Her right before assignment.* At common law the widow had a right to remain in the mansion house of the deceased husband for forty days after his death, within which time it was the duty of the heir to assign her dower. This right has been extended by our statute (H. & H. 353, § 45) until her dower is actually assigned. But this right of occupation is a mere personal privilege which cannot be assigned to another person, for until assignment she has no estate in the land; her claim for dower being a mere charge or incumbrance on the land: Hence such assignee may be ejected by the heirs; *Wallis v. Doe ex dem. Smith*, 2 S. & M. 220; yet her right of occupation is not lost when she merely permits a tenant to occupy for her; there being no contract of lease, nor an actual transfer of her privilege of possession; *Doe v. Berrard*, 7 S. & M. 319.

23. *Her right to rent before assignment.* At law the widow is not entitled to rent for her dower before assignment, but in equity the rule is different; *Harper v. Archer*, 6 C. 212. By the Rev. Code of 1857 she is entitled to the dwelling house, and the plantation free from rent or molestation, until dower is assigned; p. 470, art. 174. And it seems she would not be entitled to recover rent from the administrator, who carried on the plantation, before assignment of dower; *Billingslea v. Young*, 4 G. 95.

IV. Proceedings to obtain Dower and Jurisdiction of Probate Court over them.

See PROBATE COURT. 66, et seq.

24. *Jurisdiction as to strangers.* The jurisdiction of the Probate Court extends to all cases of claim for dower, well against strangers, as against the heirs; *Randolph v. Doss*, 3 H. 205. But this is overruled by the following cases, which hold that the court will not notice the adversary claim of strangers, but will proceed to allot dower without reference to their rights, which are not affected thereby; *Farmers' & Merchants' Bk v. Tappan*, 5 S. & M. 112; *Holloman v. Holloman*, 1b. 559; *James v. Rowan*, 6 S. & M. 393; *Bisland v. Hewitt*, 11 S. & M. 164. And the adversary rights not being affected by the decree of the Probate Court (which is always granted on proof of marriage and seisin; see above cases), the adverse claimant may put the widow to her action of ejectment, or other appropriate remedy, and in such proceedings the respective rights of the parties will be

considered *de novo* without reference to the decree in the Probate Court, except that the decree will establish that she is the widow and entitled to dower out of her husband's estate but not out of that particular land. She claims through her husband and on his title, and if there be a paramount title, it is not affected by the decree. The legal representatives are the only proper parties to the petition in the Probate Court, and adverse claimants cannot be heard there; *James v. Rowan*, 6 S. & M. 393; *Pickens v. Wilson*, 13 S. & M. 691. And if the adverse party appears and contests the claim, the result will be the same, as consent cannot confer jurisdiction; *James v. Rowan*, *supra*. To the same effect is *Jiggitts v. Bennett*, 2 G. 610, in which Judge Fisher dissented, contending that the jurisdiction was ample in all cases. In *Jiggitts v. Jiggitts*, 40 M. 718, a decree was rendered allotting dower in land claimed by a stranger, and directing the widow to be put in possession; the decree was reversed as to that part directing the widow to be put in possession of land claimed by the stranger, but affirmed as to that part directing the assignment. In *Woodbridge v. Wilkins*, 3 H. 360, the alienees of the husband were made parties defendant in the Probate Court and on their appeal, the decree of the court was reversed; and the right of the alienees to contest her right was also recognized in *Markham v. Merritt*, 7 H. 437; and in *Magee v. Mellon*, 1 C. 585, the petition of the widow for dower was dismissed, upon the answer of a purchaser from her as administratrix of her husband, showing that she had made a covenant of warranty, in conveying the land as administratrix.

25. *Jurisdiction to substitute administrator to lien on dower paid off by him.* The husband died, having purchased land from the United States and partially paid for it. The United States having a lien on the land for the unpaid purchase money, the estate became insolvent, but the administrator paid the United States and removed the lien. The widow filed her petition for dower and the administrator set up these facts in opposition and asked to be substituted to the lien of the government, but the court decided that the Probate Court had no jurisdiction to try the question of substitution; and that, if that defence was good at all, it could be set up only after it had been allowed by the appropriate tribunal; *Torrence v. Carby*, 5 C. 697.

26. *Amendment of petition.* When the petition for dower is defective, leave should be given to amend it; *Caillarett v. Bernard*, 7 S. & M. 316.

27. *Notice of petition.* Where the widow is administratrix, a decree allowing her dower, made without the publication of notice required by law, is void, and no obstacle to a petition by the distributee to procure distribution of the whole estate and insisting on her exclusion by reason of the illegality of her marriage with the intestate; *Muirhead v. Muirhead*, 1 C. 97. A decree for dower

without notice is void; *Farmers' & Merchants' Bk v. Tappan*, 5 S. & M. 112.

28. *Dower in personalty.* The interest of the widow in the personal estate of her husband is treated by our statute as dower, and is to be assigned to her in the same manner as dower in the realty; a petition, therefore, for dower in the personalty is defective, if it fail to set forth in what the personalty consisted, and that the husband died in the county in which the petition is filed, and that the property is there; *Caillarett v. Bernard*, 7 S. & M. 316.

28 a. *Same.* But she has no such interest in the personal estate of her husband whilst he is living, as will prevent him from making a voluntary gift of it, so as to defeat her claim for dower in it after his death; and if the husband make such gift by an absolute and irrevocable deed, for the benefit of his children by a former marriage, but reserving to himself the use during his life, it is not a will in disguise, and is an effectual bar to her claim for dower in the property so given; *Cameron v. Cameron*, 10 S. & M. 394.

29. *Same.* If it appear manifest to the court that the personal property in which the widow claims dower did not belong to the husband at the time of his death, the court will dismiss her petition; *Cameron v. Cameron*, 10 S. & M. 394.

30. *Petition: Without joining her husband.* A petition, in the name of the widow alone, without joining her second husband, for dower in the lands of a prior husband, is not on that account void, and a decree rendered thereon cannot be disregarded in a collateral proceeding; *Turner v. Morris*, 5 C. 733.

V. Miscellaneous.

31. *Widow not affected by advancement.* The widow's right to dower in the personalty, is not affected by advancements made to the children by the husband; *Whitley v. Stephenson*, 9 G. 113; nor is her right in that property affected by her owning a separate estate; *Id.* But her right to dower in the realty is; see *ante*, 16.

32. *When husband makes a will and is domiciled in another State.* The statute (Rev. Code of 1857, p. 432, art. 110) which enacts that "All personal property situated in this State shall descend and be distributed according to the laws of this State regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other States, and notwithstanding the domicile of the deceased may have been in another State, and whether the heirs or persons entitled to distribution be in this State or not, and the widow of such deceased person shall take her share in the personal estate according to the laws of this State;" applies only to cases of technical descent and distribution—that is where the ancestor or husband died intestate. Hence, if a husband domiciled in another State make a will and the widow renounce it, this not being a case of intestacy, is not within the statute, and such renunciation will not give the widow a

right to share in the husband's personalty, otherwise than according to the laws of the husband's domicile; *Slaughter v. Garland*, 40 M. 172.

33. *Conflict of laws.* A woman married and domiciled in Louisiana is entitled to share in her deceased husband's real and personal estate situated here, according to the laws of this State; *Duncan v. Dick*, W. 288.

33a. *Same: Dower according to the lex domicilii of husband.* The widow of a person dying domiciled in this State, is entitled to dower in his real and personal property according to the laws of this State. And this is the rule, though the matrimonial domicile be elsewhere; and it applies equally to property acquired in the matrimonial domicile as to property acquired here, wherever, by the laws of the matrimonial domicile (as is the case in this State), the wife acquires no vested interest, by the marriage, in the husband's property, but only the privilege of taking a certain share of the estate of which he may die possessed as owner, notwithstanding any disposition of his will to the contrary; *Hairston v. Hairston*, 5 C. 704; S. P., *Garland v. Rowan*, 2 S. & M. 617.

See CONFLICT OF LAWS, 29, et seq.

34. *Must be wife at husband's death.* Only she, who is the lawful wife of the husband at the time of his death, is entitled to dower in his estate; *Smart v. Whaley*, 6 S. & M. 308.

35. *Widow remitted to her dower right.* Where a widow, being an administratrix, surrenders land to the heirs, in payment of a debt due by her as administratrix, and the heirs afterwards claim to hold the land on the ground that they were entitled to it by inheritance from a former husband of the widow, and thereupon claim to collect anew the debt so paid, if their claim be sustained, the widow is entitled to her dower interest in the land; *Pinson v. Williams*, 1 C. 64. See ante 14.

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I. Title.

1. Plaintiff's Title must be Legal and Perfect.

1. *Plaintiff's title must be legal.* The plaintiff must have a legal title at the commencement of the suit; an equitable title then, which afterwards and before trial ripened into a legal title will not do; *Heard v. Baird*, 40 M. 793. See post, 15. His legal title must also continue till the trial; *Torrence v. Betsy*, 1 G. 129. A complete and

perfect equitable title will not do, though the beneficiary of a satisfied trust may defend as against the trustee holding the dry naked legal title; yet the beneficiary cannot maintain ejectment on such a title; *Heard v. Baird*, supra; S. P., *Thompson v. Wheatley*, 5 S. & M. 499. See post, 11.

2. *Same: Instances.* A. sold land to B., who conveyed the same immediately to C. as trustee to secure the purchase money due to A.; B. afterwards conveyed the land to D., who conveyed to A., the original grantor, who brought ejectment to recover possession from a third party; there was no proof that the debt due from B. to A., secured by the deed to C., had been paid: Held, that the legal title was in C., the trustee, and A. could not recover; *Heard v. Baird*, 40 M. 793. It was held also, that if the lapse of time could be considered as extinguishing the debt due by B. to A. and secured by the deed in trust, whereby, under the statute, the legal title in the trustee would be also extinguished, still the lapse and extinguishment must have occurred before the suit was brought; the delay afterwards, and consequent extinguishment after suit brought and before the trial, could have no effect; *Heard v. Baird*, supra.

And so it was held that where the plaintiff had the legal title when the suit commenced, but conveyed it before trial, he could not recover; *Torrence v. Betsy*, supra; and so where the plaintiff only had a title bond as vendee, never having received a deed, it was held that he could not recover; *Moody v. Farr*, 4 G. 192; and so where the plaintiff bought at execution sale, land which was mortgaged by defendant in execution, and the defendant in ejectment claimed under an absolute deed from the mortgagee; it was held that though the mortgaged debt was paid, yet the plaintiff could not recover. (This was before the Act of 1857, which makes payment alone revest the legal title.) *Wolfe v. Dowell*, 13 S. & M. 103; and so where both plaintiff and defendant claimed under execution sale made of land under mortgage, it was held that the plaintiff could not recover though his purchase was under the older judgment, because he had no legal title; *Cantzon v. Dorr*, 5 C. 245.

3. *Plaintiff must recover on the strength of his own title.* The plaintiff must recover on the strength of his own title, which must also be a legal title; *Winn v. Cole*, W. 119; and this is so though the defendant show no title; hence he cannot recover premises not embraced in his deed, as against a defendant showing no title, though he prove that it was the intention of the owner to convey it in the deed; *McRaven v. McGuire*, 9 S. & M. 34. He must show his title good against the world, unless the defendant be estopped to deny it; *Doe v. Pritchard*, 11 S. & M. 327; *Wolfe v. Dowell*, 1 S. & M. 103; *Cunningham v. Dean*, 4 G. 46.

4. *But his title may be made out by defendant.* But though he can recover only on the strength of his title, yet he will not fail merely because his evidence fails to make

out his title, if the defendant's evidence with the plaintiff's shows he has a good title; for the court and jury are to decide as to title upon all the evidence before them; *Wightman v. Reynolds*, 2 C. 675.

5. *Whether purchaser at trustee's sale must prove notice.* Whether a plaintiff in ejectment, claiming title under a sale made by a trustee, should show that the trustee performed such acts, as giving notice of the sale, &c., as were necessary to enable him to sell, where the grantor in the deed or one claiming under him, is defendant; *Quære?* But if the defendant do not claim under the grantor in the deed in trust, such proof is unnecessary; *Wightman v. Reynolds*, 2 C. 675. See TRUSTS AND TRUSTEES, 61.

6. *Title by descent cast.* Actual seizin of the ancestor of a part, with a claim of title to the whole tract, is sufficient to cast the title of the whole by descent on the heir; *Spears v. Burton*, 2 G. 547. And such a title is *prima facie* good, and will prevail, unless the defendant show title paramount to the title of the ancestor; *Spears v. Burton*, *supra*; *Hanna v. Renfro*, 3 G. 125.

See DESCENT AND DISTRIBUTION, 16.

2. Common source of Title, and Estoppel of Defendant to deny Plaintiff's Title.

7. *Plaintiff need not show title in common source.* The rule which requires the plaintiff to show a good title as against all the world, does not apply so as to require him to show title in the person from whom both parties claim title; *Doe v. Prichard*, 11 S. & M. 327; *Wolfe v. Dowell*, 13 S. & M. 103; *Wightman v. Reynolds*, 2 C. 679; *Doe v. Parker*, 3 S. & M. 114; *Smith v. Olley*, 4 C. 291; *Griffin v. Sheffield*, 9 G. 359; *Gordon v. Sizer*, 10 G. 805. In such case the plaintiff need not go farther back, in the first instance, than the person from whom both parties claim, but the defendant may set up a title adverse to the common source, and if he does, the plaintiff must show such title to be invalid, or produce some superior title, or he will be defeated. Thus, where the plaintiff claimed title by virtue of an execution sale of the mortgagor's interest, the legal title being in the mortgagee, and the defendant claimed under an absolute deed from mortgagor, the outstanding legal title in the mortgagee will prevent plaintiff's recovery; *Wolf v. Dowell*, *supra*. And so where both parties claimed under execution sales of mortgagor's interest; *Canlon v. Dorr*, 5 C. 245. And the rule will not apply if the defendant shows he claims under another deed from a stranger, if his claim be *bona fide* and not collusive; *Hughes v. Wilkinson*, 6 C. 600. And the rule does not apply, so as to prevent the defendant from setting up an incumbrance; nor where plaintiff claims under an execution sale, so as to prevent the defendant (who is not the defendant in execution) from showing that the defendant in execution had no such interest in the land as could be legally sold under the execution; *Smith v. Olley*, *supra* (citing *Wolf v. Dowell*, *supra*). But the de-

fendant cannot set up an outstanding title, with which he has no connection; *Griffin v. Sheffield*, 9 G. 359.

8. *The rules applied to purchasers under execution sale.* The rule which exempts the plaintiff from going farther back than the common source of title, applies with full force when the plaintiff is a purchaser at execution sale, and the defendant is the defendant in execution, or a person between whom and the defendant in execution there is a privity of estate and possession by contract, or the relation of landlord and tenant (citing *Doe v. Parker*, 9 S. & M. 114); *Smith v. Olley*, 4 C. 291. The defendant in execution after the sale is a mere tenant at will to the purchaser, and he is not at liberty to set up an outstanding title in another, or to deny that he was the true owner at the sale; *Doe v. Parker*, *supra*. And if two sales were made under two valid executions, a defective deed from the sheriff under one sale, is no defence to a recovery under the other; *Pickett v. Doe*, 5 S. & M. 470. And if both parties claim under execution sale against the same defendant, the rule applies in full force; *Doe v. Pritchard*, 11 S. & M. 327; except, that, as shown, *ante*, 7. the defendant may show that the plaintiff did not get a legal title, and that the defendant in execution had no interest in the land which could be legally sold.

9. *Where widow of grantor is defendant.* And if the plaintiff in ejectment show title by conveyances up to a certain grantor who covenanted in his deed, that he had a good title and would warrant it, he will be entitled to recover, if the defendant merely show that she is widow of the grantor, without showing she is entitled to dower, or that she has any other claim; in such case it is not necessary that he should go farther back than the conveyance by the grantor, for they claim from a common source, and if the grantor has no title when he conveyed and afterwards acquired it, the title so acquired would enure to the plaintiff; *Wightman v. Reynolds*, 2 C. 675.

10. *Vendor and vendee.* The defendant who has gone into possession under a parol sale, cannot dispute the title of his vendor in an action of ejectment by the latter to recover possession; *McClannahan v. Barrow*, 5 C. 664; nor where the sale was valid and has been rescinded; nor can he after such rescission purchase in an outstanding title against vendor; *Walker v. Williams*, 1 G. 165.

3. When Defendant may rely on Equitable Title.

11. *When trust is satisfied, trustee cannot recover against cestui que trust.* The trustee of a satisfied trust, holding the mere naked legal title, cannot set it up in ejectment against the claim of the *cestui que trust*; but the latter may defend on his perfect equitable title; *Brown v. West*, 7 H. 181; S. P., *Thompson v. Wheatley*, 5 S. & M. 499; *Dixon v. Porter*, 1 C. 84; *Heard v. Baird*, 40 M. 793. But it is considered dangerous to ex-

tend the doctrine farther, and the plaintiff will not be entitled to recover on a perfect equitable title; *Thompson v. Wheatley*, 5 S. & M. 499. And it will be applied only in favor of the *cestui que trust*, and then only when he is defendant; no other party can set up this perfect equity of the *cestui que trust* to defeat a recovery by the trustee, who may be suing really for the benefit of the *cestui que trust*; *Dixon v. Porter*, 1 C. 84; S. P., *Heard v. Baird*, 40 M. 793. This principle is recognized by the statute of 1857, which allows a defendant in ejectment to defend on a complete and perfect equitable title; See Rev. Code, p. 388, art. 17. See *ante*, 1, 2.

4. Defendant's right to set up Outstanding Title.

See *ante*, 3, 7.

II. Pleadings and Practice.

1. The Declaration.

12. *Description of locus in quo*. If the declaration describe the *locus in quo*, by land office numbers or sections, townships and ranges, it is sufficient; *Pickett v. Doe*, 5 S. & M. 470.

13. *Statement of the lease*. The declaration should state a lease to the plaintiff for a period so long that it will not elapse before trial and judgment, for if the lease declared on expire before judgment, and the declaration be not amended in this respect, the judgment will be erroneous; and the judgment will be reversed in the High Court, though no objection were made on this ground in the court below; *Lindsey v. Henderson*, 5 C. 502.

14. *Statement of demise, where an heir is plaintiff*. At the common law the heir could not recover upon a demise laid in his own name, but of a date within the lifetime of his ancestor, because then the heir had no right of possession. Yet after issue joined, this defect is cured by the statute of jeofails; *Winn v. Cole*, W. 119.

15. *Demise laid before plaintiff's lessor gets a legal title*. It is no objection to the admission of a patent offered by plaintiff, that it is dated subsequent to the demise laid in the declaration, when such patent is the mere consummation of a title which had its inception anterior to the demise; *McRaven's Heirs v. McGuire*, 1 C. 100. But it must be noted that the legal title must be perfect in the plaintiff before suit is commenced; and that if it be vested afterwards, it will not do, though it were but the consummation of a perfect equitable title existing when the suit was commenced; See *ante*, 1.

16. *Where two demises are laid*. If there be two demises in a declaration of ejectment, and the title be in either of the lessors, the plaintiff is entitled to recover, and this is the reason why two demises are allowed (citing *Doe v. Dignowitty*, 4 S. & M. 73, *post*, 17); *Surget v. Little*, 2 C. 118.

17. *Joint and several demise*. And so if a joint and several demise be laid in the same count, the plaintiff will be entitled to recover,

upon proof of title, either in all the lessors jointly, or in any one of them; and this is a good mode of declaring, where it is doubtful, in which one of several lessors the title is; *Doe v. Dignowitty*, 4 S. & M. 57.

18. *Same: Death of one of lessors: Revivor*. If there be a joint and several demise declared on, and one of the lessors of the plaintiff dies before trial and judgment, and the suit be not revived in the name of his heirs, the action will be considered as abated or discontinued as to that demise; and a judgment against the plaintiff will not affect his title as stated in that demise; *Printard's Lessee v. Griffing*, 3 G. 133.

19. *Same: Case in judgment*. An action of ejectment was brought upon the joint and several demise of A. and B., and a verdict was rendered in favor of the plaintiff. A new trial was granted, and the plaintiff took a bill of exceptions, which showed that the verdict was rendered on the title of B. alone, no title appearing in A. Afterwards B. died, and without the suit having been revived in the name of his heirs, a second trial was had, and a verdict and judgment were rendered for the defendant, upon his plea of *puis darrein continuance*, averring that the term and all right and title of the plaintiff had ceased and determined. A motion for a new trial was made by the plaintiff and overruled, but he took no bill of exceptions. On writ of error this last judgment was affirmed, because: First, B. being dead, and there being no final judgment as to him, this court cannot revise the judgment, setting aside the first verdict so far as it affects him. Second, there being no error in that judgment as to A., he cannot complain of errors therein to the prejudice of B. Third, there being no bill of exceptions taken on the second trial, the last verdict is presumed correct. Fourth, it being established by the last verdict that the plaintiff's title had ceased and determined since the first trial, the court will not grant a new trial which could not change the result; *Ib*.

2. Appearance and Plea.

20. *Entry of: Case in judgment*. The record contained this entry, "A. Gwinn, on his motion was admitted to defend in the room of Richard Roe, and thereupon by attorney comes and defends the wrong and injury when, &c., and pleads the general issue, and confesses lease, entry and ouster," &c. *Held*, that this was not a mere recital by the clerk of the appearance of the defendant, but the statement of the court on that subject; and that the appearance was good, and also that the plea was good, there being no statute in this State requiring pleas to be drawn up and signed by the defendant or his counsel, it being sufficient if it appeared by the record that an issue was joined; *Gwinn v. Williams*, 5 C. 320.

20a. *Plea of general issue only is allowable*. The statute only allows the plea of general issue to an action of ejectment, special pleas (including pleas setting up the statute of limitation) are nullities, and a trial

may be had without any notice of them being taken; *Hutton v. Thornton*, 44 M. 166.

3. The Consent Rule.

21. *Necessary to make possessor a defendant.* The party in possession cannot be made a party defendant in place of the casual ejector, without an order of court admitting him as such, and consent rule entered into. And a trial without such order and rule being entered, will be erroneous and the judgment reversed; *Battaile v. Hall*, 2 C. 246.

22. *Entry of, conclusive.* An entry on the minutes of the court of the usual consent rule, is conclusive for the purposes of that suit; *Hughes v. Wilkinson's Lessee*, 8 G. 482.

23. *Special consent rule.* The only case in which a special consent rule is necessary, is where an actual entry is necessary to be made before suit is commenced. But an amendment of the consent rule, entirely inoperative on the rights of the parties, or on the quality and measure of the proof, is not error; *Newman v. Foster*, 3 H. 383.

4. Process.

24. *On whom notice of the suit must be served.* The tenant in possession is the party who, in ejectment, must always be served with process. A recovery cannot be had, if the vendor be served with notice, and admitted to defend, and it be proven that his vendee was in possession at the commencement of the suit. It would be contrary to the plainest principles of justice, that the vendee should be ejected, on notice given to his vendor, for he might have another and very distinct title, upon which he might rely; *Wallis v. Doe*, 2 S. & M. 220.

25. *How served: Proof of service.* At common law, service of notice on the person in possession of the *locus in quo*, in an action of ejectment, might be made either by the sheriff, or a private person, but in both cases an affidavit of the service was necessary to prove it; but under our statute, service of notice by the sheriff is proven by his return as in other cases; *Williams v. Doe*, 1 S. & M. 559.

5. Pleading Act of 1850.

26. *Action of ejectment not abolished by.* The action of ejectment as a remedy for the recovery of land, was not abolished by the new Pleading Act of 1850, though its form, as it existed at common law, was abolished; *Cooper v. Benson*, 6 C. 766.

27. *Declaration under Act of 1850.* A complaint in the name of the party claiming the land, against the party in possession, in which the title of the plaintiff is stated, and his right to possession, and the possession of defendant, is a sufficient action of ejectment under that act; and if the plaintiff states his title as being by devise, without stating whether the devise was for life or for a term of years, or in fee, it will be construed that he sues for an interest for life, as that was the meaning of a simple devise of land, without more, at common law; *Cooper v. Benson*, 6 C. 766.

28. *No demise necessary.* Under the Pleading Act of 1850, the declaration need not aver a demise to plaintiff; an averment of title in the plaintiff at the commencement of the suit is sufficient; *Brewer v. Beckwith*, 6 G. 467.

29. *Judgment under Act of 1850.* A judgment for plaintiff under the Act of 1850, is conclusive evidence of his title in a subsequent action, for mesne profits, against the defendant; *Ib.*

6. Possession of Defendant.

30. *Possession must be proven.* The possession of the *locus in quo* by the defendant at the commencement of the suit must be proven; *Newman v. Foster*, 3 H. 383; though the failure to prove it will defeat the action, yet if that point be not insisted on in the court below, it will lose much of its force when raised for the first time in the High Court; and in such a case, if the record show that the defendant read in evidence two leases for the land in controversy, both from persons claiming under the party from whom the plaintiff claimed, this will be sufficient to uphold a verdict for plaintiff, so far as possession of defendant is concerned, without any other proof of possession; *Pickett v. Doe*, 5 S. & M. 470.

31. *Same.* Nor will a judgment in favor of plaintiff be reversed, merely because the record does not show that the defendant was in possession, there being no bill of exceptions setting out the evidence, and there being no objection made on that account in the court below; *Kane v. Mackin*, 9 S. & M. 387.

32. *Possession by tenant good.* But proof that the tenant of the defendant is in possession, is sufficient proof of defendant's possession (citing *Wallace v. Doe*, 2 S. & M. 220 and *Pickett v. Doe*, 5 S. & M. 470); *Smith v. Walker*, 10 S. & M. 584.

III. Evidence.

33. *Sale by administrator: Admission of his deed.* In an action of ejectment by the heirs against a party claiming title by purchase from an administrator, if the defendant be permitted to read in evidence, without objection, the record of the proceedings in the Probate Court ordering a sale, which are irregular, he ought also to be permitted to read in evidence the deed made by the administrator; since it is possible that the defects in the record might be cured by a more perfect transcript; *Commercial Bk of Manchester v. Martin*, 9 S. & M. 613.

34. *Action by purchaser at sheriff's sale: Proof necessary.* In an action of ejectment by a purchaser under an execution sale, against the defendant, it is necessary for the plaintiff to introduce in evidence the judgment and execution under which the sale was made; but it is not necessary to introduce in evidence the intermediate executions. Nor will it be error to refuse the defendant permission to introduce in evidence these intermediate executions, unless they

tend to prove either satisfaction or title in defendant; *Kane v. Mackin*, 9 S. & M. 387.

35. *Plaintiff claiming under trustee's sale:*

Proof. Whether a plaintiff in ejectment claiming under a sale made by a trustee should show that the trustee performed such acts—as giving notice of the sale, &c.—as were necessary to enable him to sell, when the grantor in the deed in trust, or one claiming under him, is defendant; *Quære?* But when the defendant does not claim under such grantor, it is unnecessary to make such proof; *Wightman v. Reynolds*, 2 C. 675.

36. *Must identify locus in quo.* The plaintiff must show by parol proof, with reasonable certainty, that the *locus in quo* is embraced within his muniments of title; *Swayze v. McCrossin*, 13 S. & M. 317; S. P., *Nixon v. Porter*, 9 G. 401.

37. *Uncertainty: Where there are two grants.* Where there is an uncertainty as to the location of land embraced in two grants, and it is doubtful whether both grants are not for the same land, the question should be referred to a jury; *Surget v. Little*, 2 C. 118.

38. *Copies furnished by other party competent.* A party to an action of ejectment may, without previous notice given to produce the original, read in evidence a copy of a deed belonging to his adversary, and which was furnished by the latter with his bill of particulars of his title, if the party furnishing the copy decline to produce the original when requested to do so at the trial; *Griffin v. Sheffield*, 9 G. 359.

39. *Evidence as to boundary.* A declaration by the owner of adjoining land, that his neighbor's land extends to a certain line, accompanied by acts of forbearance on his part to go beyond that line, is evidence that the line so designated is the boundary; *Surget v. Little*, 2 C. 118. Private boundaries may also be proven by reputation, but the proof must be reasonably certain; *Nixon v. Porter*, 5 G. 697.

See BOUNDARIES. SURVEYING.

40. *Certificate of entry and patent.* By statute a certificate of entry issued to a purchaser of public land, by the register of the United States land office, is evidence of title; *Doe v. Parker*, 3 S. & M. 114. But if a patent be subsequently issued to another, the certificate is no longer evidence of title; (citing *Dickinson v. Brown*, 9 S. & M. 130); *Dixon v. Porter*, 1 C. 84. The certificate is but a substitute for title, and must give way when the patent is produced; *Dickinson v. Brown*, *supra*. But when the junior patent is absolutely void, for some inherent and intrinsic infirmity, as when the government had no title to the land, or when the officer had no authority in law to issue the grant, it may be so declared at law as well as in equity (citing *Hil tuk-homi v. Watts*, 7 S. & M. 363; *Wray v. Doe*, 10 S. & M. 452); *Dixon v. Porter*, 1 C. 84. But where the patent is not void for some reason of that character, but is attempted to be attacked for some extrinsic fraud, or sought to be made subservient to some superior equity, the patent,

though junior to a certificate of entry, must prevail. Hence, where plaintiff reads in evidence a patent for the land, it is incompetent for the defendant to offer in evidence, in an action of ejectment, the certificate of entry, showing payment made by him for the same land, prior to the patent; *Dixon v. Porter*, *supra*. But a court of equity would give effect to the prior entry, notwithstanding the subsequent issuance of a junior patent to another, and a verdict and judgment against the holder of the certificate, in an action of ejectment, would be no bar to this relief; *Hester v. Kembrough*, 12 S. & M. 659. And so, if the patent be issued to the enterer, and be for any cause void, he may rely on his certificate of entry; *Carter v. Blanton*, 4 G. 291.

IV. Mesne Profits and Improvements.

41. *Mesne profits not recoverable at common law, nor under Act of 1846.* At common law, only nominal damages can be recovered in an action of ejectment. Mesne profits were only recoverable in an action of trespass *vi et armis*. Nor has the rule been changed by our statute of 1846, (H. C. 856), which provides “that the jury may allow, by way of set-off to any damages assessed by them in favor of the plaintiff, in an action of ejectment, the value of all improvements made on the land,” &c. This statute, though passed by the Legislature under the belief that such damages are recoverable in an action of ejectment, does not change the common law rule on the subject; *Davis v. Delpit*, 3 C. 445.

42. *Same: Under Pleading Act of 1850.* But under the Pleading Act of 1850 (so under Rev. Code of 1857), mesne profits were recoverable under an action of ejectment; *Garner v. Jones*, 5 G. 505.

43. *Same: Rule for mesne profits where improvements are destroyed.* Where valuable improvements made by defendant on the *locus in quo*, are destroyed by fire before the trial, and he is thereby deprived of his right to compensation for the same, in case the plaintiff recovers, he cannot recover as mesne profits during any portion of defendant's possession, anything more than a reasonable rent for the premises, estimated without the improvements so made and destroyed; *Nixon v. Porter*, 9 G. 401.

44. *Judgment where improvements exceed rent.* If, in an action of ejectment, the defendant gives notice under the statute (H. C. 857), that upon the trial he will claim the value of his improvements over the value of the rent, the court in entering judgment should give the defendant judgment for the excess so found by the jury, and direct a stay of the writ of *habere facias possessionem*, until the excess be paid to the defendant; *Abbey v. Merrick*, 5 C. 320. And in such a case if the court fail to enter judgment for such excess so found, it will not be presumed that there was evidence to justify it. If plaintiff objected to the verdict on that ground, he should

have made a motion to set it aside; *Abbey v. Merrick*, *supra*.

45. *Color of title gives the right to improvements.* If the defendant has color of title, he may claim improvements; *Ib*.

45a. *Defendant cannot recover improvements if the plaintiff do not claim rent.* If the plaintiff does not in his declaration demand rent or mesne profits, the defendant cannot set off the improvements; in such case the defendant is without remedy at law; *Learned v. Corley*, 43 M. 687; but the rule is otherwise under the code of 1871.

V. Judgment and Execution.

45b. *Judgment: Verdict and execution: When the plaintiff takes too much.* When the plaintiff in ejectment recovers more land than he has shown title to, the court will limit his writ of possession to the part he has shown title to; *Bledsoe v. Little*, 4 H. 13. And hence it is not error for the court to refuse to instruct the jury, "that if part of the land sued for was in possession of plaintiff, the jury cannot as to that find for the plaintiff; and they cannot find for the plaintiff as to any portion, unless the proof show what portion was occupied by the defendant or his tenant." For in this action, the jury may give a general verdict for the term yet to come in the lands mentioned in the declaration; and the plaintiff then takes possession at his peril under the execution, subject to be put right by the court in a summary way if he take more than he is entitled to; or the jury may find a special verdict, designating by metes and bounds the precise part they find for the plaintiff, and in such case the judgment and execution must conform to the verdict; *McRaven's Heirs v. McGuire*, 1 C. 100.

46. *Same.* Where the declaration and judgment in an action of ejectment are general, and not definite in describing the premises, and the plaintiff takes under his writ of *habere facias possessionem*, more than he is entitled to recover, the defendant may have restitution by motion in the court from which the writ issued; but not where the premises are specifically described in the writ of *habere facias possessionem*; *City of Natchez v. Vandervelde*, 2 G. 706.

47. *Judgment by default and costs.* If the tenant in possession fail to appear, the judgment should be against the casual ejector; *Williams v. Oppelt*, 1 S. & M. 559. But in such a case, no judgment can be entered against the tenant for costs. In such case the remedy of the plaintiff is an action for mesne profits, in which, at the discretion of the jury, costs are recoverable as consequential damages; *Tate v. Weir*, 2 C. 465.

48. *Same: Where there are several defendants.* Where there are several defendants in possession, part of whom only are served with notice, judgment by default may be taken against the casual ejector for those served with notice, but not for the others, unless it appear by affidavit that they are joint tenants; in which case, service of no-

tice on a part is good as to all; *Ib*. But under the Act of 1857, judgment by default final, for the recovery of the land, may be entered against the tenant if he fail to plead; *Shirley v. Conway*, 44 M. 434.

49. *Judgment only binding between the parties: Injunction.* A court of equity will not at the instance of the holder of the paramount legal title, restrain the execution of a writ of *habere facias possessionem*, emanating from a judgment in an action of ejectment between other parties. In such a case the complainant not being at all affected by the proceedings in ejectment, to which he was no party, may recover possession in another action of ejectment against the person in possession; nor can the defendant in ejectment against whom judgment has been entered, restrain the execution of it by attorning to the holder of the paramount legal title, and receiving possession from him; *Harper v. Hill*, 6 G. 63.

VI. Miscellaneous.

50. *Possession puts plaintiff on proof of title.* Ordinarily possession, accompanied by a claim of title, is *prima facie* evidence of a seisin in fee, and sufficient to put the opposite party on proof of his right; *Heard v. Baird*, 40 M. 793.

51. *Vendee under void sale: Notice to quit.* A vendee under a sale void because not in writing, is not entitled to notice to quit, before he is liable to an action of ejectment by vendor for the recovery of possession; *McClanahan v. Barrow*, 5 C. 664.

52. *Trustees of school lands.* The township trustees of school lands may, in the name of their president, maintain an action of ejectment for the school lands wrongfully detained from them; *Windham v. Chisholm*, 6 G. 531.

53. *By tenants in common against each other.* It seems that an action of ejectment cannot be maintained by one tenant in common against another, without proof of an actual ouster; but it is not necessary that the ouster should be accompanied by force; it may be inferred from circumstances such as receiving and claiming all the rents, and a refusal to let the other party in possession on demand; *Harmon v. James*, 7 S. & M. 111; S. P., *Corbin v. Cannon*, 2 G. 570. See *post*, 55.

54. *Joint tenants and tenants in common as co-plaintiffs.* At common law, joint tenants and parceners may unite as plaintiffs in ejectment, but tenants in common could not; but under the Pleading Act of 1850, tenants in common may unite as plaintiffs; *Cannon v. Cannon*, *supra*.

55. *Tenants in common of right of way: Effect of judgment.* If a person owning a right of way in common with the owner of the fee in the land over which the easement exists, stop up the way and use it exclusively for his own use, the owner of the fee may recover possession by action of ejectment; but the recovery will not interfere with the defendant's right to use the way according to his title; *Gordon v. Sizer*, 10 G. 805.

56. *Action against two defendants.* In an action of ejectment against two defendants, the plaintiff will not fail because he fails to show a joint possession in both defendants; but if the proof show possession by one alone, he can have judgment and execution against him; *Ib.*

57. *Possession by husband of an easement appurtenant to wife's land.* The use and occupation by the husband and his family of a right of way purchased in his own name, but appurtenant to the wife's land, is a sufficient possession by the wife of the right of way, to authorize a judgment in ejectment against both husband and wife in favor of a plaintiff, who has a common interest in the right of way; *Ib.*

58. *Outstanding title barred by limitation.* The defendant in ejectment cannot set up an outstanding title barred by the statute of limitations; *Harney v. Morton*, 7 G. 411; nor can he defeat plaintiff's recovery by showing he has purchased in an outstanding title, so barred, at the time of his purchase; *Griffin v. Sheffield*, 9 G. 359.

59. *Outstanding title, with which defendant has no connection.* Nor can defendant defeat plaintiff's recovery by setting up an outstanding title with which he has no connection, when they both claim from the same source; *Ib.*

60. *Who may set up outstanding title.* A defendant in ejectment having color of title, is not a mere intruder, and may set up an outstanding title in a stranger to defeat plaintiff's recovery; *Nixon v. Porter*, 9 G. 401.

61. *Judgment: What is proper.* Where the verdict is for plaintiff, a judgment for one cent damages and costs is not proper; the judgment should be for the unexpired term and the costs; *Wightman v. Reynolds*, 2 C. 675.

62. *Instruction as to adverse possession.* In an action of ejectment, an instruction for defendant "that if he has been in continuous possession for the time limited by statute, it is a good bar," is bad; the instruction should have stated that the possession must be adverse; *Shirley v. Conway*, 44 M. 434.

Effects.

For meaning of the term, see PERSONAL ESTATE.

Election.

1. *Election to hold one of two liable.* Where a sheriff receives depreciated currency in satisfaction of an execution, and plaintiff disavows the act, but proceeds against the sheriff for his money upon the return of "satisfied" on the execution, this is not strictly within the rule of election, where a party having a claim against several, is bound by his election to proceed against one to release the others; but it is, nevertheless, an act evincing a determination to withdraw the disavowal, and a circumstance to show that the plaintiff acquiesced in the act of taking the uncurrent money; *Bibb v. Peyton*, 11 S. & M. 275.

2. *Election in power of sale and grant.* An act of the Legislature authorized a guardian to sell "three lots" of his ward, in the town of P. The ward owned more than three lots in the town: *Held*, that the act granted an election to the guardian to sell any three of the lots he saw proper. Whether the grant of "three lots" in the town of P., where the grantor had more, would authorize the grantee to elect which three he would take; *Quære?* *McComb v. Gilkey*, 7 C. 146.

3. *Election of heir to take hire or profits.* Where an administrator carries on the plantation of deceased without authority of law, the heir has an election either to charge the administrator with legal hire and rent, or to take the profits of the plantation, but he must make the election when he files the petition for distribution. It seems he is not entitled to an account before making his election; *Billingslea v. Young*, 4 G. 95. And this election must be made in the petition for distribution, and if in that he fail expressly to claim hire and rent, he will be held to have elected to take the profits, which election will be irrevocable; *French v. Davis*, 9 G. 167.

4. *As to election and appointment of officers.* See OFFICES AND OFFICERS.

Emancipation.

See SLAVERY.

Emblements.

1. *Sale under mortgage.* Where mortgaged premises are sold under a power of sale contained in the mortgage, the purchaser will be entitled to the crop then growing; *Planters' Bank v. Walker*, 3 S. & M. 409.

2. *Whether heir or executor entitled to.* Emblements are the growing crops of those vegetable productions of the soil, which are annually produced by the cultivator. At common law, upon the death of the owner of the soil in fee, the growing crops went to his executor, and not to his heir. But by our statute this rule has been modified. The heir here being entitled to the immediate possession of the land upon the death of the ancestor would necessarily take the crop growing thereon, unless the executor should get an order from the Probate Court, either to sell the crop, or to cultivate it; and if he do neither, and the heir enter and cultivate and gather the crop, it will be his. Possibly, the heir may be liable to the executor for the value of the crop, as it was when he took possession, as he would certainly be liable for any of the personalty of the estate which he took and appropriated to raising the crop; *McCormick v. McCormick*, 40 M. 760.

Eminent Domain.

See CONSTITUTIONAL LAW, 20 to 31.

Endorser.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

En Ventre sa mere.

See ANCESTOR AND HEIR, 2, 3.

English Statutes.

1. *English statutes not in force here.* By the ordinance organizing the Mississippi Territory, and the constitution of 1817, schedule section 5, all English statutes are excluded from operation in this State; *Boarman v. Catlett*, 13 S. & M. 149.

2. *Champertry.* The English statute of 32 Henry VII., c. 9, on the subject of champertry, is not in force here; *Sessions v. Reynolds*, 7 S. & M. 130.

3. *Construction.* The construction placed by the courts of England, upon their statutes which have been re enacted here, will not be implicitly adopted by our courts; but it would have great weight in determining what construction of our statute should be adopted; *Ingraham v. Regan*, 1 C. 213.

Enrolment.

See JUDGMENT, sub-division Lien of Judgment, 6. CIRCUIT CLERK, 10. APPROPRIATION OF PAYMENTS.

Equity of Redemption.

See JUDGMENT, 83. EXECUTION, 31. MORTGAGE, 71.

Erasure.

See ALTERATION OF WRITINGS.

Error.

See HIGH COURT, AND WRIT OF ERROR.

Escheat.

1. *Escheator general entitled to estate.* The administrator of an intestate dying here without heirs, cannot by injunction restrain the escheator general from collecting the property of the deceased. And a creditor of such intestate must proceed against the escheator general; *Bolls v. Duncan*, W. 161.

Escrow.

See DEED, 38, 39.

Estate.

1. *Meaning of word "estate."* The meaning of the word "estate" in a will, embraces both real and personal property, unless the context shows the contrary; *Andrews v. Brumfield*, 3 G. 107; but the words "estate," "effects," and words of a like general import, when used in a clause containing an enumeration of personal property, will generally be confined to estate or effects, *ejusdem generis*, with that specified, unless a different construction be required by the context; *McIntyre v. Ingraham*, 6 G. 25.

2. *Rights of heirs apparent in ancestor's estate.* A vested right is, when there is an

immediate fixed right of present enjoyment, or a present fixed right of future enjoyment. The right of a child to his father's estate during the father's life, is not a vested right; *Marshall v. King*, 2 C. 85.

3. *Estate of tenant at sufferance.* The estate of a tenant at sufferance cannot be sold under execution; *Wildy v. Bonney*, 4 C. 35.

See LIFE ESTATE. LIMITATION OF ESTATES. ANCESTOR AND HEIR. WILLS.

Estate Tail.

See LIMITATION OF ESTATES.

Estoppel.

As to estoppel by deed, see DEED.

1. *Estoppel by recital in record.* A recital in the record of a judgment, that "this day came the parties by their attorneys, and the defendant waives all service of writ and pleadings," estops the defendant from assigning in error, any matter embraced in the waiver; *Walker v. King*, 1 H. 17.

2. *Estopped by representation acted on by another.* The answer of the maker of a note to a person wishing to trade for it and applying to him to know if there was any defence to it, "that it was given for slaves purchased of one M., and that he (the maker) did not then know of any defence to it," does not estop him from setting up a defence to the note, afterwards discovered by him to be good; *McMurrin v. Soria*, 4 H. 154; but if the maker say "he has no defence, and the note will be paid," he will be estopped to set up a defence, then existing, but unknown to him; *Land's Adm'r v. Lacoste*, 5 H. 471; so if he say "the note is just, and I consider it good against me, and I expect to make satisfactory arrangements with the holder when it falls due;" *Montgomery v. Dillingham*, 3 S. & M. 647; *Ayres v. Mitchell*, 3 S. & M. 683. And such estoppel operates not only against the maker making the promise, but against his co-maker, even though he may be a mere surety; *Montgomery v. Dillingham, supra*, *Dillingham v. Jenkins*, 7 S. & M. 479; but an express promise even to pay the assignee, made before the assignment, does not estop the maker from showing that the assignee has not a legal title to the instrument; *Beard v. Griffin*, 10 S. & M. 586; and if the assignee had notice that the consideration of the note was illegal, the promise will not estop the maker from setting up the illegality; otherwise, when the consideration has merely failed, since the maker could waive that; *Torry v. Grant*, 10 S. & M. 89.

See BILLS OF EXCHANGE, &c., 152, 153, 154.

2a. *Same: Where promise made after assignment.* A promise, however, made after the assignment was consummated is no estoppel; yet, if the assignment were originally made as collateral security for a debt due by the assignor to the assignee, and on the faith of the promise the assignee releases the assignor un-

conditionally, from all liability for the debt, the effect would be the same as if the promise were made before the assignment of the note; *Gilpin v. Smith*, 11 S. & M. 109.

3. *Same: Release from estoppel by violation of condition.* But if the promise which is set up as an estoppel be made upon condition that the assignee would give extension of time for payment of the note, and the assignee violates this agreement, then the promise is no longer an estoppel; *Ib.*

4. *Estoppel by owner representing to purchaser he has no interest.* When one of two joint tenants sold the whole land, and took notes for the purchase money, payable to both tenants, and his co-tenant afterwards transferred his interest in the notes to the tenant who made the sale, this is not sufficient as between the joint tenants, to take the case out of the statute of frauds; and the interest of the joint tenant not making the sale, will not be conveyed. But, if after such sale by one, the other state to the purchaser, before payment made by him for the land, that the sale was good, and he had no interest in the land, and thereupon the purchaser pay the price, the tenant making such statement will be estopped thereby from setting up his title to the land, upon the principle that where one knowingly suffers, even passively, another to purchase, and expend money on, land, under an erroneous opinion of the title, without making known his claim, he will not be permitted afterwards to exercise his legal right against such person; *Dixon v. Green*, 2 C. 612.

See HUSBAND AND WIFE, 114.

5. *Same.* And so, where the ancestor had made a sale by a defective conveyance, and his heirs had acquiesced for twenty years, and stood by and permitted the land to be sold, and large sums to be expended in improvements on it, without making known their claim, or setting up any objections, it was held that they were estopped; *Nixon's Heirs v. Carco's Heirs*, 6 C. 414.

6. *Must be pleaded.* An estoppel must be pleaded, and hence, if in an action against the trustees of school lands, for their neglect in allowing a note belonging to the fund to become subject to the bar of the statute of limitations, it being averred in the declaration that the trustees had brought suit on the note, and the maker had successfully defended it on that ground, but there is no allegation that a judgment was rendered in that suit for the maker, and the judgment be not pleaded as an estoppel, the trustees may plead that the note was not barred, and put that fact in issue in the suit against them; *Marshall v. Hamilton*, 41 M. 229.

7. *Voluntary deed no estoppel.* A voluntary deed is no estoppel to the grantor; *Fairley v. Fairley*, 5 G. 18. But when a gift is made by deed, and the donor acknowledge, under his seal, that a delivery was made, he is estopped to deny the delivery thus admitted, especially after the deed has been recorded; *Newell v. Newell*, 5 G. 385.

8. *Infant not estopped by deed.* An infant

is not estopped by his deed; *Cook v. Toubms'* 7 G. 685.

9. *Agent estopped.* An agent making a deed of his own land, in the name of the principal, is estopped to deny the principal's title; *Harney v. Morton*, 7 G. 411.

10. *Void decree is no estoppel.* See *Martin v. Williams*, 42 M. 210.

11. *Estoppel of decree in Probate Court against administrator.* See PROBATE COURT, 190a, and VENDOR AND VENDOR, 110b.

12. *Estoppel by receiving proceeds of unauthorized act.* See HUSBAND AND WIFE, 140.

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See CRIMINAL LAW, sub-division Evidence; and CHANCERY, sub-division Evidence.

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I. General Principles.

1. *Rules of evidence adapted to practical ends.* All rules of evidence are adapted for practical purposes in the administration of justice, and must be so applied as to promote the ends for which they were designed; *Lampley v. Scott*, 2 C. 328. And they should be liberally construed for the advancement of justice; *Moye v. Herndon*, 1 G. 110.

1a. *Policy to enlarge the competency of evidence.* The policy of modern legislation and judicial decisions, is to widen the door for the reception of evidence and to give the party offering it the benefit of all doubts as to its competency; *Partee v. Silliman*, 44 M. 272.

II. Mediate and Indirect Evidence.

1. Admissions.

2. *Always admissible against a party.* The admissions of a party are always admissible against him. Hence, when a memorandum of the terms of the rescission of a contract not signed by either party, made no mention as to whether payments which had been made on the contract were to be refunded or not, it was held competent to show that they were not to be refunded, by the declarations made before and after the rescission by the party now claiming the refunding of the payments; *Clark v. Perry*, 4 H. 285.

3. *But they must be voluntary.* The confessions or admission of a party are inadmissible in a civil suit against him, if obtained by force, or by operating on his fears; and hence it is proper to ask a witness proving such admission, if he had not used threatening language to the party, and forced him to give up his money to the witness, before he made any confession or admission; *Jones v. Donald*, 4 C. 461; the rule is the same in criminal cases. See CRIMINAL LAW, sub-division Confessions; and *Jordan's Case*, 3 G. 382.

4. *Value of, as evidence.* The admissions of a party are the strongest or weakest evidence, according to the surrounding circumstances, and it is for the jury, and not for the court, to determine upon their value in a particular case; *Prewett v. Coopwood*, 1 G. 369; and admissions are weakened, if it be

shown that they were made under a motive to conceal the truth, especially if the circumstances showing the motive, also tend to show the falsity of the admission; *Parker v. McNeill*, 12 S. & M. 355.

5. *Admissions of a party competent to testify.* As a general rule, the admissions of one competent to testify in a cause, are inadmissible; *Carmichael v. Bank of Pennsylvania*, 4 H. 567; but if the party making the admission be competent to testify, if he will, but have the right to refuse to testify, his admissions are admissible, unless he voluntarily appear and offer to testify; *Duncan v. Watson*, 2 S. & M. 121. See post. 22.

6. *Admissions agreed to for purposes of the suit or trial.* Where the parties to a suit have made an agreement in writing, admitting the existence of certain facts as evidence in the cause, this will be conclusive, and neither will be permitted to introduce evidence to contradict the agreement thus made; *Morgan v. Reading*, 3 S. & M. 366.

7. *Admitting affidavit made for continuance.* Where, on an application for a continuance, the party resisting it, admits the affidavit as evidence, or as containing the evidence of the absent witness, he may introduce evidence to contradict it; and this is now the rule also by statute, Rev. Code of 1857, p. 622, art. 302. But if he admit the facts stated in the affidavit, he cannot then introduce evidence to contradict them; *Brent v. Heard*, 40 M. 370.

8. *The whole conversation must be introduced.* Where the conversation of one party is introduced in evidence by the other, the former has the right to have all that conversation detailed in evidence; and this rule applies wherever a party, introducing a witness to prove a conversation, allows him to state the result of another conversation, so as to give to the party whose conversation has been thus introduced, the right to have both conversations fully stated to the jury; *McIntyre v. Harris*, 41 M. 81.

9. *Same: Effect of endorsement of credit as an admission.* But an endorsement on a promissory note, of a credit in these words: "Received on this note, \$1,236, it being proceeds of 40 bales of cotton shipped to Liverpool on account thereof," was held to be an admission of the reception of the cotton, but not evidence that the plaintiff had a right to ship it to Liverpool; and hence, evidence was admitted to show the value of the cotton in the markets of the State where the parties lived, there being no other proof about the cotton than the endorsement, and the evidence thus admitted of its value; *Phillips v. Com'l Bk of Manchester*, 1 S. & M. 636.

10. *Propositions made to a stranger containing admissions: Case in judgment.* A letter from the defendant (who was sued as endorser of a note), addressed to a stranger, in which assistance was asked by the defendant to arrange a note made by the same person as the note sued on (and on which the letter stated the writer was endorser), with the view of getting possession of the note, to enable

the defendant to sue the maker on it, is competent to go to the jury as an admission of the defendant, in regard to the notice of the dishonor of the note sued on, there being other evidence identifying the note sued on, as the one alluded to in the letter; *Duncan v. Watson*, 2 S. & M. 121.

11. *Effect of receipt as evidence.* A receipt given by the defendant for a promissory note made by him, is evidence that he gave such a note; and if he be sued on the note as described in the receipt, and on being served with notice to produce it, he produce a note in all respects like the one described in the receipt, except that it is under seal, the plaintiff will, nevertheless, be entitled to recover upon the evidence contained in the receipt, unless the defendant show by evidence, that there is a mistake in the receipt, and that the writing obligatory produced by him, and not a promissory note, was the instrument really received for; *Anderson v. Root*, 8 S. & M. 362.

12. *Same: When there is a mistake in the parties' names.* An action was brought by a bank, on a note made by G., W. & M. as partners, and also by F., for \$500, due 1st January, 1840, and payable at the bank. The defendants, to show payment, read in evidence without objection, a memorandum signed by the teller of the bank, to this effect: "Bank, in account with G. & W.; 1841, March 25. By cash, \$600; interest on same, \$30. To Cr. \$630, to be applied to payment of note." And on this evidence the jury found that the note was paid: *Held*, that the verdict was warranted by the evidence; *Union Bk v. Graves*, 12 S. & M. 130.

13. *Effect of introducing sworn admission.* If a party introduce in evidence the sworn statements of his antagonist, it will not be error for the court to instruct the jury that he is bound by such statements, unless it be contradicted by the other evidence; *Crowder v. Nelson*, 3 G. 260.

14. *Effect of promise by maker to pay to the assignee.* If the maker of a note promises the holder (who is an assignee) to pay it, this is *prima facie* evidence of title in him, and dispenses with proof of the endorsement to him; *Barringer v. Nesbit*, 1 S. & M. 22.

15. *Effect of admission as to boundary.* A declaration by the owner of adjoining land that his neighbor's boundary extends to a certain line, when accompanied by acts of forbearance on the part of declarant to go beyond that line, is evidence as against the declarant that the line designated is the boundary; *Surget v. Little*, 2 C. 118.

16. *Effect of admission made by a lawyer.* Where a positive and absolute acknowledgment of liability for the acts of his co-administrator, is made by one cognizant of all the facts, and entirely competent to form an opinion as to the extent of his liability (as by a lawyer of eminence), the acknowledgment is conclusive, unless it be shown affirmatively that it was founded on mistake; *Jeffries v. Lawson*, 10 G. 791.

See GUARDIAN AND WARD, 61.

17. *Offers of compromise.* Offers of com-

promise are inadmissible in evidence; *Garner v. Myrick*, 1 G. 448. Though the courts of late have leaned against their exclusion; *Grubbs v. Nye*, 13 S. & M. 433. But the admission of distinct facts, though made in an offer of compromise, is admissible; *Garner v. Myrick*; *Grubbs v. Nye*, *supra*; *Prussell v. Knowles*, 4 H. 90.

See COMPROMISE, 1.

18. *Same: Case in judgment.* To an action of assumpsit on a promissory note, the defendant pleaded *non assumpsit*, which, under our statute, is an admission of the execution of the note; and he then wrote to the plaintiff a letter in which he stated: "It appears I am surety for William on a note for \$7500;" and that he (the maker) was old and infirm, without property and unable to pay; but that he had a son who would pay for him in cotton, at twelve cents per pound, in five years, without interest, provided a judgment should be obtained against him in that suit. The defendants afterwards pleaded a denial of the execution of the note under oath: *Held*, that the letter was admissible in evidence against the defendant, because: 1st. It did not seem to be an offer of compromise, or to be written pending a proposition to compromise; and, 2d, if it were, still the admission that he was surety on the note was admissible; *Grubbs v. Nye*, *supra*.

19. *Admissions by pleading.* It is well settled under our statute (H. & H., p. 595), that a plea to the action admits the character in which the defendant is sued, as maker, endorser, partner, and the like, and that he cannot introduce evidence to overturn the admissions so made; *Wade v. Staunton*, 5 H. 631. But unsworn pleadings at law or in chancery are not admissible in evidence, against the party pleading them, in another suit, as admissions of the facts stated in them; such averments being generally the mere acts of the counsel preparing the pleadings; *Crumpp v. Gerock*, 40 M. 765. And an allegation in one plea is no evidence to overturn another distinct plea. Hence a plea in ejectment setting up a claim for improvements in the *locus in quo*, is no evidence of possession by the defendant, when the general issue is also pleaded; *Morris v. Henderson*, 8 G. 492. Under the Pleading Act of 1850 allegations of the complainant not denied by the answer, are to be taken as true; *Pruett v. Coopwood*, 1 G. 369. An affirmative plea setting up matter in avoidance, unaccompanied by any plea denying the cause of action, is an admission of the cause of action as stated in the declaration; *Winn v. Skipwith*, 14 S. & M. 31.

20. *Admissions inferred from silence.* An admission of a statement made to a party, may sometimes be inferred from his silence in not denying it; but such evidence is equivocal and should be received with caution and reluctant credence; and when such evidence is introduced all the attendant circumstances should be known. The temper of the parties and the tenor of the conversation should be stated with accuracy; *Hulls v. Thompson*, 1

S. & M. 443. Thus, where a witness stated the language of the parties to a conversation, except that in proving an admission made by one of them, the witness said, that the party "did not deny the concealment but admitted the suppression," it was held that this testimony raised but a very remote presumption that an admission of concealment had been made; *Halls v. Thompson, supra*. The statement also must be clearly shown to be made in the hearing of the other party; *Presley v. Quarles*, 2 G. 151. And there can be no admission from silence or failure to deny, where it is shown that the party so failing, had no personal cognizance of the matter stated in his hearing; *Miller v. Northern B'k*, 6 C. 81. Thus, where the proof was "that an agent of the plaintiff presented an account against a partnership to the junior member of the firm, who looked at it and said that he had some money in the house, which he could pay on it, but he would rather wait a few days till his father (the senior member) came home; that he was then looking for him, and he would return through the town in which the plaintiff did business and settle the matter; and this partner (the junior) examined the account and made no objection to it;" it was held that the proof was insufficient to sustain the account, as it was evident that the junior member referred plaintiffs agent to his father, because he was not cognizant of the transaction; *Miller v. Northern B'k, supra*. As to silence of agent, see *post*, 25, and PUBLIC CONTRACTS, 2. As to silence of administrator, see EXECUTOR AND ADMINISTRATOR, 176.

21. *Admissions by partners*. The declarations of one copartner made after the dissolution of the partnership, but in relation to facts which transpired during its existence, and in the regular course of its business, and not creating a new liability, are admissible against his associate; *Curry v. Kurtz*, 4 G. 24.

See PARTNERSHIP, 17, 18.

22. *Admission by an executor*. The admission of an executor that he had received notice of the dishonor of a note endorsed by his intestate and falling due after the executor's appointment, is admissible in evidence in an action against the executor, unless he appear at the trial and consent to be examined as a witness himself; *Duncan v. Watson*, 2 S. & M. 121.

See EXECUTOR AND ADMINISTRATOR, 174 to 176.

22a. *As to effect of admission made under erroneous advice of counsel*, see ATTORNEY AT LAW, 57.

23. *Admissions by husband or wife*. An admission made by a *femme covert* in relation to the title of a slave in her possession, is admissible against her, and those claiming under her; *Parr v. Gibbons*, 1 C. 92; S. C., 5 C. 375. And the admission by the husband of the wife's title to personalty in their joint possession, is admissible against him and those claiming under him, to prove title in her; *Sharpe v. Maxwell*, 1 G. 589.

24. *By attorney at law*. The unsolemn

and extra-judicial declarations of an attorney at law admitting the payment to him of a debt due to his client, is evidence against the client; *Wenans v. Lindsey*, 1 H. 577.

25. *By agents*. The admission of an agent made whilst in the discharge of the duties of his agency, are admissible against the principal, and hence, an account rendered by the clerk of a bank, whose duty it was to make it, is evidence against the bank to show usury; *Formiquet v. West Feliciana R. R. Co.*, 6 H. 116. And so the statement of an agent of an incorporated seminary of learning, made to a person as an inducement for him to subscribe for a scholarship in the corporation, as to what studies were embraced in the scholarship, is admissible in evidence on the part of the subscriber, and so also are the resolutions and actions of the board of trustees; *Mary Washington Female College v. McIntosh*, 8 G. 671. And so statements made by one party to the authorized agent of the other, in reference to dealings between the declarant and the agent in the matter of the agency, and not denied by the agent, are admissible in evidence in favor of the declarant; *State v. Farish*, 1 C. 483. See *ante*, 20.

See PRINCIPAL AND AGENT, 59.

26. *By joint trespassers*. In a joint action for trespass against several, the admission of one of the defendants who died after suit brought, is not admissible to prove the trespass against the others; *Blackwell v. Davis*, 2 H. 812. But when, in such an action, the evidence tends to show a combination between the defendants to commit the injuries complained of, the acts and declarations of one of the defendants during the continuance of the affair, *i. e.*, "before the difficulties had entirely ceased, and while the revengeful feelings of the defendants were still aroused," and before the parties have entirely separated, such acts and declarations showing circumstances of aggravation, are admissible against all—they are a part of the *res gestæ*. Hence, testimony that immediately after the trespasses were over, the witness and another were about to get water to wash the blood from plaintiff's face, caused by injuries received from the defendants, when one of the defendants prevailed on them not to do so, using abusive language towards the plaintiff; and that as plaintiff, who was then mounted on his horse, was about to quit the scene of the trespass, the same defendant struck him, is competent; *Bell v. Morrisson*, 5 C. 68. See *post*, 79.

27. *By joint makers and obligors*. The admission of a joint maker or obligor of a note or bond is admissible in evidence against the others, especially when they have not severed in pleading; and this is so though the admission be made in an answer to a bill of discovery filed against the party making the admission; *Montgomery v. Dillingham*, 3 S. & M. 647. See ESTOPPEL, 2.

28. *Admissions by privies: Assignor and assignee*. An admission by an assignor of a chose in action, made whilst he was the owner and holder of it, is competent evidence against

the assignee and those claiming under him; and this rule is universal in this State, and extends to admissions of illegality of consideration made by the payee of a note before assignment; *Brown v. McGraw*, 12 S. & M. 267.

29. *Same*. On the trial of an action brought by the drawees against the drawer of an accommodation bill of exchange, for money paid out by plaintiff on the bill, the payee was introduced by the defendant to show that the plaintiff had obtained the bill without value; but the witness could not state, without access to his books, whether he had received value from the drawees of the bill at the time he deposited it with them, or afterwards. The plaintiff then introduced in evidence the books of the payee to prove that when they took the bill, and afterwards, they made advances to the payee on the faith of it: *Held*, that the books, in connection with the testimony of the payee, introduced by the defendant, were competent evidence for the plaintiff, as the defendant was bound by the payee's acts in regard to the bill, since he had drawn the bill for his accommodation and intrusted it to him; *Fellows v. Harris*, 12 S. & M. 462.

30. *Same: Distributee and administrator*. The admission of one of several distributees of an estate is not competent evidence against the administrator, as it would affect the interest of the other distributees; *Prewett v. Coopwood*, 1 G. 369.

31. *Same: Heir and ancestor, lessor and lessee*. The declaration of the ancestor or lessor, qualifying his right, is competent evidence against the heir or lessee; *Graham v. Busby*, 5 G. 272.

32. *Principal and surety: Guardian and executor, and their sureties*. The inventory returned by the guardian is *prima facie* evidence against his surety of the reception by the former of the assets therein mentioned; *State v. Stewart*, 7 G. 652. And so is a decree rendered against an executor in the Probate Court evidence against his surety, being a part of the *res geste*, and the unsolemn admission of the principal; but it is only *prima facie* and not conclusive as to the surety; *Lipscomb v. Postell*, 9 G. 476. The sureties in such case are not in such privity with the principal as to be concluded by the judgment, unless there be a special stipulation in the bond to that effect; *Ib.*

33. *Of vendor impeaching his deed*. The declarations of a vendor made after the execution of the deed, are not admissible in evidence to impeach it; and this rule is applicable where the declarations of the grantor in a deed of trust, as to the motive he had in making it, is sought to be introduced by his creditor, who seeks to impeach it upon the ground that it is fraudulent as to his creditors; *Ferriday v. Selser*, 4 H. 506.

2. Res inter alios acta.

A. DECLARATION AND ENTRIES BY DECEASED WITNESS.

34. *Same*. An entry or memorandum by one who knew the fact, and had no interest to

falsify it, and made in the course of his business, is admissible, after his death, as evidence of the fact. And upon this ground a memorandum made by a notary public in his notarial record of the protest of a promissory note, stating the time and manner of serving notice of protest on the endorser, is admissible after the notary's death; and in such case it is not necessary that the whole record should be in the notary's handwriting, if it be signed by him; *Barnard v. Planters' Bank*, 4 H. 98; *Ogden v. Glidewell*, 5 H. 179; *Bodley v. Scarborough*, 5 H. 729. And by the statute of 1833, such record is admissible in evidence if made under the oath of the notary, except in the county where the notary resides; *Ogden v. Glidewell, supra*. But if not made under oath, it is admissible at common law if the notary be dead; *Dorsey v. Merritt*, 6 H. 390.

See BILLS OF EXCHANGE, 81.

35. *Same*. And so where it was a matter in controversy what was the true date of a sale of land made by a guardian, a mortgage executed by the purchaser to indemnify his sureties for the purchase money, which recited the date of the sale, was, after the mortgagor's death, held competent to show the date; *McComb v. Gilkey*, 7 C. 146.

36. *Declarations as to pedigree*. The declaration of a deceased person, that her former husband was dead at the time of her second marriage, is competent evidence on the trial of an issue involving the legitimacy of the children of the second marriage; *Sprars v. Burton*, 2 G. 547; S. P., *Henderson v. Cargill*, 2 G. 367.

B. DECLARATIONS WHERE PARTY IS NOT DEAD.

37. *Same: Entry must be proven*. But where a creditor received cotton from his debtor, for shipment to a foreign port, and sold it there on the debtor's account, a paper purporting to be an account of the sale and to be made by a commission house in that port, is not admissible in evidence without proof that it is the actual and true account of the sale; *Commercial Bank of Manchester v. Chisholm*, 6 S. & M. 457.

37a. *Declaration post litem motam*. The exception to the general rule admitting hearsay evidence of matters of general interest, which excludes the admission of declarations made *post litem motam*, applies only to the principal matters in controversy and in issue in the suit, and not to collateral and incidental questions arising during the progress of the trial; and hence it is no objection to the admission of the testimony of a witness, impeaching the character of another witness, on a trial for murder, that the former never heard the character of the latter called in question till after the homicide was committed; *Mask's Case*, 7 G. 77.

3. As to admissibility of Declarations in favor of Declarant.

38. *Answer in chancery, not admissible at law*. An answer in chancery to a bill of dis-

covery and injunction filed pending an action at law, is not admissible in evidence, except as against the party making the answer. A party cannot make evidence for himself, either verbal or written; *Bien v. Weatherspoon*, 1 H. 28; S. P., *Newell v. Newell*, 5 G. 385.

39. *Declaration of party to prove possession.* The statement of a party claiming that he is in possession of realty, is not evidence for him to prove possession; *McMullen v. Mayo*, 8 S. & M. 298; *Nixon's Heirs v. Carco's Heirs*, 6 C. 414.

40. *Declarations explanatory of possession.* And where the statement of a party is sought to be admitted on the ground that it is explanatory of his possession, the fact of his possession must be shown by proof. Hence, in an action on a promissory note against one of several joint makers, the statement of a deceased maker, not sued, is not admissible in favor of the defendant, even in connection with evidence which tends to show, but does not show, that the declarant had the note in his possession at the time, and the statement was explanatory of his possession; *Nye v. Grubb*, 8 S. & M. 643.

41. *Sheriff's return admissible in his favor.* A sheriff's return of a levy and sale of realty, is competent evidence in his favor, in an action by him against the purchaser, for the price bid by the latter; but a mere memorandum made in a private book by the sheriff, is not. The return is an official act, and as such admissible; *Hand v. Grant*, 5 S. & M. 508.

42. *Declarations admitted from necessity.* The declarations of a party interested may be received in his own favor, in cases of extreme necessity, where, from the nature of the case, no better evidence can be reasonably expected. But the necessity must not arise from an accidental failure of evidence in a particular and isolated case, but it must be general in its nature, embracing a large and definite class of cases, and must arise in the usual and natural course of human affairs. And this principle is so applied, as to admit not only the declarations of the party interested, but to make him a competent witness in his own favor. Hence, when a mandatory has been secretly robbed of the bailor's goods or money, his statement made soon after the robbery, detailing the circumstances, are competent evidence in his favor, and he is also a competent witness in his own behalf; *Lamley v. Scott*, 2 C. 528; S. P., *Holman v. Murdock*, 5 G. 275.

43. *Where notice is required.* Where the law imposes the duty on one to give notice to another, the letter of the former giving the notice is competent evidence in his favor, so far as the contents go to give the required notice; *Swann v. West*, 41 M. 104.

44. *Where the fact of setting up a claim is in issue.* When evidence is introduced to the effect that a creditor had stated to his debtor that he would not require payment of the debt, unless he (the creditor) should afterwards get into a situation where he would need it; it will be competent to show the declarations of the creditor, made after-

wards, claiming the debt, or demanding payment; *Young v. Power*, 41 M. 197.

4. Admission of Books of Accounts.

45. *Admissibility of books of accounts.* When direct proof of a claim for goods sold or services rendered, cannot be made by the oath of the creditor or of other witnesses, the books of account of the creditor are admissible, not as conclusive evidence of the claim, but as evidence tending to establish it, the credit of which is to be weighed by the jury. But their competency in any particular case is a question for the court, and in order to justify their admission they must appear to be the regular books of account of the party, containing the original entries of his transactions from day to day, and in the regular course of business, and made at or near the time of the transaction to be proven, and also that the books are fairly and honestly kept. The entries must also purport to have been made with the view to charge the opposite party. And if alterations or additions appear in the account, they must be satisfactorily accounted for. And in order to make them competent evidence, no particular mode of keeping them is required. The question of their competency must be determined by their appearance and the character of the books, regard being had to the degree of education of the party, the nature of his employment, the manner of the charges against other people, and all the circumstances of the case. And they will not be evidence of any charge not in the regular course of business of the party, nor of any fact that may collaterally arise in the case; *Moody v. Roberts*, 41 M. 74; confirmed in *Hunter v. Wilkinson*, 44 M. 71.

46. *Copies of books not admissible.* The practice which has grown up in this State of admitting copies of accounts transcribed from the books, and sanctioned by several cases, is condemned as illegal; *Moody v. Roberts*, *supra*. The cases referred to are the following: *Hazlip v. Leggett*, 6 S. & M. 326; where it was said in relation to proof of a physician's account, that it would have been strengthened by proof that the plaintiff kept correct books and the account was correctly copied from them. And in *Simmons v. Means*, 8 S. & M. 397, a similar case, it was said the proof introduced was insufficient, because there was no proof that he kept correct books, and the account sued on was correctly transcribed from them. And to the same effect is *Moore v. Joyce*, 1 C. 584.

47. *Books of a partnership as evidence.* The books of a partnership in which are entered all its transactions, and in which are also entered the transactions of the surviving partner, are evidence in a suit by the representatives of the first deceased partner, against the representatives of the surviving partner, who had also died, for an account. And they are the standard, if proven to be correctly kept, by which the surviving partner is to account, and he is not to be held accountable for profits not shown by the books, but which witnesses acquainted generally

with the partnership business, estimate as right; *Maysen v. Beazley*, 5 C. 506.

48. *Abstract of lost books evidence.* And if such books be lost, and the bookkeeper who kept them be dead, the solicitor of the party seeking the account will be compelled to produce a fair abstract which he has made of them for his use in the suit, and the abstract when so produced and proven by the solicitor to be fair, will be competent evidence to prove the contents of the book; *Ib.*

48a. *Impeachment of books of account.* The account books of a physician were offered in evidence by his administrator to prove an account for medical services. The plea was the general issue only; defendant sought to prove that the plaintiff's intestate had been known to receive payment from other customers, which he never entered on his books: *Held*, that the evidence was not germane to the issue; but that evidence showing that he charged for services not rendered, was competent; *Hunter v. Wilkinson*, 44 M. 721.

5. Presumptive Evidence.

A. FROM CONDUCT.

49. *Title presumed from acts of parties.* After a great lapse of time, when positive proof of a fact is impossible, resort may be had to circumstantial evidence derived from the conduct of the parties at the time. It was a question in 1841 whether certain slaves of the wife came to the possession of husband and wife before the husband's death in 1827; there was no positive proof on this point, but it was held that the circumstantial evidence warranted the belief that the slaves came to the husband's possession before his death, and this proof was mainly based on the ground that they were, soon after the husband's death, appraised as a part of his estate, and that his administrator, who caused it to be done, was a man of fine business capacity and of exemplary probity; *Harper v. Archer*, 6 C. 212.

50. *Presumption from failure to produce a witness.* The fact that witnesses evidently friendly to the party failing to call them, were not introduced to contradict another witness (it appearing that they were cognizant of the transaction), is a circumstance tending to strengthen the testimony of that witness; *Calhoun v. Burnett*, 40 M. 599.

51. *Proof of marriage by conduct of the parties.* Proof of cohabitation between a man and a woman, and an acknowledgment of each other as husband and wife, and that they were so regarded and treated by their relatives, and that they recognized and gave the family name to their children, raises the presumption of a legal marriage between them, which is not rebutted by proof of occasional declarations made by each of them, denying the marriage, if they be not made under circumstances of peculiar seriousness and solemnity; nor by proof of conduct on their part which amounts only to a suspicion that they were not married; *Henderson v. Car-gill*, 2 G. 367.

51a. *Presumption of continuance of adul-*

tery. Unlawful sexual intercourse, once shown, is presumed to continue, if the parties continue to live in the same house, though the other inmates of the house are not prepared to depose to that fact; *Carotti's Case*, 42 M. 334.

52. *Presumption as to intent to charge: Case in judgment.* G. married the widow of C., and lived with her during her life, in the occupancy and enjoyment of C.'s estate; and continued such occupancy and enjoyment till his own death, being in all a period of twenty years, and made no charge against C.'s estate during that time for the support and maintenance of C.'s children, who lived with him; nor for money laid out for the estate. After G.'s death his administrator presented an account against C.'s estate, for the support of the children and for money paid out for the estate: *Held*, that the facts raised a fair presumption that G. never intended to charge for the maintenance and support of the children, nor for money disbursed by him for the estate; *Carter v. Probate Judge*, 2 S. & M. 42.

52a. *Presumption as to official conduct.* The presumption of the correctness of official character is a general one, and applies to all official acts: *Wray v. Doe*, 10 S. & M. 452; *Hardin v. Ho-yo-po-nubby's Lessee*, 5 C. 567.

B. FROM POSSESSION.

53. *Possession of order by drawee.* The possession by the drawee of an order directed to him by a judgment creditor, and requesting him to pay a certain sum of money, and stating "this shall be your receipt for so much money paid on said judgment," is *prima facie* evidence of payment by the drawee of the amount stated in the order; *Witherspoon v. Cain*, W. 407.

54. *Possession presumed rightful.* Possession of realty is an apparent right, and when it has long continued, it is highly favored in law, which sustains it by all reasonable presumptions. Almost every variety of written evidence of title will be presumed in favor of long possession; all presumptions being in favor of the possessor, and none against him; *Grand Gulf Bank v. Bryan*, 8 S. & M. 234; *S. P., Nixon's Heirs v. Carcos's Heirs*, 6 C. 414; *S. P., Stevenson's Heirs v. McReary*, 12 S. & M. 9. See *post*, 56.

55. *Possession of deed.* Possession by the grantor of a deed is presumptive evidence of delivery; *Morris v. Henderson*, 8 G. 492.

C. FROM LAPSE OF TIME.

56. *Presumption: Supplying records after thirty years.* Whilst it is settled in this State that a sale of realty made by an administrator under an order of the Probate Court, is void, unless the record show affirmatively everything necessary to give the court jurisdiction over the person and over the subject matter; nevertheless, when the sale was ordered and made in the infancy of the territorial government of Mississippi, and the record showed the appointment of the administrator, and an order declaring the estate insolvent, and

directing the sale of the realty, but did not show that notice was given to the heirs, nor that a bond was given to account for the proceeds, it was held in favor of the purchaser, who had been in possession for thirty four years under a deed from the administrator, reciting in detail the performance of all legal acts necessary to a valid sale, that from the great lapse of time the legal presumption was that the sale was regular in all respects and valid, and that this presumption would prevail in the absence of countervailing proof showing the contrary; and that the presumption was strengthened by proof, that at the time of the sale and subsequently, the officers in charge of the records of the court were careless and negligent in the discharge of their duties, as such proof must tend to show the probability of the loss or destruction of the records; *Stephenson v. McReary's Heirs*, 12 S. & M. 9. See *ante*, 54.

57. *Same*. After the lapse of eleven years only, notice of a motion to confirm a sale of realty will not be presumed, it not appearing that any of the records or papers are lost, and it is doubtful whether the doctrine allowing presumptions of the existence of writings after a great lapse of time, is at all applicable to cases of records; *Learned v. Matthews*, 40 M. 210.

58. *Same*. The lapse of twenty years from the date of the record, and of the proof of the execution of a will, is no presumption of its probate, where nothing has been done in execution of the will, and no possession held under it; *Fotherree v. Lawrence*, 1 G. 416. See *WILLS*, 113, 114.

59. *Deed thirty years old: Proof of execution*. A deed thirty years old may be established by proof of the signature of one of the subscribing witnesses, without proof showing his death or absence from the State; *Nixon v. Porter*, 5 G. 697. And if the grantee took possession of the land soon after the date of such a deed and held it a short time, and the grantor twenty years afterwards admitted that he executed the deed on the day of its date, this is sufficient to dispense with the production of the subscribing witnesses; *Ib*.

60. *Same*. That a deed merely bears date thirty years before its production in evidence, is not sufficient to bring it within the rule which admits as evidence ancient documents, without proof of their execution; but the existence of the deed for thirty years, must be shown by proof *alunde*; this may be done, however, by proof of circumstances creating the presumption of execution, as by proof of its possession by the party claiming under it for thirty years, or by proof of possession of property conveyed by it for that period; *Fairly v. Fairly*, 9 G. 280.

See *DEED*, 92, 92a.

61. *Presumption of payment from lapse of time*. When the statute of limitations, barring actions on a bill single, is sixteen years, it is a very serious question whether the failure to sue on the bill for nine years, even with additional circumstances, would warrant a presumption of payment; and the failure

to sue for three years, whilst the holder was in easy circumstances, affords but a slight presumption against him. And when the debtor removes to another State, any presumption of payment arising from lapse of time, is repelled whilst the debtor and creditor resided in different jurisdictions; *Mann v. Manning*, 12 S. & M. 615.

See *VENDOR AND VENDKE*, 230.

62. *Same: Repelling presumption: Case in judgment*. A bill single overdue for many years, was presented to the maker for payment, and he answered that he would make inquiry in another State, where the bill single was executed, to ascertain whether or not it had been paid, and if it had not been paid he would pay it; but he took no steps to make the inquiry: *Held*, that this conduct was a circumstance to repel any presumption of payment arising from the lapse of time; *Ib*.

63. *Presumption of death*. A party who has left the State, and has not been heard from for five years, is presumed to be dead; within the five years he is presumed to be alive; *Spears v. Burton*, 2 G. 547; *Gibson's Case*, 9 G. 313. But this last presumption in favor of life is not sufficient to establish the illegality of the marriage of such absentee's wife within the five years, especially when the validity of the marriage is attacked after the lapse of twenty years from his departure from the State, during all which time he has not been heard from; *Spears v. Burton*, *supra*.

64. *Same*. And the legal presumption in favor of the validity of a second marriage, of a party whose husband or wife at the time of the second marriage has been absent five years without being heard from, will be indulged in a prosecution for bigamy against a party to the second marriage, who subsequently contracts a third marriage, and who insists that the second marriage was void on account of his absent wife being then alive; *Gibson's Case*, 9 G. 313.

64a. *Presumption of death: Case in judgment*. Art. 252, p. 521, of the Rev. Code of 1857, is as follows: "Any person who shall remain beyond sea, or absent himself from the State, or conceal himself in the State, for seven years successively, shall be presumed to be dead, in any case wherein his death shall come in question, unless proof remains that he is alive within that time," &c. The mother of the absentee testified in the year 1866, that he sailed from New York in 1856, bound for Spain; about five days after the sailing, there was a violent storm at sea, and that neither the ship, nor any person on board (including her son) had been heard from afterwards: "*Held*, that this was sufficient presumptive proof of the son's death; *Learned v. Corley*, 43 M. 687.

See *LIMITATION OF ACTIONS*, 12.

6. Circumstantial Evidence.

65. *Identity proven by circumstantial evidence: Case in judgment*. Identity may be proven by circumstantial evidence as well as positive. Hence, in an action on the case for damages for enticing away a slave, the plain-

tiff may prove by one witness that he lost a slave of a certain description, during such a period, and he may prove by another witness that a slave of that description was on the defendant's plantation during the period of the absence; *Suzett v. Buckels*, 7 H. 663.

66. *Consideration proved by circumstances.* When the date and amount of a note correspond exactly with the date and amount of a certificate for stock issued by the payee to the maker, this correspondence, in the absence of all contrary proof, is sufficient to authorize a jury to find, that the stock was the consideration for the note; *Barringer v. Nesbit* 1 S. & M. 22.

67. *Proof as to assent to receive uncurrent funds: Case in judgment.* The plaintiff in execution made a motion against a sheriff for a failure to pay over money collected on his execution, which the sheriff had returned "satisfied," and the sheriff was allowed to prove that he collected it in Union Bank notes, and notified plaintiff's attorney of that fact, who made no objection thereto; that about the same period plaintiff was in the habit of receiving from his agents and attorneys, without objection, the same kind of funds; that these bank notes constituted the circulating medium of the State at that time, and were generally received by execution creditors, and that the money had been collected four years before the motion was made: *Held*, that the evidence was competent and legal, and also, that it was such, that in view of it the court could not instruct the jury, there was no legal evidence before them that the plaintiff authorized the reception of those notes in payment of his execution; *Anketell v. Torrey*, 7 S. & M. 467.

68. *Circumstantial evidence of probate of will.* A certified transcript of the record of a Court of Ordinary, for the State of Georgia, in which is embraced a copy of a will, and the affidavit of the attesting witnesses, proving its execution, made in open court, and also a statement that the will was recorded, and copies of the receipts given by the legatees named in the will, to the executor for legacies bequeathed to them, which receipts were also recorded in said court, contains sufficient, though informal, evidence of the probate of the will; *Jordan v. Thomas*, 2 G. 557.

69. *Proof that jury were sworn.* If the record recite, that "the jury were sworn, a true verdict to give according to the evidence," it is presumed they were regularly sworn, or that the parties waived the regularity, if no exceptions were taken; *Welborn v. Spears*, 3 G. 138.

See CRIMINAL LAW.

7. *Res gestæ.*

70. *Difficulties as to general rule: Discretion of court.* It is difficult, if not impossible, to lay down any precise general rule as to what acts and declarations are admissible in evidence as a part of the *res gestæ*. And from this inherent difficulty, questions in relation thereto must, to a great extent, be left

to the sound discretion of the court of the first instance, and for this reason the appellate court will, in reviewing the decisions of the inferior tribunal on such questions, defer much to the discretion of that court; *Meek et al. v. Perry*, 7 G. 190.

71. *Tests of the admissibility of res gestæ.* The principal points of attention upon the admissibility of acts and declarations, as a part of the *res gestæ*, are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they are so connected with it as to illustrate its character; *Ib.*

72. *Same.* The declarations must appear to have been made at the time the act was done which they are supposed to characterize, and they must be well calculated to unfold the nature and quality of the facts which they are introduced to explain, and must so harmonize with them as obviously to constitute only one transaction. They must also be such as may fairly be regarded as the natural suggestion of the co-existing motive which influenced the conduct under investigation, and referable only to that motive and conduct; *ib.*; *S. P., Holman v. Murdock*, 5 G. 275.

73. *Same.* If the declarations be merely narrations of a past transaction, or if they be not the natural and inseparable concomitants of the main fact in controversy, and so connected with the hypothesis they are introduced to support, as to induce the belief that they are the mere result and consequence of the co-existing motives which they are designed to establish, they are inadmissible. And if from the experienced connection between the circumstances and situation, in which the declarant was placed at the time the declarations were made, and of human motives and conduct under like circumstances generally, the declarations are most likely the result of contrivance and a fraudulent design to conceal the truth, they are inadmissible; *Meek et al. v. Thornton, supra.*

74. *Same: An instance.* The act of importing a slave into this State is a single transaction, confined to a single point of time; and, moreover, the importer, by procuring the certificate of character required by the statute, has it in his power to avoid the necessity of relying upon his own declarations as evidence of his intention in making the importation; and hence, his declarations, made on the eve of his departure from the State to purchase slaves in another State, and after his return with the slaves, and whilst they were in his possession, that they were for his own use and not for sale, are inadmissible in evidence in his favor, to show that the slaves were not introduced for sale; *Holman v. Murdock*, 5 G. 275.

75. *Same.* And the fact that the members of the bar, and the inhabitants of the county in which a person, who has imported slaves into this State, resides, believed at the time of the importation that it was not illegal to import uncertificated slaves for sale, is not a

circumstance from which the inference could be legally drawn, that the importer entertained the same opinion, and is not, therefore, competent evidence to go to the jury in support of the truth and sincerity of declarations made by the importer at the time of the importation, that they were introduced for his own use, and not for sale; *Ib.*

75a. *Same: Attachment case for removal.* The jury in the trial of an issue, whether an attachment taken out on the ground that the defendant was about to remove from the State was wrongfully sued out or not, must consider all the contemporaneous acts and conduct of the defendant, and also his declarations as to his intention to remain and carry on his farm here, if made before the attachment was sued out; but his conduct and declarations after the suit was commenced, are inadmissible. The fact that he hired hands to work a plantation in this State, a short time before the attachment was sued out, is admissible in his favor; *Baker v. Kelly*, 41 M. 696.

75b. *Records a part of the res gestæ.* Records and judgments not between the parties, if a part of the *res gestæ* are admissible in evidence; *Wells v. Shipp*, W. 353. Thus a judicial proceeding for partition, though void for uncertainty in the designation of the parcel allotted to each coparcener, yet if referred to in a parol agreement for partition, is admissible as a private writing, being a part of the *res gestæ*; *Willey v. Bonney's Lessee*, 2 G. 644; and so the inventory of a guardian is evidence against his surety; *State v. Stewart*, 7 G. 652. And so a judgment rendered in the Probate Court on an accounting by the executor is a part of the *res gestæ*, and admissible in evidence against the surety; *Lipscomb v. Posell*, 7 G. 476.

76. *Admissible to explain uncertain writing.* Where an instrument on its face is uncertain as to whether it is a deed or will, the acts and declarations of the maker at the time of its execution and delivery, are admissible to explain it; *Herrington v. Bradford*, W. 520.

77. *Admissible in suit for divorce.* In a suit for divorce on the ground of the defendant's desertion of complainant for three years, when there is no ground to suspect collusion between the parties, the declarations of the complainant made to the defendant about the date of the commencement of the separation, explanatory of the relations between them and of the motives on which complainant acted, are in the nature of verbal acts, constituting a part of the *res gestæ*, and are admissible in evidence in favor of the declarant; *Fulton v. Fulton*, 7 G. 517.

78. *Declaration of parties to a fraudulent sale.* Q. was applied to by J., a judgment debtor, to buy his property then levied on, for J.'s benefit, but Q. being unwilling to buy, applied to S., a neighbor of J., to do who made no reply to the proposition, but bought the property, and afterwards stated he bought it for the benefit of J. Q., during the bidding, asked several parties not to bid

against S., as he was buying for the benefit of J.: *Held*, that these declarations of Q. were admissible against S. on two grounds. 1st. They constituted a part of the *res gestæ*, and as such were admissible, though not made in the presence of S. 2d. They were the declarations of one of several conspirators to defraud J.'s creditors, and were made in pursuance of that design, and as a means of carrying it out; *Stovall v. Farmers' & Merchants' Bank*, 8 S. & M. 303. See *VENDOR AND VENDEE*, 225. *FRAUDULENT ASSIGNMENT*, 77.

79. *Declaration of joint trespassers.* The proof tended to show a combination on the part of the defendants to commit a trespass on the plaintiff. After the trespass and before the parties had separated, one of the defendants committed another act of trespass, and used declarations of insult and abuse: *Held*, that this conduct was admissible, as a part of the *res gestæ*, against all; *Bell v. Morrison*, 5 C. 68; *see ante*, 25.

80. *Declarations before the trespass.* In such a case the declarations of the plaintiff, made on the day he was assaulted and beaten by defendants, and before the trespass, and whilst he was on the way to the place where it occurred, to the effect that his purpose in going there was to get a load of cotton for his flat boat, is competent,—it not being shown by any evidence that he anticipated a difficulty with defendants; *Ib.*

81. *Declarations of a prisoner after the crime.* On the trial of an indictment for murder, a witness for the State testified that on the day of the killing, he met the accused about one-half mile from the scene of the murder, and that he had blood on his hands. On cross examination he stated that the accused was coming from his own house at the time spoken of; that he discovered the condition of the prisoner's hands, in consequence of the prisoners calling his attention to them. The accused then asked the witness to state what the prisoner said at the time he showed his hands to him: *Held*, that the question was illegal, as the statement of the prisoner was no part of his confession drawn out by the State; nor any part of the *res gestæ*. That declarations are admissible as a part of the *res gestæ* only, upon the presumption that they elucidate the fact with which they are connected, having been made without premeditation or artifice, or a view to consequences. That the declaration sought to be introduced was made at the distance of half a mile from the scene of the killing, and that sufficient time had elapsed to enable the accused to determine the nature of the explanation he would make; and hence was not of that impulsive character which distinguishes declarations made at the time of the transaction; *Scagg's Case*, 8 S. & M. 722.

III. Written Evidence.

1. Document of a Public Nature not Judicial.

A. STATE PAPERS AND STATUTES OF OTHER STATES.

82. Printed volume of State papers. A

volume of State papers, printed by authority of Congress, is a public record, and admissible as such in evidence: *Nixon v. Porter*, 5 G. 697.

83. *Where printed statutes of a sister State evidence.* Where the printed statutes of a sister State are offered in evidence under the Act of 1833, they must appear on their face to be printed by authority of such State; *Baughan v. Graham*, 1 H. 220.

B. SURVEYS AND MAPS.

84. *Where plot of survey admissible.* A plot of the survey of land ought not to be admitted in evidence upon the mere certificate of the surveyor who made it, unless the survey were made under an order of court, or in pursuance of the statute for establishing private boundaries; *Carmichael v. Trustees of School Land*, 3 H. 84.

85. *Same.* A plot and certificate of survey made in pursuance of an order of court, if they show generally the metes and bounds of the *locus in quo*, may be introduced in evidence, though they do not show the parcels or lots of which the tract is composed; *Spears v. Burton*, 2 G. 547.

86. *Certificate of survey of Spanish grant.* The certificate of the surveyor general of lands, south of the State of Tennessee, to the map of the survey, of a private grant of land made by the Spanish government, is competent evidence under the statute (H. & H. 605, § 24). And it is no objection to such certificate that it has no date; since, as the certificate states he is surveyor general, it must have a date, within the time when the certifying officer held that office; *Sessions v. Reynolds*, 7 S. & M. 130.

And a survey of the premises, though made prior to the institution of the suit and under an order of court in another suit and between other parties, is admissible in evidence as a private survey. And a private survey made *ex parte* and without an order of court is admissible in evidence in an action of ejectment to establish boundary; for the boundary being provable by parol, a surveyor who is examined as a witness may refer to and put in evidence as a part of his testimony and as explanatory of his meaning, a map made by him; *Surget v. Little*, 5 S. & M. 319.

See LAND LAWS OF UNITED STATES, 40.

C. UNITED STATES LAND OFFICE RECORDS.

87. *Statute: Location of Indian reserve.* By statute (H. & H. 605), copies of records pertaining to the United States land office, located in this State, duly certified, are competent evidence. In an action of ejectment, therefore, by a Chickasaw Indian, claiming under the 6th article of the Chickasaw Treaty of 1834, a copy of the records of the land office, verified by the certificate of the register, and showing the location of the plaintiff's reservation and its date, is competent evidence; nor in such case is it necessary for the Indian to show the preliminary steps to the location, nor that he was on a list of persons entitled to reservations, made out by the chiefs; the location being equivalent to a grant, all the

preliminary steps are presumed to have been taken; *Wray v. Doe*, 10 S. & M. 452; *Harden v. Ho-yo-po-nubby*, 5 C. 567.

88. *Form of certificate.* The certificate of the register of the land office to a map, "that it is a correct representation," is not sufficient; he should certify that it is a correct copy of the original map, and that the original is of record in his office; *Doe v. King*, 3 H. 125. Nor is a certificate good, which certifies that W. C. had purchased and paid for the land in question, "as appears by the books of his office," and that a patent was then in his office in the name of J. C., as assignee of W. C. Such a certificate is not one which the register is authorized to make under the act of Congress, nor is it a certificate to a copy of any record in his office. Officers are not authorized to certify to the substance of the records in their offices, but only to copies; *Cockerell v. Wynn*, 12 S. & M. 117. Nor is the following certificate evidence: "I, A. M. Reynolds, &c., certify that J. C. entered W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sect. 5, T. 7, R. 3, W. on 7th Sept., 1835, as appears of record in my office;" *Hardin v. Ho-yo-po-nubby*, 5 C. 567.

89. *Same.* But the following certificate is good:

"COPY."

Reservation under 6th Article of the Chickasaw Treaty.

Roll No	Res'rve	Sect	Town	Range	Date of Location
620	Ho-yo-po-nubby	16	9	5E	June 29, 1838.

Register's Office.

Pontotoc, Miss.

I, Andrew J. Edmonson, Register of the Land Office of the United States, at Pontotoc, Mississippi, do hereby certify, that the above is a true copy, from the list of persons furnished by Benjamin Reynolds, Chickasaw Agent, on 2d November, 1838, to the register and receiver, of Indians entitled to land, under the 6th article of the treaty between the United States and Chickasaw Indians, and of the location of *Ho-yo-po-nubby*, as the same remains of record in my office.

Given under my hand this 18th March, 1846.

A. J. EDMONSON,

Register of Land Office; Ib.

90. *Certificate of clerk of the register.* The mere certificate of the clerk of the register of the land office, showing that the land in controversy has been purchased by one of the parties, is not competent. The books of the register are public in their nature, and it is competent to prove their contents by copy (in this decision no reference is made to the Act of 1833, H. & H. 605); *Wooldridge v. Wilkins*, 3 H. 360.

90a. *Certificate of entry.* The certificate of entry, given by the register of the land office to the purchaser of land, at the time of the purchase, if regularly issued and uncanceled, is competent evidence (under our statute, H. C. 858) of title, in an action of

ejectment; *Davis v. Freeland's Lessee*, 3 G. 645.

91. *Same: Irregular certificate: Case in judgment.* The plaintiff's lessor offered in evidence to maintain his action of ejectment, a certificate of entry of the land in controversy, signed by a register of the land office of the United States. On this certificate was endorsed, "suspended for want of township plot." It also appeared that the certificate had been deposited in the land office at Washington City, and was by the commissioner of the general land office, sent to the plaintiff's lessor, to be used for the purpose of testing his right to the land in the courts of this State, and further, that the commissioner had directed the certificate to be returned to him: *Held*, that the certificate thus appearing never to have been issued with a view of vesting a title in the person named in it as purchaser, was not, under the statute, evidence of plaintiff's title in an action of ejectment; *Ib.*

92. *What papers and records may be certified.* The statute (H. & H. 605, § 24) which makes duly authenticated copies of the records appertaining and belonging to the land office of the United States, established in this State, competent evidence, wherever the originals would be, embraces copies of certificates of confirmation of Spanish grants of lands, made by the board of commissioners west of Pearl river, when such copies are, taken from the land office in which the originals are deposited; *Sessions v. Reynolds*, 7 S. & M. 130. So copies from the records of the land office, of notices of confirmation of claims, and the journals of the board of commissioners, are competent; *Vick v. Peck*, 4 H. 407; so of the certificate of survey of a Spanish grant, made by the surveyor general; *Sessions v. Reynolds*, 7 S. & M. 130.

93. *Same: List of swamp lands: Letter from commissioner of land office.* A list of the swamp or overflowed lands donated to the State under the Act of Congress of 28th of September, 1850, approved by the secretary of the interior, is a record; and a certified copy of it made by the register of the land office, for the district in which the lands are situated, is admissible in evidence; *Fore v. Williams*, 6 G. 533; and so a letter from the commissioner of the general and in relation to the title to lands entered from the United States, may be proven by an authenticated copy; *Davis v. Freeland's Lessee*, 3 G. 645. See *ante*, 87.

See LAND LAWS OF UNITED STATES, 40.

D. RECORD OF DEEDS.

94. *When certified copy evidence.* Under the statute (H. & H. 348), a certified copy of a recorded deed is admissible in evidence only when the original is lost or destroyed, and not in the power of the party to produce it. The fact that it is on file as an exhibit in a suit in the Chancery Court, does not make the certified copy admissible, as it is in the power of the party to withdraw it upon proper application to the chancellor; *Haydon v. Moore*, 1 S. &

M. 605; S. P., *Chaplain v. Briscoe*, 5 S. & M. 198; *Harmon v. James*, 7 S. & M. 111. This is now changed by statute, Rev. Code of 1857, p. 516, art. 228, which allows certified copies to be read in evidence without accounting for the non-production of the original, unless its execution be denied under oath.

95. *Copy of deed not entitled to record.* The certificate by a justice of the peace, or other officer, of an acknowledgment to a deed, not authorized by law to be recorded, is no proof of its execution; nor is a certified copy of such instrument, though recorded, admissible in evidence, except upon due proof of the execution of the original, and accounting for its absence; *Thomas v. Grand Gulf Bk.* 9 S. & M. 201.

96. *Deed conveying land in two counties and recorded only in one.* Whether a certified copy of a deed conveying land lying in two or more counties, and which has been recorded only in one, is admissible in evidence, in a suit concerning that part of the land conveyed in it, which lies in a county in which the deed has not been recorded; *Quære?* It is, however, upon proof of the loss of the original and independent proof, that it is a correct copy; *Harper v. Hill*, 6 G. 63.

97. *Deed of gift of personally.* A deed of gift of personally by § 3, of the statute of frauds (H. C. 628), may be recorded, and a certified copy of such a deed, when recorded, is therefore admissible in evidence; *Cogan v. Frisby*, 7 G. 178.

98. *Certificate of acknowledgment of unrecorded deed.* Whether the certificate of acknowledgment of an unrecorded deed is admissible in evidence to prove its execution; *Quære?* *Morris v. Henderson*, 8 G. 492. It is not; *Lock v. Jayne*, 10 G. 157; *Davis v. Rhodes*, *Ib.* 152.

For Domestic deeds acknowledged in a foreign State. see post, 103.

E. FOREIGN DEEDS, ETC.

99. *Authentication of record of deed in another State.* The Act of Congress of 27th March, 1804, prescribes that all records and exemplifications of office books, kept in any State and not pertaining to a court, shall be proved for use in another State, by the attestation of the keeper of said records or books, under his seal of office, if there be one, together with the certificate of the presiding judge of the county or district in which the office may be kept, or of the governor, secretary of State, chancellor, or keeper of the great seal, that the attestation of the keeper of the record is in due form: *Held*, under this act, that if the attestation of the keeper of said record be authenticated by the certificate of the clerk of a court of record in the county in which the record is kept, and the certificate of this last officer be authenticated by the certificate of the governor, judge, &c., it will not do. The certificate of the governor, judge, &c., must be to the official character and due attestation of the keeper of the record; *Kidd v. Manly*, 6 C. 156.

100. *Acts of sale in Louisiana.* By the law of Louisiana, acts of sale may be legally made by being registered in the office of a notary, who is made the depository of them; and such an act is a record; and a copy thereof properly authenticated is competent evidence, under the Act of Congress of 27th of March, 1804 (see *ante*, 99); *James v. Kirk*, 7 C. 206.

101. *Copies of foreign deeds.* Our statute, art. 228, p. 516, of the Rev. Code of 1857, which allows the introduction in evidence of certified copies of deeds and other instruments, properly proven and recorded according to the laws of a sister State, where they are executed, without accounting for the non-production of the original, applies only to copies of such foreign deeds as are properly recorded in the proper office, according to the law of the State where made, and certified by the clerk who is the legal custodian of such record; *Davis v. Rhodes*, 10 G. 152.

102. *Authentication of foreign power of attorney.* The plaintiff, after notice to the defendant to produce a power of attorney, executed by the latter and his failure to do so, offered in evidence a copy of a power of attorney, purporting to be executed by the defendant, to which was appended a copy of the certificate of a notary public of Louisiana, attesting its due execution by the defendant, and also a certificate of the governor of that State authenticating the official character of that notary. All these were authenticated by the certificate of another notary public, who certified they were "true copies of the original power of attorney, and the governor's certificate annexed, to an act of deposit of the same, passed before him" (the last notary). And to the last certificate of the last named notary was appended a certificate of the governor of Louisiana to the official character of the last named notary, and also certifying that he was the proper officer to certify the instruments annexed, and that his attestation was in due form, &c.: *Held*, that the last certificate of the governor was at least *prima facie* evidence, that the instrument offered in evidence was a record by the laws of Louisiana, to be kept in a public office in that State, not appertaining to a court; and it was incumbent on the other party to produce the original and show it was not recorded, or show the law which dispensed with that ceremony; and said instrument being a record was provable in this State, by a copy duly authenticated; *Rou'h v. Agricultural Bank*, 12 S. & M. 161.

102a. *A deed to property here, made and recorded in another State.* A deed made and recorded in Alabama, conveying slaves which were at the time of its execution or registration in this State, in the adverse possession of another, is inadmissible in evidence, as a recorded deed under our statute, allowing deeds made and recorded in any one of the United States, according to the laws thereof, to be admitted as evidence, without further proof of their execution; *Davis v. Herndon*, 10 G. 484.

103. *Deed acknowledged before a foreign officer.* The statute of this State, declares that "when the parties or witnesses to a deed reside in a foreign kingdom, State, nation, or colony, the acknowledgment or proof made before any court of law, or mayor, &c., and certified by said court, or mayor, &c., in the manner such acts are usually authenticated by him or them, shall be sufficient." Under this, an acknowledgment to a deed purporting to be taken before the mayor of the city of Liverpool, in England, and to be his official certificate, and bearing the corporate seal of that city, but which is not signed by the mayor, but by the city clerk, "by order of the mayor," is sufficient; for it will be presumed that the certificate is in due form according to the law of England—the certificate itself being presumptive evidence of that, until the contrary is shown. Whether the certificate of a foreign officer is in accordance with the law of the nation where it is made, is a question of fact; but the certificate itself is *prima facie* evidence of conformity until the contrary is shown; *Sessions v. Reynolds*, 7 S. & M. 130.

F. SWORN RECORDS OF NOTARIES PUBLIC.

104. *May be impeached.* The statute (H. & H. 609, § 33,) which allows the record of a notary, reciting how he gave notice of protest, to be admitted in evidence, when certified under the oath of the notary, does not make it an unimpeachable record, but gives it only the same force as if the notary were present testifying to the same facts in relation to the notice, and it can have no higher effect than the deposition of the notary, and may be impeached and contradicted in the same way that his deposition could, if it had been taken; *Wood v. Am. Life Ins. Co.*, 7 H. 609.

105. *Same : Manner of impeachment.* This record can be impeached by proof of a particular fact, such as 1st. By showing that the notary was in the habit of altering his records, upon the application of parties interested. 2d. That the particular part of the record in evidence had been altered by him in a material part. 3d. That he procured blank affidavits to be attached to his notarial record that these affidavits were months afterwards attached, and that when they were attached he was not sworn to any one in particular, but to all. 4th. That he offered to a witness to swear that notice in another case was sent to a particular post office, then ascertained to be the correct one, when he had, on two former occasions, stated that the notice had been sent to another post office; 1b.

G. CORPORATION BOOKS AND PAPERS.

106. *Subscription paper.* The subscription paper of a corporation is legal evidence of the promise of the subscribers to pay for stock in it; *Smith v. Nat'chez Steamboat Co.*, 1 H. 478.

107. *Books of the company.* After the death of the secretary of a corporation, any member of it may take possession of the

books, and such possession will justify their introduction in evidence, as the books of the company. The company has power to place its books in whose custody it pleases, and the books are the best evidence of the acts of the corporation as between its members, but they are not admissible until proven to be the books of the company; *Ib.*

2. Judicial Documents.

A. JUDGMENTS OF SISTER STATES.

See JUDGMENTS OF SISTER STATES.

108. *Rendered without jurisdiction is void.* A transcript of a judgment rendered in a sister State, against a resident of this State, founded on proceedings by attachment, and without the service of any process on the defendant, is inadmissible in the courts of this State, as either conclusive or *prima facie* evidence of the debt claimed by the plaintiff from the defendant; *Chew v. Randolph*, W. 1; S. P., *Gerauld v. Anderson*, W. 30; *Wright v. Weisinger*, 5 S. & M. 210.

109. *How authenticated by the common law.* At common law, foreign judgments are authenticated, 1st. By an exemplification, under the great seal of the State. 2d. By a copy, proved to be such by a person who has examined and compared it with the original. 3d. By the certificate of an officer authorized by law to give a copy, which certificate must also be properly authenticated. And if a record of a judgment in a sister State is not authenticated according to the Act of Congress, yet if proven as required by the common law, it is admissible in evidence as a foreign judgment; *Stewart v. Swanzy*, 1 C. 502.

See JUDGMENTS OF SISTER STATES, 5.

109a. *Foreign will and probate.* A will probated in another State, must be authenticated like other judgments, by the certificate of both clerk and judge; *Stewart v. Swanzy*, 12 S. & M. 684. But a duly authenticated copy of a foreign will, disposing of property here, is admissible by statute to probate here, and when so admitted, that record may be authenticated like other records in this State, and just the same as if the will had been originally recorded here; *Montgomery v. Milliken*, 5 S. & M. 151.

110. *How authenticated when judge and clerk are the same person.* When the functions of the judge and clerk of a court are discharged by the same person, as in South Carolina, where the ordinary is both judge and clerk, the proper mode of authenticating a record, under the act of Congress, is for that person to certify as clerk, and then authenticate his certificate as clerk by his certificate as judge, as required by the act of Congress when the two offices are distinct; *Stewart v. Swanzy*, 1 C. 502; *Sherwood v. Houston*, 41 M. 59. But there need not be two separate certificates; it is sufficient if there be one certificate which embraces in it all that the act contemplates should be in two, when the offices are distinct; *Jordan v. Thomas*, 2 G. 557.

111. *When court has two names.* If it

appear that the judgment was rendered in the Court of Pleas and Quarter Sessions, and the transcript be certified by the clerk and judge of the County Court, it will be sufficient, if it also appear by the transcript that these courts are one and the same; *Strong v. Runnels*, 2 H. 667.

112. *As to the judge who certifies.* A certificate to the clerk's verification of a record of a judgment in the Court of Common Pleas of the State of South Carolina, in these words, is good: "I, J. B. O'Neal, one of the associate judges of the State aforesaid, and a presiding judge in the Court of Common Pleas, in the State aforesaid, do certify" (proceeding in other respects as the law requires); for the courts here by statute are required to take judicial notice of the law of South Carolina, which makes the associate judges of the State alternately judges of the Court of Common Pleas; *Bates v. McCully*, 5 C. 584.

113. *Where the record is lost.* If the record of the judgment in a sister State be lost or destroyed, so that an exemplification of it, as required by law, can not be had, the contents of the record may be proven by parol; *Scott v. Loomis*, 1 S. & M. 635.

113a. *Where there has been an appeal.* Where the declaration describes as an inducement to the plaintiff's action two judgments rendered in a sister State, one in the court of the first instance, and the other rendered in the Appellate Court, upon a writ of error to the first judgment, if the defendant plead *nul tiel record* as to the judgment mentioned in the plaintiff's declaration, without specifying which judgment is denied, a record of the judgment in the Appellate Court, duly authenticated by the judge and clerk of that court, embracing the judgment of the court of the first instance, will be sufficient to sustain the issue for the plaintiff; *Phipps v. Nye*, 5 G. 330.

See JUDGMENT OF SISTER STATES. See, also, WILL, 98, *et seq.*

B. DOMESTIC JUDGMENTS.

See RECORD. JUDGMENTS, 32a to 43.

114. *Proof of.* When transcripts of judgments and executions are introduced in evidence, they must be accompanied by the proper certificate; but if no objection be made on that account in the court below, the High Court will presume that the proper certificates were attached, though none such appear in the bill of exceptions; *Cockerel v. Wynn*, 12 S. & M. 117.

115. *Parol proof.* Where the minutes of the Probate Court show a decree for the sale of land, it is competent to show by parol, that the citations were duly issued against the heirs and returned executed, and that they are lost, provided the party claiming the benefit of the evidence be not implicated in the loss. But it cannot be shown by parol, that a judgment, not appearing on the minutes, was actually rendered—the minute book not being lost—that would be not to supply a lost record, but to substitute parol evidence

for a record which the law requires should be made; *Eakin v. Vance*, 10 S. & M. 549.

115a. *Proof of issue on which judgment was recovered by parol.* As to this, see GUARANTY, 23.

116. *Admissibility of judgments: Subject matter.* A judgment in a proceeding for forcible entry, or unlawful detainer, is no evidence in a subsequent action of trespass or ejectment, between the same parties, and about the same land; *Spears v. McKay*, W. 265.

117. *Same: Parties: Whole record.* Judgments and decrees are admissible in evidence to prove the facts on which they are founded, only between parties and privies; and when so admissible, the whole record, and not the mere final judgment or decree, should be produced; *Goddard v. Long*, 5 S. & M. 782; S. P., *Englehard v. Sutton*, 7 H. 99; *Gridley v. Denney*, 2 H. 820; *Moore v. Carson*, 1 H. 53; *Dogan v. Brown*, 44 M. 235; *McKnight v. Dozier*, 44 M. 606. See post, 124.

118. *Same: Res gestæ.* But when the judgment is a part of the *res gestæ*, it is admissible; *Wells v. Shipp*, W. 353. See ante, 75, for instances.

See also JUDGMENT, 36.

119. *Same: Parties: Vendor and vendee: Notice to vendor.* A judgment against the vendee, recovering from him the property which he bought from vendor with warranty of title, is evidence against the vendor in a suit against him by the vendee to recover the damages for the false warranty, though rendered without notice to the vendor. But in such case it is only evidence of the fact of the recovery and of the *quantum* of damages; but it is no evidence of the truth of the fact upon which it is based, to wit, that the plaintiff therein had a title paramount to the title of the vendor, unless the vendor had notice of the pendency of the action and an opportunity of sustaining the title warranted by him. But if it be shown that the vendor was present in court, when that cause was tried, this is sufficient evidence of notice; *Pickett v. Ford*, 4 H. 246.

See GUARANTY, 24. JUDGMENT, 34, 35.

120. *Same: Judgment against sheriff, no evidence against his sureties.* A judgment against a sheriff, on a motion for a failure to pay over money collected by him, is not evidence in another action against the sureties on his bond, to establish a breach of the bond; *Carmichael v. The Governor*, 3 H. 236.

See JUDGMENT, 37, 38.

121. *Same: Where parties are different, no evidence.* A transcript from the records of the Probate Court in another State, in a proceeding to which the defendant was not a party, is no evidence in this State of the heirship of the party therein adjudged to be an heir; *Lehr v. Tarball*, 2 H. 905.

See JUDGMENT, 36, as to who are parties and privies.

122. *Same.* In an action against the administrator, on a note made by an intestate, it is not competent for the administrator, by

way of establishing the maker's incompetency, to show that he had been decided incompetent to make a will of older date than the note; *Gray v. Thomas*, 12 S. & M. 111.

122a. *Probate of will in common form.* The record of the probate of a will in common form, is not admissible in evidence in favor of the executor, upon the trial of an issue *devisavit vel non*; *Edwards v. Gaudling*, 9 G. 118.

123. *When the whole record must be produced.* Where a judgment is introduced to prove the truth of the facts on which it is based, the whole record must be introduced; *Goddard v. Long*, 5 S. & M. 782; *Lehr v. Hall*, 5 H. 54. Thus, in actions on an administrator's bond for a *devastavit*, if a judgment against the administrator, be introduced to show the *devastavit*, the whole record must be introduced; *Lehr v. Hall*, supra. And in a suit on an injunction bond, the decree of the court dissolving the injunction and dismissing the bill, must be accompanied by the whole record; *Goddard v. Long*, 5 S. & M. 782.

124. *When whole record need not be introduced.* In an action of ejectment, where the plaintiff claims title under an execution sale, he need not introduce the whole record. A certified copy of the entry of the judgment, and of the execution under which the sale was made, is all that is necessary; *Cockerell v. Wynn*, 12 S. & M. 117. And so, where the sale is under a decree in chancery, the decree showing that the court has jurisdiction of the parties; *Starke v. Gildart*, 4 H. 267; S. P., *Carson v. Huntington*, 6 S. & M. 111. And the judgment and execution may be separately certified; *Carson v. Huntington*, supra. And so a deed made to a defendant under a decree in chancery, may be introduced by him to show that he claims and has color of title, without producing the record; *Nixon v. Porter*, 5 G. 697. See ante, 117.

125. *Same.* When the whole of a record which can have any bearing in the case before the court, is offered in evidence, it should be admitted; and hence, in a suit involving the question of marriage between two parties, and the consequent legitimacy of their offspring, the children may introduce in support of the marriage, a bill filed by one of the parents against the other for a divorce, and the answer thereto in which it is charged and admitted that a marriage was solemnized between them; and they need not produce any other part of the record; *Henderson v. Cargill*, 2 G. 367.

126. *Same: Record of administration.* The record of the administration of an estate in the Probate Court is not an entire thing, like an action at law; and parts of it, as the inventory, account of sale, final account, and a receipt filed with the final account as a part of it, may be introduced separately, without a production of the whole record of the administration; *Lee v. Gardiner*, 4 C. 521.

127. *Same: Mandate from High Court.* The certificate of the clerk of the High Court made by the clerk of the court from which the appeal was taken, certifying to the re-

versal of the judgment, is evidence in the court below of the reversal, without the production of the whole record; *Hoy v. Couch*, 5 H. 188.

129. *Same: Rule where record is in the court where offered.* Where a judgment is offered in evidence in the court where it is rendered, the same strictness is not necessary in proving it; the whole record is then open to either party in the trial; the judgment is *prima facie* valid, and if it be void, that can easily be shown by the other party; *Cockerell v. Wynn*, 12 S. & M. 117.

130. *Recital in judgment as to jurisdictional facts.* The Probate Court has power in a proceeding to sell the land of a decedent to determine the regularity and sufficiency of the proof of notice upon the heirs, and if the decree recites that proof of service of notice on the heirs, according to law, was made, it will be presumed in the absence of proof to the contrary, that service was made; *Commonwealth Bank of Manchester v. Martin*, 9 S. & M. 613; *Cason v. Cason*, 32 S. & M. 578; *Monk v. Horne*, 9 G. 100; S. P., *Canon v. Cooper*, 10 G. 784; and such recital is indisputable in a collateral proceeding; *Canon v. Cooper*, *supra*.

See JUDGMENT, 7, 8, 9, 10, 11, 12. PROBATE COURT, 47, 195.

130a. *Recital as to evidence.* Where the final decree recites that "the court has maturely considered the allegations and proofs, and being satisfied," &c., this court, in the absence of record testimony, will infer that there was sufficient evidence in the court below to uphold the decree; *Wells v. Smith*, 44 M. 296.

3. Private Documents.

A. GENERALLY.

131. *Original must be produced.* The original of a writing being the best evidence, must be produced, or its absence accounted for; *Randolph v. Doss*, 3 H. 205. See *ante*, 94.

132. *Compelling witness to produce his title deeds.* A witness is not compellable to produce his title deeds, where the production would prejudice his rights; but he is not the judge of this, and when served with a subpoena *duces tecum*, he must obey and bring the document with him and submit it to the court, who will determine whether it ought to be admitted in evidence or not; *Chaplain v. Briscoe*, 5 S. & M. 198.

133. *Cotemporaneous writings construed together.* Where two cotemporaneous instruments in relation to the same subject matter refer to each other, they will be construed together, and be deemed parts of the same instrument; *Doe v. Bernard*, 7 S. & M. 319.

134. *Proof of execution of.* When the execution of a deed is denied by a sworn plea of *non est factum*, and the proof offered in support of the deed be uncertain and doubtful, the failure of the grantee to introduce any proof as to the genuineness of the signature of the alleged grantor, when it is presumable that such proof could be obtained, is a circumstance against him; *Lock v. Jayne*,

10 G. 157. And under such a plea, proof of the signature of the maker is sufficient, if there be no other proof; *Sumpter v. Geron*, 4 H. 263.

As to proof of execution of deeds, see DEEDS, 33 to 40. As to proof of Estoppels, see ESTOPPELS AND DEED, 60, *et seq.* As to certificate of acknowledgment to an instrument not under seal, see DEED, 43.

B. SUBSCRIBING WITNESS.

135. *Must be produced, or his absence accounted for.* In proving a deed, when there is a subscribing witness, he must be produced, or his absence satisfactorily accounted for, by proving that he is dead, cannot be found, or has gone beyond the jurisdiction of the court; *Downs v. Downs*, 2 H. 915; S. P., *Chaplain v. Briscoe*, 11 S. & M. 372. If the deed be thirty years old, the handwriting of the subscribing witness may be proven without showing that he is dead or gone beyond the jurisdiction of the court; *Nixon v. Porter*, 5 G. 697; see *ante*, 59, 60; and in such case, if grantee took possession under the deed, he may prove the deed by showing that the grantor admitted that he executed it without producing the subscribing witness; *Id.* And if the subscribing witness afterward become interested, his handwriting may be proven; *Tinnin v. Price*, 2 G. 422.

136. *Who is a subscribing witness.* Where the names of persons, not parties to nor interested in the deed, are found subscribed to it, at the place where the subscribing witnesses usually sign their names, they will be considered as subscribing witnesses, though it does not so appear, that they are such, otherwise than from the place where their names are subscribed; *Chaplain v. Briscoe*, 11 S. & M. 372.

IV. Parol Evidence to Explain and Contradict Writings.

1. Patent and Latent Ambiguities.

137. *Uncertainty on the face of instrument.* Where a writing is so uncertain on its face, that it can have no operation without a resort to parol evidence, it is void for uncertainty, and parol evidence is inadmissible to remove the ambiguity, which in that case is patent; *Gildart v. Howell*, 1 H. 198; *McGuire v. Stevens*, 42 M. 724.

138. *Uncertainty in applying to subject matter: Map.* But where the writing is plain and certain on its face, but a doubt arises, when it comes to be applied to the subject matter conveyed in it, this is a case of latent ambiguity, and resort may be had to extrinsic evidence, to show what was conveyed, or intended to be included in the description contained in the instrument; *Doe v. Jackson*, 1 S. & M. 494. Thus, where a deed conveyed land, bounded "by the common of the town of M., and marked on the map of the town as swamp land," located on the Yazoo river; and on production of the map, there was no land marked on it as "swamp" or "commons," but at the desig-

nated place on the river, there was a flat of land not marked into lots, streets or alleys; it was held that it was competent to prove that this plat was the land referred to in the deed as "swamp," or "commons;" *Ib.* See *post*, 160.

139. *Same: Map.* Parol evidence is also admissible to show the situation, location and boundaries of a tract of land mentioned in a certificate, survey and plot, made under order of court; *Spears v. Burton*, 2 G. 547. And it is admissible to show that a dotted line in a map, made by the United States surveyor, means that the line was never actually run as a boundary; *Newman v. Foster's Heirs*, 3 H. 383. But it was held in *Hardin v. Ho-yo-po-nubby*, 5 C. 567, that such a map was a record, and must be tried by itself, and that it was incompetent to introduce parol evidence to show the meaning of certain lines and figures on it, appearing in ink differently colored from the balance of the map.

140. *Same: Case in judgment.* A written memorandum, signed by the plaintiff, and stating that a sum therein specified is good as a set-off to plaintiff's claim against the defendant, if plaintiff has more claims against defendant than one, it presents a case of latent ambiguity, and parol evidence is admissible to show to which one of the plaintiff's claims the set-off should be applied; *Wilson v. Horne*, 8 G. 477.

141. *Same: Another instance: Submission to arbitration.* When the parties have agreed to submit to arbitration, "all the matters in dispute between them" parol evidence is admissible to show what the disputed matters were; *Hill v. Hill*, 11 S. & M. 616.

142. *Admission of deed containing latent ambiguity.* A deed containing a latent ambiguity may be introduced before the ambiguity is explained; but on failure to explain it during the trial, it should be excluded; *Hanna v. Renfro*, 3 G. 125.

143. *Latent ambiguity in tax deed.* A tax collector's deed, which designates the land sold by the proper section, township and range, but omits to state the county in which it is located, is not void for uncertainty; such omission creates a latent ambiguity, which may be explained by parol evidence, showing the identity of the land; *Hanna v. Renfro*, 3 G. 125.

144. *Parol evidence admissible to explain meaning of words: Case in judgment.* A common carrier, engaged in carrying the United States mail, and also in the transportation of passengers, wrote a letter to a postmaster at one of the offices from which he was accustomed to carry the mail, informing him that on a certain day one of his vessels, which did not ordinarily stop and receive a mail or passengers at that place, would stop there, and also requesting the postmaster to have a mail in readiness, and to "advise all who may feel interested in the above;" *Held*, that the expression "all who may feel interested," &c., did not refer alone to persons interested in the arrival and departure of the mail, but, under the circumstances, included also those

who might wish to take passage on the vessel; and further, that it was competent to introduce evidence of the circumstances under which the letter was written, and of the nature of the business in which the carrier was engaged; in explanation of the phrase, "all who may feel interested," &c., and to show thereby that "passengers" were embraced in it; *Heirn v. McCaughan*, 3 G. 17.

As to parol evidence to explain the meaning of term, "legal representative," see LAND LAWS OF UNITED STATES, 17.

To explain receiver's certificate, see same title, 18.

2. Cases in which Parol Evidence is Admitted.

145. *To correct mistake in date of a deed.* Where the deed is inconsistent, and repugnant in its recitals in relation to the date of the sale made by an administrator, and which it was made to consummate, and the figures representing the date are in a different handwriting from the remainder of the deed, it was held that parol evidence was admissible to show the true date of the sale; *McComb v. Gilkey*, 7 C. 146.

146. *To correct misdescription of a note in deed of assignment.* Parol evidence is admissible to show that a note described in a deed of assignment as being for the amount of \$904, was in fact only for \$900, and that the extra \$4 was for protest fees; and hence, that the note for \$900 passed by the deed; *Marsh v. Mandeville*, 6 C. 118; *S. P., Mandeville v. Stockett*, *Ib.* 398.

147. *To show a resulting trust, and to rebut a legal presumption.* Parol evidence is admissible to show a resulting trust in opposition to deed; *Dismukes v. Terry*, W. 197. And so it is admissible to rebut a legal presumption, as where there was a written memorandum of the rescission of a contract, and nothing was said in it about whether money which had been paid on the contract was to be refunded; it was held that parol evidence was admissible to show that it was agreed that the money thus paid should not be refunded; *Clark v. Perry*, 4 H. 285.

148. *To show want or failure of consultation.* The rules which prevent the introduction of parol evidence to contradict or vary a writing, have no application where it is offered to show a want or failure of consideration; *Buckels v. Cunningham*, 6 S. & M. 358; *Matlock v. Livingston*, 9 S. & M. 489; nor where it is offered to show that the contract was altogether void, or never had any legal existence, either by reason of fraud, or want of due execution or delivery; *Wren v. Hoffman*, 41 M. 614; and in such cases it is admissible to prove the true consideration, though a different consideration be expressed in it; *Marsh v. Lisle*, 5 G. 173. And so it is admissible to show that the note sued on was given in renewal of another which was payable in a depreciated currency; *Eckford v. Hogan*, 44 M. 398. See *post*, 170.

149. *To show a valid consideration.* When usury is pleaded, and the contract expresses a higher rate of interest than is allowed, ex-

cept in cases of money loaned, it is competent for the plaintiff to show that the true consideration was loaned money, no other consideration being expressed; *Luckett v. Henderson*, 12 S. & M. 334.

150. *To show separate price of two articles where it is stated in solido.* In an action for a false warranty of one of two articles, both of which were warranted sound in a bill of sale, in which the price of both is stated in *solido*, and not separately, it is competent to show, by parol evidence, the estimated value in the trade of the unsound article; *Tutt v. McLeod*, 3 H. 223.

151. *To disprove correctness of transcript certified.* The deposition of the clerk who is the keeper of a record is admissible to prove that a transcript of it, regularly certified, is incorrect; *Mandeville v. Slockett*, 6 C. 398.

152. *To show existence of record and its loss.* Parol evidence is admissible to show that a paper, which is a part of a record, was once in existence, and has been lost; *Morgan v. Morgan*, 2 G. 546.

153. *To show real parties in interest in a suit.* It is competent to show by parol proof who were the real parties in interest in a former suit, so as to conclude them by the judgment therein rendered; *Shirley v. Fearn*, 4 G. 653.

154. *To show conditional delivery.* Parol evidence is admissible to show that a written agreement, signed by one of the parties, was delivered to the other upon the condition that it was not to be binding on him, unless the other should procure the signature of other persons to it; *Butler v. Smith*, 6 G. 457.

154a. *Admissible to show suretyship.* Parol evidence is admissible to show that a party who signed a note, which stated that he and others were sureties to a principal therein named, was in reality a surety to all the co-makers of the note; *Hunt v. Chambliss*, 7 S. & M. 532.

See PRINCIPAL AND SURETY, 2.

3. Cases in which Parol Evidence is Admissible in Equity, but not at Law.

155. *To show absolute deed a mortgage.* Parol evidence is admissible in equity, but not at law, to show that an absolute deed or bill of sale was intended as a mortgage; *Blake v. Morrison*, 4 G. 123. And also to show that a trust was intended in favor of the children of the grantor, after the extinction of the mortgage debt; *Anding v. Davis*, 9 G. 574.

156. *To show mistake in a deed.* Parol evidence is inadmissible in a court of law, to show a mistake in the numbers of land embraced in a deed, but is admissible in equity; *Peques v. Mosby*, 7 S. & M. 340; *Lauderdale v. Hallock*, 1b. 622; *Ross v. Wilson*, 1b. 753. See post, 157, 158.

156a. *To show suretyship of joint obligors in a bond.* Parol evidence is not admissible at law to show that a part of the obligors in a bond are sureties; this may be done in equity; *Willis v. Ives*, 1 S. & M. 307.

4. Cases in which it is not Admissible.

157. *To show mistake in number of acres conveyed in a deed.* Parol evidence is not admissible to show a mistake in the number of acres conveyed in a deed, where no fraud is shown; *Kerr v. Calvit*, W. 115.

158. *Contracts cannot rest partly in writing and partly in parol.* A contract cannot exist partly in parol and partly in writing; nor can a mistake be shown at law, but only in equity. Hence, when a contract was in these words: "This is to certify, that I set over to S. Y., one-fourth interest of J. & J. (Indians), settled or located in sect. 34," &c., it was held incompetent for the vendor to show by parol, that it was the understanding that he was to sell the interest of the Indians whatever it might be, without warranty or guaranty on his part that they had any; *Young v. Jacoway*, 9 S. & M. 212; S. P., *Brantley v. Carter*, 4 C. 282.

159. *Same: Another instance.* When a party taking a note from another gives a receipt, whereby he binds himself to return it, in case he does not collect it, he cannot show by parol, that the agreement also was, that he should endeavor to use the note as a set-off, and if he failed that the other party was to pay all the expenses and costs of making such effort; *Brantly v. Carter*, supra.

160. *Same.* As a general rule parol evidence is inadmissible to add a new term to an agreement, which when so modified, is to be specifically performed; but this rule does not prevent the introduction of extrinsic evidence, in order to identify persons and things referred to in the agreement. Hence, when the contract was to convey "the land in the town of B., on which the college is erected," parol evidence is admissible to show what land is embraced in the description, by showing on what land the college is located; *Whitworth v. Harris*, 40 M. 483; S. P., *McGuire v. Stevens*, 42 M. 725. See ante, 138.

161. *Evidence of previous colloquium.* Parol evidence of the oral alterations, propositions and offers, and conversations between the parties pending the negotiation of a contract, is inadmissible where the contract is reduced to writing. They are merged in the writing, which becomes the sole exponent of the terms of the contract. Hence, when a sale of a slave is made, and a note for the purchase money given, and a bill of sale executed, warranting the soundness of the slave only, it is incompetent to show that the vendor represented the slave to be a good cook, and that he would not collect the note if slavery was abolished by the late civil war; *Herndon v. Henderson*, 41 M. 584; S. P., *Cocke v. Bailey*, 42 M. 81; *Kerr v. Kuykendall*, 44 M. 137; *Wren v. Hoffman*, 41 M. 616. But this rule does not extend so far as to prohibit the admission of evidence to show the illegality, failure, or want of consideration of a contract, or that it is altogether void, or never had any legal existence, either by reason of fraud, or want of due execution and delivery; *Wren v. Hoffman*, supra. See ante, 148.

162. *To contradict or vary liability of*

maker of a note. It is not competent for a guardian who has given a note for the debt of his ward to show by parol that it was agreed when he signed it that he was to be liable on it only, when he had assets of the ward; *Ib.*

163. *Same.* It is not competent to show that a note, appearing on its face to be payable in a "cotton bond," was also to be payable in the notes of a particular bank; *Cole v. Hundley*, 8 S. & M. 473. Nor is it competent to show by parol that a note for the absolute payment of money, was only to be payable in case the maker could succeed in using as a set-off a debt on a third person, which the payee sold to him as the consideration of the note; *Powell v. Jones*, 12 S. & M. 506.

164. *Acceptance of a bill.* Nor can an absolute acceptance in writing of a bill of exchange be shown by parol to be conditional; *Heaverin v. Donnell*, 7 S. & M. 244.

165. *To show "money" to mean something else.* Parol evidence is inadmissible to show that an account of administrator or guardian, passed by the Probate Court and showing the estate in his hands to be in money, is, in fact, in choses in action or in any other kind of currency than constitutional currency; *Adams v. Westbrook*, 41 M. 385; *McFarlane v. Randle*, *lb.* 411.

166. *To explain record.* The record of the probate of a note by a deceased notary contained these words: "Notice to J. W., G. Port." *Held*, it was incompetent to show by the clerk of the notary that these words meant that notice of protest was sent by mail to J. W., at Port Gibson, on the day of the protest; *Duncan v. Watson*, 2 S. & M. 121. Nor is it competent to show that a judgment in favor of a bank on a note, payable to her, was only for the true value of the bank notes at the date of the judgment, so as to prevent the judgment debtor from availing himself of the legal privilege of paying the judgment in the depreciated notes of the bank; *Mandeville v. Bracy*, 2 G. 460.

167. *To impeach judgment.* It is not competent to impeach the judgment of the Probate Court by parol proof showing that a publication of notice to non-residents was made on insufficient evidence; *Cason v. Cason*, 2 G. 578. And so it is inadmissible to impeach the validity of a judgment by showing that the record was made up by an unsworn deputy clerk, and embraces a judgment not on the minutes of the court; *Shirley v. Fearn*, 4 G. 653.

169. *To prove intention and construction.* It is not competent to prove by the draftsman of a written agreement, the construction put on it by the parties at the time it was made; *Ellis v. Kelly*, 4 G. 695.

170. *To show different consideration.* A different consideration from the one mentioned in a deed cannot be shown by parol; *Calvitt v. Kerr*, W. 115; *Hughes v. Daniel*, *lb.* 488. See *ante*, 148.

171. *To show exception in a deed.* Parol evidence is inadmissible to show that certain land was embraced in an exception in a deed

which reserved out of its operation all the land which the grantor had not previously conveyed, as shown by a certain map which was referred to in the deed. The map is thus made a part of the deed and can alone be referred to to show the exceptions; *Pool v. Myers*, 13 S. & M. 466.

172. *To show extension of time of payment.* Parol evidence is inadmissible to show an agreement to extend the time of payment for stock subscribed to a railroad company, beyond the time limited in the company's charter; *Thigpen v. Mississippi Central R. Co.*, 3 G. 347.

172a. *That it is admissible to show in defence of a bill for specific performance a waiver of vendee of certain provisions in the written contract*, see VENDOR AND VENDEE, 250.

V. Secondary Evidence of Contents of Writings.

1. The Notice to Produce, and Proceedings Under it.

173. *Notice to produce necessary: Answer of the party notified.* When the writing is in the possession of the adverse party, notice to him to produce it is necessary to enable the other to introduce evidence of its contents, in case of the failure to produce. And where he fails to produce when notified, secondary evidence of the contents is always admissible; *Cooper v. Granberry*, 4 G. 117. When, in answer to the notice to produce, the party notified produces a paper not answering in every particular the writing described in the notice, and states that this is the only paper of the kind called for in his possession, the statement is not evidence to go to the jury; *Anderson v. Root*, 8 S. & M. 362.

174. *When paper produced is evidence for the party producing it.* Nor is such paper evidence for the party producing it, until delivered to the other party for inspection. After this it is evidence for him; *Ib.*

175. *When notice unnecessary.* A party to an action of ejectment may, without giving previous notice to produce the original, read in evidence a copy of a deed belonging to his adversary, which was furnished by the latter with his bill of particulars of his title, if the party furnishing the copy decline to furnish the original when requested so to do at the trial; *Griffin v. Sheffield*, 9 G. 359.

2. Proof of Existence, and Loss, &c., of Original.

176. *The best evidence must be produced.* It is well settled that the best evidence of which the case in its nature is susceptible, should be introduced; and hence, where it appears that there is a written contract, which is the foundation of the plaintiff's title, no parol evidence of its contents is admissible if the original be in existence, and capable of being produced; *Baldwin v. McKay*, 41 M. 358; S. P., *Martin v. Williams*, 42 M. 210.

177. *Same.* Thus, parol evidence that the defendant executed a "sound bill of sale,"

is inadmissible, unless the absence of the original be accounted for; *Barker v. Justice*, 41 M. 240.

178. *What is sufficient proof of loss.* Proof that a receipt was executed and delivered to the party's counsel, and that the same had been lost is sufficient to let in proof of its contents; *Smith v. Mississippi & Alabama R. R. Co.*, 6 S. & M. 179. The proof should show that diligent search and inquiry have been made of those parties in whose possession the original should be, and that it cannot be found; *Freeland v. McCaleb*, 2 H. 756. And where a paper used in evidence on a former trial, went into possession of the circuit clerk, for the purpose of making up the record in the case, and has not been seen since, its loss will not be sufficiently proven without examining the clerk, for it must be shown that diligent search has been made for it; *Parr v. Gibbons*, 5 C. 375.

179. *Ex parte affidavit as to loss.* An ex parte affidavit of a witness is not sufficient to prove that an original is lost; *Doe v. King*, 3 H. 125. But the ex parte affidavit of the party offering the evidence is competent evidence to go before the court as the foundation of letting in secondary evidence of its contents, but it is improper to let it go to the jury; *Davis v. Black*, 5 S. & M. 226; S. P., *Scott v. Loomis*, 13 S. & M. 635. See *post*, 188.

180. *The court decides on the loss.* Satisfactory proof is to be made to the court of the loss of the original, and upon the court's being satisfied as to the loss, secondary evidence of its contents may go to the jury; *Scott v. Loomis, supra*.

181. *Paper on file in another court as an exhibit.* The fact that a paper is on file as an exhibit in the Chancery Court, does not authorize secondary evidence of its contents in any other court, as it is in the power of the party to withdraw it, by making application to the court for that purpose; *Haydon v. Moore*, 1 S. & M. 605.

182. *Paper in hands of another party.* Whenever the writing is in the hands of a party residing in this State, it must be produced. The party desiring it as evidence, must resort to a *subpœna duces tecum*, if necessary, to compel its production; *Chaplain v. Briscoe*, 5 S. & M. 198.

183. *Telegram.* The testimony of a person to whom a telegram is sent, is inadmissible to prove its contents without proof of the loss of the original, and that the alleged writer sent it; but the admission of the writer is competent to prove both the fact of its sending and its contents, without proof of the loss of the original; *Williams v. Brickell*, 8 G. 682.

3. Proof of the Contents.

183. *Contents of deposition before a justice of the peace.* Where a witness has been examined in a criminal case by a justice of the peace, and his deposition reduced to writing, and afterwards lost, it is competent, in order to impeach the testimony of the witness, to show by the justice, what the witness testified

on the trial before him. The justice may testify from his recollection of what the witness said, and need not undertake to state the substance of what was reduced to writing. The deposition (by the law as it then was) was not required to be returned to the circuit clerk's office, nor to be preserved as a record, and was but a memorandum of the justice of the peace as to what the witness said, and proof of what the witness did say, is necessarily proof of the contents of the lost deposition; *Pearce v. Furr*, 2 S. & M. 54.

184. *Proof of lost deed, how established.* A deed made by a vendor, cannot be impeached by evidence that he had said prior to making it, that he had made a deed to that same land to another, under whom the party offering the evidence claims title. The proper course to pursue, where a deed has been made and lost, is for the vendee and those claiming under him, to go into chancery and have the deed established; *Harmon v. James*, 7 S. & M. 111.

185. *Contents of lost receipt.* When a receipt given for the delivery of cotton has been lost, it was held that the proof was not confined to its contents, but that the delivery of the cotton might be proven by any evidence in the power of the party; *Smith v. Miss. & Ala. R. R. Co.*, 6 S. & M. 179.

186. *Contents of deed, refused to be produced.* Proof on the part of the plaintiff that his vendor had authorized the defendant to redeem from the sheriff the *locus in quo*, which had been sold under an execution against the vendor, and that the defendant had stated that he had redeemed the land, but would not permit the plaintiff to have the deed of redemption, is sufficient to authorize the jury to find that the land had been properly redeemed, when the defendant upon being notified refused to produce the deed on the trial; *Cooper v. Granberry*, 4 G. 117.

187. *Contents of lost record.* Parol proof of the contents of a record, lost or destroyed, is admissible, since in that case the authentication required by law is impossible; *Scott v. Loomis*, 13 S. & M. 635.

188. *Ex parte proof.* An ex parte affidavit of a witness or party, is incompetent evidence of the contents of a lost instrument of writing; *Doe v. King*, 3 H. 125. See *ante*, 179.

189. *Abstract of mercantile books.* Where the books of a partnership have been lost and the book-keeper is dead, an abstract, made of them by the solicitor of the complainant, will, at the instance of the other party, be required to be produced, and if proven fair, will be admissible in evidence of the contents of the books; *Mayson v. Beazley*, 5 C. 106. See *ante*, 47, 48.

4. When Secondary Evidence admitted without Notice, Proof of Loss, &c., and other Matters on this Subject.

190. *Copies furnished by adverse party.* A party to an action of ejectment may, without giving previous notice to produce the original, read in evidence a copy of a deed

belonging to his adversary and which the latter furnished him, with a bill of particulars of his title, if the party furnishing the copy declines to furnish the original when requested so to do at the trial; *Griffin v. Sheffield*, 9 G. 359.

191. *Certified copies of recorded deeds.* Under the statute certified copies of deeds and other instruments authorized by law to be recorded, when duly proven for record and also duly recorded, are admissible in evidence without accounting for the loss of the original, except the execution of such instrument be denied under oath; See Rev. Code of 1857, art. 228. p.

192. *Refusal of public officer to give up a writing.* Where the officer having possession of a patent from the United States government for land refuses to deliver it up, this does not authorize the admission of parol evidence to prove its contents. A subpoena duces tecum should be taken out to compel its production; *Woodbridge v. Wilkins*, 3 H. 360.

193. *Imperfect memorandum.* Parol proof of a settlement between the parties, which was reduced to writing to the extent of writing down the claims on either side, which were embraced in it, may be made without accounting for the absence of the writing; *Calhoun v. Calhoun*, 8 G. 668.

194. *Notice of protest.* Parol proof of notice of protest given in writing and sent by mail, is admissible without accounting for the loss of the original; *Offit v. Wick*, W. 99.

195. *Telegram: How proven.* See ante, 183.

VI. Witness.

1. Competency as affected by Interest.

A. NATURE OF INTEREST WHICH DISQUALIFIES.

196. *Must be direct and positive and in the result of that suit.* The interest which renders a witness incompetent, must be direct and positive, and not remote and contingent, and it must be also an interest in the event of the suit in which he is called to testify; *Phebe v. Prince*, W. 131. If he have no interest in the record as evidence, he is not incompetent, though his interest may be affected by the result of the suit; *Judge of Probate v. Green*, 1 H. 146. His interest to disqualify must be direct in the event of the suit; *Carter v. Graves*, 6 H. 9. If the witness could in any event be a loser by the success of the plaintiff, or a gainer by his defeat, he is interested and incompetent to testify for defendant; *Dunbar v. Chevalier*, 6 C. 161. The current of authority is now against the exclusion of a witness where his interest is remote and merely possible; when his competency is doubtful, the better opinion is to admit him and let the objection go to his credibility; *Kilpatrick v. Bush*, 1 C. 189.

197. *Witness's erroneous belief on this subject.* A witness is incompetent if he erroneously believe that he is interested, but not if he believe his interest is merely honorary, not legal; *Phebe v. Prince*, W. 131.

198. *Incompetent from interest. Instances: the judgment exempting witness from a liability.* A person who would be liable to the plaintiff in case he fail to recover, but against whom in case of recovery by plaintiff, the defendant would have no recourse, is incompetent as a witness for the plaintiff; *Kirkland v. Carr*, 6 G. 584. So where an administrator has committed a *devastavit* by wrongfully removing personal property of the estate to another State, and it there gets into the possession of a third party, he is not competent for the distributee in a suit by him to recover it, for he is directly interested in the distributee's success, which would to that extent relieve him from liability; *Kilpatrick v. Bush*, 1 C. 199. And so in an action of replevin by a tenant for life, to recover property of which he has been wrongfully dispossessed, if it be shown that the defendant took possession of the property at the instigation of another, the instigator is not a competent witness for the defendant to show title in himself, and thus defeat plaintiff's action; *Lloyd v. Goodwin*, 12 S. & M. 223. And a party assigning a note, even without recourse, if he represent to the assignee that it is on a good and valid consideration, is a guarantor that it is so, and is therefore incompetent for the assignee to prove the validity of the consideration; *Brodnax v. Brodnax*, 13 S. & M. 369. See post, 219, 201.

199. *Instance: Distributee for administrator.* A distributee of an estate is an incompetent witness for the administrator; *Carter v. Graves*, 6 H. 9; *Dillard v. Wright*, 11 S. & M. 455. But if the suit be against a third party to recover property, a distributee is competent for the defendant to show that the title is not in plaintiff, but in the estate; for in the result of that suit the distributee has no interest; *Parker v. McNeill*, 12 S. & M. 355.

200. *When witness interested to charge the debt to another, because it exempts him.* An administrator, who has given his note as such, is not a competent witness in a suit by the payee to enforce its collection out of the assets of the estate, to prove on behalf of the complainant that the note was given for a just debt of the estate, or for money borrowed by the administrator and afterwards applied to the debts of the estate. For he is directly interested in establishing the claim, as it would release him from a direct personal responsibility to the payee, and make his ultimate liability to the estate depend upon the uncertain issue of a litigation thereafter to be waged with the distributees; *Woods v. Ridley*, 5 C. 119.

201. *Bailor and bailee.* A bailee of money or a debtor is not a competent witness for the bailor or creditor, to establish that he has paid the money in his hands or due by him to a third person, the defendant, as the success of the party calling him would relieve him from liability; *Jackson v. Crawford*, 12 S. & M. 545. See ante, 198, and post, 219.

202. *Interest in subjecting property to witness's debt: Case in judgment.* The assignor of a bond for title, without any covenant of

warranty, is not a competent witness in a controversy between his creditors on the one side, attacking the assignment for fraud, and the assignor on the other, to prove that the assignment was fraudulent; for he is interested in subjecting the property to the payment of his debts, and not being bound by any covenant of warranty, there is no equipoise in his interest; *Ellis v. Ward*, 7 S. & M. 651. And so the judgment debtor is not a competent witness for the garnisheeing creditor to prove that the garnishee is indebted, notwithstanding his answer denying it, he being directly interested in subjecting the debt of the garnishee to the judgment; *Standifer v. Welby*, 4 C. 145.

203. *Interest in subjecting property to debt where he is endorser.* Where a deed was made to two trustees to secure debts of the grantor, and among them a debt on which one of the trustees was endorser, that trustee is an incompetent witness in a trial of the right to the property so conveyed, to establish the legality and fairness of the conveyance. And this is so, even after he has resigned his office as trustee, and released his interest to the co-trustee, who was asserting the claim under the trust deed, for he could not release the interest of the creditor on whose debt he was endorser; *Selser v. Ferriday*, 13 S. & M. 698. See *post*, 241.

204. *Liability of witness for costs.* A witness is not competent if he be liable for the costs; *Com'l & R. R. B'k of Vicksburg v. Lunn*, 7 H. 414. Thus, where all the joint makers of a note were sued in the same action, and an order was made without objection that one be allowed to sever on his defence and trial, another joint maker is not a competent witness for the one so allowed to sever: 1st, because he is liable for costs; and 2d, being a party to and having notice of the suit, a judgment against the defendant on trial would be evidence against the witness in a subsequent suit for contribution; *Ib.* So if the judgment debtor be liable in any way for the costs of a trial of the right of his property, he would not be competent; *Mizell v. Herbert*, 12 S. & M. 547. And his liability for costs will make him incompetent, though his interest be otherwise equally balanced; *Cason v. Robson*, 7 C. 97; *S. P. Scott v. Watkins*, 2 S. & M. 233. The prosecutor on an indictment is a competent witness for the State, notwithstanding his contingent liability for costs, if the prosecution should turn out frivolous or malicious; *State v. Blennerhassett*, W. 7.

205. *Interest of partners.* A partner can never so far divest himself of interest in the firm, as to make him a competent witness for it, or his associates in matters relating to the firm business; *Collins v. Flowers*, 1 H. 26. So one of several sued as partners, is incompetent on behalf of the plaintiff, to prove the existence of the partnership and the consequent liability of the others, because he is interested in the recovery by plaintiff against his co-defendants; *Garner v. Myrick*, 1 G.

448. But a partner not sued is competent for the plaintiff to prove the existence of the partnership; *Lake v. Munford*, 4 S. & M. 312. And a person who in purchasing the interest of one partner, covenanted to pay his vendor's share of the partnership debts, is not a competent witness in a suit against the other partner on a partnership liability, to prove payment of the same; *Perry v. Randolph*, 6 S. & M. 335. A person who makes a contract, acting as partner of a defendant in a suit brought to enforce it, is not a competent witness for defendant; *Randolph v. Govan*, 14 S. & M. 9. And so when several are sued as partners in replevin, and one alone gives the replevin bond, the others are not competent witnesses, for they are liable for the costs, and also for the damages for the taking and detention; *Wilson v. Clark*, 5 C. 270. See *post*, 236.

206. *Parties as witnesses: When incompetent.* A party, whether interested or not, cannot be compelled to testify against his will. An executor is a party, and cannot be compelled to testify, unless he is willing to do so; *Duncan v. Watson*, 2 S. & M. 121. A complainant in an original or cross bill cannot be examined, either for a co-complainant or defendant; *Servis v. Beatty*, 3 G. 52. And if a material defendant be examined by the complainant, he cannot have relief against that defendant on his own evidence; *Stanton v. Green*, 5 G. 576. But this rule is technical and abolished by the Rev. Code of 1857; *Burks v. Loggins*, 10 G. 462. One of the defendants who is a maker of the note sued on, cannot be introduced as a witness by the endorser to prove payment of the debt; *Wade v. Staunton*, 5 H. 631; *S. P. Scott v. Watkins*, 2 S. & M. 233. But the maker of a note after a judgment has been rendered against him on it, is a competent witness to prove its payment in a suit against the endorser; *Routh v. Helm*, 6 H. 127.

207. *Same: Joint defendants.* Where two defendants are tried together, though on separate indictments for the same offence, one is not a competent witness for the other, unless no proof of guilt is offered against the defendant proposed as a witness; *State v. Blennerhassett*, W. 7. But after one is convicted, where they are jointly indicted, he is competent for the other, if not rendered infamous by the conviction; and where the punishment or conviction, is a fine it is immaterial on the question of his competency, whether it has been paid or not; *Strawhorn & Grizzle v. State*, 8 G. 422. And where the indictment, though joint, charges the prisoners with the commission of separate and distinct offences, and not with the joint commission of the same offence, it seems they are competent witnesses for each other, either before or after conviction; *Ib.*

208. *Same. Nominal plaintiff.* The nominal plaintiff is a competent witness for the defendant, if he be willing to testify; but he cannot be compelled to testify; *Blundell v. Vaughan*, 12 S. & M. 625; *Coopwood*

v. Foster, Id. 718; *Watts v. Smith*, 2 C. 77. The nominal plaintiff is a good witness for himself, even against a deceased person's estate; *Hedges v. Aydelott*, decided, October Term, 1871. See *post*, 214 a.

209. *Public officer: A party.* Where a party to a suit is a public officer, in whom an official right to sue is vested by law, he is a competent witness, as he has no personal interest and is not liable for costs; *Ellis v. Carlisle*, 8 S. & M. 552; and when such party dies, his testimony on a former trial of the suit may be given in evidence like that of any other deceased witness; *Russell v. Moore*, 8 S. & M. 700.

210. *Prochein ami.* Whether the next friend of an infant, who sues for him in the Probate Court to recover a legacy, is a competent witness for the infant; *Quere?* Yet, if he is not competent, his testimony, if prejudicial to the infant, will not cause a reversal of the decree in the infant's favor; *Quinn v. Moss*, 12 S. & M. 365.

211. *Statute of 1857: Rev. Code, 510, art. 190.* This statute enacts that "No person, whether a party to the suit or otherwise, shall be incompetent to give evidence in any suit at law or equity, by reason of an interest in the result thereof, or in the record as an instrument of evidence in other suits; but the deposition of such interested witness shall not be read in evidence; and the court and jury shall give such weight to the testimony of parties and interested witnesses, as in view of the situation of the witness, and other circumstances, it may fairly be entitled to. Any body may by subpoena, as in other cases, compel any other party to the suit to appear and give evidence. *Provided*, that no person shall be a witness in any suit by or against himself, to establish his own claim to an amount exceeding \$50, against the estate of any deceased person."

212. *Party witness against decedent.* Under the Act of 1857 (*ante*, 211), a party cannot be a witness in his own behalf, in a suit instituted in the Circuit Court to establish his claim against a decedent to any amount. The proviso in that act allowing him to prove his claim to the amount of \$50, applies only to suits before a justice of the peace; *Griffin v. Lower*, 8 G. 458.

213. *Same: The proviso prevents executors and administrators from being witnesses in Probate Court to sustain their accounts.* An executor or administrator is not a competent witness to sustain any item of credit in his account, nor to exonerate himself from any sum with which the heirs and legatees may seek to charge him; *Haralson v. White*, 9 G. 178.

214. *Same: Party not competent to exonerate himself.* A party cannot be a witness to discharge himself from a claim set up by an administrator in favor of his intestate to a greater amount than \$50; *Otey v. McAfee*, 9 G. 348; *S. P., Lamar v. Williams*, 10 G. 342, for which see *post*, 289d.

214a. *Nominal plaintiff witness against a decedent.* In *Hedges v. Aydelotte*, decided

October term, 1871, the nominal plaintiff was allowed to testify for the use to establish a claim against a deceased person's estate, there being no other proof of his want of interest than his own statement, and the fact that the suit was for the use of another.

B. INTEREST NOT DISQUALIFYING WITNESS.

214b. *Interest in the subject matter, but not in the result of the suit.* If a witness be interested in the subject matter of the suit merely, without being interested in the result, he is competent. Thus, where a lessee sued a sub-lessee on a parol contract for rent, the lessor and owner is not incompetent for the plaintiff, though it appear that if the defendant's (sub-lessee) note had been taken for the rent, it was to have been made payable to the witness; *Estice v. Cockerell*, 4 C. 127. So, if plaintiff in ejectment claim title as heir of his father, a relative of the father, who would be next of kin to the father in case plaintiff were illegitimate, is competent in that action to prove the illegitimacy; *Spears v. Burton*, 2 G. 547. And so the maker of a note, after a judgment has been rendered against him, is no longer interested in a suit on the note against the endorser, and may be a witness for the endorser to prove its payment; *Routh v. Helm*, 6 H. 127.

Interest in the question involved does not disqualify, there being no interest in the result of the suit; *Clapp v. Mandeville*, 5 H. 197.

215. *Trifling interest: Grantor in voluntary deed.* A grantor in a deed conveying four slaves for the consideration of love and affection and ten dollars, with warranty of title, is not an incompetent witness to sustain the title of the grantee, by reason of his warranty. The inconsiderable and trifling amount of the pecuniary consideration, compared with the value of the property, showing that it was nominal, and inserted under the idea that the naming of a pecuniary consideration was necessary; *Moore v. McKie*, 5 S. & M. 238. See *DEED*, 15.

216. *No interest in the result.* A daughter is a competent witness for her mother in a suit by a third person against the mother, to recover personal estate in the hands of the mother, though the effect of her testimony is to disprove plaintiff's title, by showing it to be in the administrator of her deceased father, in whose estate she is interested as a distributee; *Parker v. McNeill*, 12 S. & M. 355.

217. *Same.* T. made an obligation, and the defendants bound themselves to see it performed, but this was done without the request of T., and upon a distinct and separate agreement with the obligee: *Held*, that T. was a competent witness for the defendants, who were sued upon their guaranty thus entered into; *Thornton v. Dabney*, 1 C. 559.

218. *Agent as a witness.* The agent is a competent witness to prove his agency, and also that he made the contract sued on, as such; *Austin v. Feamster*, 1 S. & M. 166. Thus, in an action to recover for goods sold to defendant, S. was called as a witness for

the plaintiff to prove that he purchased the goods as agent of the defendant. He answered on his *voir dire* that he did not know that he was interested in the suit; he did not know if plaintiff succeeded whether he would be liable to defendant or not; that he had acted as the agent of the defendant in purchasing the goods on the authority of a written order, which he did not then have and did not know where it was: *Held*, that his answer did not show him to be incompetent from interest; *Ib*.

219. *Same: When not competent.* But whilst, as a general rule, the agent is a competent witness for the principal, in matters about which he acted as agent, yet when the judgment, if rendered in accordance with the agent's testimony, would procure a direct benefit to himself, he is not competent. Hence, where certain payments were made by a debtor of the principal to an agent, he is not competent, for the principal, to show that he applied the payments to a debt due by the person making them to himself; since the effect of this evidence would be to allow him to retain in his possession the means to pay a debt due him, and at the same time exempt him from responsibility to the principal, by furnishing the principal a judgment for the whole debt, undiminished by this payment; *Poindexter v. La Roche*, 7 S. & M. 699. See *ante*, 198, 201.

219a. *Interest voluntarily acquired.* An interest voluntarily acquired, by a witness, or acquired by the procurement of the party who objects to him, subsequent to the event about which he is called on to testify, does not disqualify him; *Clapp v. Mandeville*, 5 H. 179.

219b. *Agreement that one suit shall abide another.* An agreement of counsel that another suit shall abide the decision of the one on trial, does not disqualify a party to that suit from testifying in the one on trial, if the agreement were made without his knowledge or consent; *Ib*.

220. *Attorney at law: Interest in commissions.* Whether an attorney at law, who is to receive as his compensation, a commission on the amount he collects on a claim, is a competent witness for his client, in a suit on that claim; *Quære?* *Arthur v. Mitchell*, 10 S. & M. 326.

221. *Same: Where he is under an acceptance to pay for his client.* An attorney at law, who is under acceptances for his client, to be paid out of the proceeds of judgments which he had recovered, is a competent witness for his client in a controversy between the client and a third party, to whom the client had assigned a judgment in payment of a debt due to the assignee, to show that although he had given a receipt to the sheriff for the money due on the judgment, yet the judgment was not in fact paid, he having only received the sheriff's note for the judgment; *Clark v. Kingsland*, 1 S. & M. 248.

222. *Master of a vessel.* The master of a vessel is a competent witness to establish a

claim against the owners in favor of a third party; *Steamer General Worth*, 1 G. 703.

223. *Surety on attachment bond competent against the garnishee.* The surety on an attachment bond is not interested in the collateral trial had upon an issue contesting the answer of a person summoned as garnishee in the case, and hence, is a competent witness for the plaintiff, to show an indebtedness by the garnishee to the attachment debtor, which the latter denied in his answer; *Peters Moss*, 1 S. & M. 331.

224. *Judgment debtor witness for claimant.* The judgment debtor is a competent witness for the claimant in a trial of the right of property levied on under execution, to show that the property belongs to the claimant, and not to him; and this, though there be proof tending to show that the witness had made a fraudulent conveyance of his property to defeat his creditors; *Mizell v. Herbert*, 12 S. & M. 547. The interest of the witness is adverse to the claimant; *Ewing v. Cargill*, 13 S. & M. 79. But he would not be competent if he were in any way liable for costs, *Mizell v. Herbert*, *supra*.

225. *Judgment debtor competent witness for his garnishee.* The judgment debtor is a competent witness in favor of his garnishee, to show that he had assigned the debt, before the garnishment was served; *Byars' Garnishee v. Griffin*, 2 G. 603. But he is not competent for the creditor to disprove garnishee's answer, denying indebtedness; *Standeser v. Welby*, 4 C. 145.

226. *Taxpayer of municipal corporation.* An inhabitant and taxpayer of a municipal corporation is a competent witness for and against the corporation; *Munn v. Yazoo City*, 2 G. 574.

C. WHERE THE INTEREST OF THE WITNESS IS EQUALLY BALANCED, AND INTEREST PREPONDERATING ON ONE SIDE.

227. *Equipoise of interest: Preponderant interest: Rule.* If the witness be equally interested on both sides, he is competent for either; but if it preponderate on one side, he is incompetent for that side; *Carter v. Graves*, 6 H. 9; *S. P., Fatheree v. Fletcher*, 2 G. 265; *Austi v. Teamster*, 1 S. & M. 166; *Doe v. Jackson*, 1 S. & M. 494; *Hunt v. Chambliss*, 7 S. & M. 532; *Ellis v. Ward*, 7 S. & M. 651; *Arthur v. Williams*, 10 S. & M. 326; *Cason v. Robson*, 7 C. 97; *Dean v. Young*, 13 S. & M. 118.

228. *Same: Instance of equipoise.* Where both parties claim title to the property in controversy from the same grantor, under different conveyances, executed by him to them, the grantor is as much liable to one party as to the other, upon failure of the title conveyed by him, and he is therefore indifferent in point of interest, and may be a witness for either to impeach the title of the other; *Fatheree v. Fletcher*, 2 G. 265. But it seems this rule would not apply, if the consideration for one conveyance was greater than that for the other; See *Noel v. W. Heally*, 7 G. 181. See *post*, 230.

229. *Same: Instances of preponderant interest.* An execution against a distributee was levied on personal property, which was claimed by the executor, as a purchaser from the distributee in payment of the distributee's debt to the estate: *Held*, that the distributee was not a competent witness for the executor, as his interest was not an equipoise; for although, if the executor failed, the property would go to the payment of the distributee's debt; yet if the executor succeed, the property would go also to pay the distributee's debt to the estate, and in addition the distributee would get his distributive share in the property. But this would not be so if the distributee had already received his share of the estate, including the debt he owed it, for then his interest would be equally balanced; *Carter v. Graves*, 6 H. 9. And so a person receiving payment of a debt for a creditor, is a competent witness for the creditor to prove that he had no agency to receive payment, and consequently that it was invalid, his interest being adverse to the party calling him; *Dean v. Young*, 13 S. & M. 118. An endorser of a note, if released by want of notice, is competent for either party, but if he is still liable he is not competent for the holder; *Partee v. Silliman*, 44 M. 272.

229a. *Contingent interest on one side, and certain on the other.* A witness whose interest is direct and certain on the side that calls him, and is contingent and uncertain on the other side, is not competent. Hence, a grantor who has made two deeds with warranty of title, with an exception from the sale in the first, in which the land in controversy may or may not be embraced (as may be shown by extrinsic evidence), is not a competent witness for the last in an action of ejectment for the land between these parties, to show that the land conveyed in the last deed was within the exception from the conveyance in the first. For, in case the last grantor loses, the witness would certainly be liable to him on his warranty, and in case the first grantor loses, the witness would still have the right to show that the land was not sold because embraced in the exception; *Picol v. Myers*, 13 S. & M. 466.

230. *Equipoise in interest: Interest against party calling witness.* A witness whose interest is equally balanced, or whose interest is against the party calling him, is competent. Hence, in an action of ejectment, where both parties claim under the same grantor, he is a competent witness for the defendant to show that certain lands ambiguously described in the deed, is really embraced within it, he having afterwards conveyed the same lands to the plaintiff's lessor. For his interest is against the defendant, as he is liable on his warranty to plaintiff, in case defendant sued; or at all events his interest is equally balanced, he being liable to both parties; *Doe v. Jackson* 1 S. & M. 494. See *ante*, 228, 229a.

231. *Same: Liability for costs destroys equipoise.* When the interest of the witness

is an exact equipoise, except that he is liable for costs on one side, that destroys the equipoise, and makes him incompetent; *Cason v. Robson*, 7 C. 97.

D. INTEREST AGAINST THE PARTY CALLING HIM.

232. *Competent for party against whom he is interested.* A witness is not incompetent, if his interest be adverse to the party calling him, if he do not object himself; *Englehard v. Slater*, 7 H. 538; *Austin v. Teamster*, 1 S. & M. 166; *Doe v. Jackson*, 1 S. & M. 494; not even if he be a nominal plaintiff; *Blundell v. Vaughan*, 12 S. & M. 625; *Coopwood v. Foster*, 12 S. & M. 718; *Watts v. Smith*, 2 C. 77; *Dean v. Young*, 13 S. & M. 118. See *ante*, 228, 229, 229a.

E. OBJECTIONS ON ACCOUNT OF INTEREST.

233. *When objection made.* If the interest of a witness be discovered on his examination on his *voir dire*, objection should be then made, and the witness not allowed to testify; if discovered on his examination in chief, objection should be then made, and he be not allowed to testify further; but if discovered on cross-examination, objection may be properly made, for the first time, by asking an instruction to the jury to disregard his testimony; *Carter v. Graves*, 6 H. 9. The objection cannot be made for the first time in the High Court; *Woods v. Ridley*, 5 C. 119.

234. *Force of the objection, when made to testimony given to the court.* Objections to the competency of testimony offered to the court have not the same weight, as when made to evidence offered to the jury; *Clark v. Kingsland*, 1 S. & M. 248.

F. RESTORATION OF COMPETENCY OF WITNESS.

235. *Release from liability: Acceptance of release.* If a release from liability appear in the deposition of an otherwise interested witness, taken on behalf of the releasor, it will be presumed to have been accepted by the witness, so as to make his deposition competent evidence; *Cooper v. Granberry*, 4 G. 117.

236. *Partners: Case in judgment.* A witness called by the defendant, stated upon his *voir dire*, that the debt sued on was a partnership debt, he and the defendant being the partners. The defendant then executed to the witness a release of all claim for contribution on that account: *Held*, that this did not make him competent; the witness ought also to have executed a general release to the defendant; *Scott v. Watkins*, 2 S. & M. 255. See *ante*, 205.

237. *Vendor released by vendee.* A vendor, with covenants of warrants of title, may be made a competent witness for vendee, by a release from the vendee of his liability on the warranty; *Cooper v. Granberry*, 4 G. 117.

238. *Release by claimant, of the sureties on his bond.* The sureties on a claimant's bond, given, under the statute for the trial of the right of property, are incompetent witnesses for the claimant; but if objections be made

on that account, the claimant has the right to execute a new bond in lieu of the original, and thus restore their competency as witnesses. *Moore v. McKie*, 5 S. & M. 238.

239. *Right of party to release witness in order to make him competent.* It will be error to refuse a party calling an interested witness, the privilege of releasing him, so as to make him competent; *Englehard v. Slater*, 7 H. 538.

240. *Release of interest by witness.* A release of interest in a corporation, by one of its members, makes him a competent witness for the corporation; *Smith v. Natchez Steamboat Co.*, 1 H. 479.

241. *Release by a trustee.* A trustee cannot, by releasing his individual interest in a trust deed to his co-trustees, and renouncing his trust, make himself a competent witness, without the consent of the *cestui que trust*, or by decree of a court of equity; *Ferriday v. Selser*, 4 H. 506; see this same case reported in 13 S. & M. 698, digested *ante*, 203.

242. *Release by residuary legatee.* A residuary legatee was offered as a witness for the executor, and to render her competent she executed a release to her co-legatees, of an amount of her interest in the estate equal to the demand against the executor in the suit, and the costs, and this was to take effect whether the suit were gained or lost; and the executor also executed to the witness a release from all demands for contribution in that case: *Held*, she was still incompetent for the executor, 1st. Because, if the suit were decided against the executor, the effect of her release would not be to exempt her remaining interest in the estate from liability for the judgment, as all the estate was so liable in law. 2d. The release executed by the executor did not release her from liability to the co-legatees for contribution; *Dunbar v. Chevalier*, 6 C. 161.

243. *Restoration of a joint trespasser by verdict.* As to this see *Bell v. Morrison*, 5 C. 68, digested in 89, 90, 91, under PRACTICE. See *post*, 289c, *et seq.*, and *ante*, 211, *et seq.*, as to effect of act of 1857, on the competency of witnesses.

2. Competency as affected by Public Policy.

A. HUSBAND AND WIFE AS WITNESSES FOR EACH OTHER.

244. *Husband not competent for the wife.* The husband is not a competent witness for the wife; *Moore v. McKie*, 5 S. & M. 238; not is he a competent witness for a bank in which the wife is a stockholder; *Routh v. Agricultural Bank*, 12 S. & M. 161. And the wife of a deceased principal in a note is not a competent witness for the surety in an action on the note; *Payne v. Devinal*, 11 S. & M. 460.

245. *Husband's and wife's competency for each other under the Act of 1857.* The wife was excluded by the common law from being a witness for the husband, upon the ground that they were one person in law, and as the husband could not testify for himself, so the wife could not, her interest being identical with his. But by the Rev. Code of 1857, p. 510,

art. 190 (see *ante*, 211), the incompetency of any person, whether a party to the suit or otherwise, by reason of interest in the result of it, is abrogated, and the wife is therefore a competent witness for the husband; *Lockhart v. Luker*, 7 G. 68.

246. *Same.* The husband and wife were excluded from testifying for each not only on account of the identity of their interest and rights, but more especially on account of the privileged sanctity with which the law regards the confidential intercourse of married life. And hence, art. 190, p. 510 of the Rev. Code of 1857 (*ante*, 211), does not remove the disability of the wife as a witness for her husband in a civil case, and she is incompetent. But by art. 193, on same page, husband and wife are made competent witnesses for each other in a criminal case; *Dunlap v. Hearn*, 8 G. 471. In this case the testimony of the wife, which was excluded, did not embrace confidential communications made to her by the husband.

247. *Same.* In this case the wife was held a competent witness for the executor of her husband, to prove conversations between the husband and the alleged creditor, in relation to a contract upon which their dealings were based. And the court say, "The incompetency of husband and wife as witnesses for each other, were placed by the common law, first, on their identity of rights and interests, and second, on principles of public policy, that the statute (see *ante*, 211), having removed the incompetency arising from *interest*, and her testimony (in this case) not falling within the class of confidential communications which, on principles of public policy, are held sacred, there remains no legal obstacle to its admission; *Stuhlmüller v. Ewing*, 10 G. 447; S. P., *Whitfield v. Whitfield*, 44 M. 254.

B. OFFICER IMPEACHING HIS OFFICIAL ACT.

248. *Same: J. P. not competent to impeach his certificate.* An officer taking and certifying the acknowledgment of a married woman to a conveyance of her separate estate, is an incompetent witness to impeach the validity of the conveyance, by proving that the statement in his official certificate is false (citing *Planters' Bank v. Walker*, 3 S. & M. 409); *Stone v. Montgomery*, 6 G. 83. Yet, though a justice of the peace will not be allowed to give evidence to deny his official act, he may show the circumstances under which it was done, though the effect may be to invalidate his official certificate; *Wood v. American Life Insurance Co.*, 7 H. 609.

249. *Sheriff incompetent to impeach his return.* A sheriff is an incompetent witness to impeach his return; *Van Campen v. Snyder*, 3 H. 66; *Planters' Bank v. Walker*, 3 S. & M. 409.

C. PARTIES TO NEGOTIABLE PAPER AS WITNESSES TO IMPEACH IT.

250. *Whether such party competent or not.* Whether a party to a negotiable instrument, who has actually given the paper credit by

negotiating it, is competent as a witness to impeach it by showing it to be originally void; *Quære? Williams v. Miller*, 10 S. & M. 139; *Watts v. Smith*, 2 C. 77. But, however this may be, the rule when allowed to exclude him, is applied only when there has been such negotiation of the paper as to pass his legal title; and hence, in this case, the payee in a note payable to bearer in whose name the suit was brought as nominal plaintiff, was held a competent witness to show that its consideration had failed; the form of the action itself showing that the legal title still remained in the payee; *Watts v. Smith*, *supra*. Whether a principal in a note signed by the surety in blank as to the amount, and delivered to the principal for a particular purpose, is competent to show that in negotiating the note he exceeded the authority thus given; *Quære? Torrey v. Fisk*, 10 S. & M. 590. A party transferring negotiable paper will not be allowed to give testimony to impeach it; *Partee v. Silliman*, 44 M. 272.

251. *But competent to show payment.* Such party is competent, however, to show that the instrument has been discharged or paid; *Williams v. Miller*, 10 S. & M. 139; *Gray v. Thomas*, 12 S. & M. 111; *Routh v. Helm*, 6 H. 127.

252. *Competent to show fact transpiring after negotiation.* And such party is also competent to show any fact, as want of notice, transpiring after the paper left his hands; *Drake v. Henly*, W. 541.

253. *Competent if the instrument is not negotiable.* And the rule of exclusion does not apply when the instrument is not negotiable; *Williams v. Miller*, 10 S. & M. 139.

D. JURORS AND GRAND JURORS.

See *JURY*, 40.

254. *Grand juror competent by statute.* By statute, art. 252, p. 614, of the Rev. Code of 1857, a grand juror may be examined in open court in relation to the action and proceedings of the grand jury, and the testimony of witnesses before them; *Rocco's Case*, 8 G. 357. And before this statute, it was a matter in the discretion of the court, to allow a grand juror to testify or not in relation to statements made, before the grand jury, by a person giving that body information in relation to a violation of the criminal law; *Sands v. Robinson*, 12 S. & M. 704.

255. *Juror incompetent to impeach his verdict.* A juror's affidavit is not competent to impeach his verdict; *Friar's Case*, 3 H. 422. He is not competent to prove facts inculpat- ing himself or his associates, and to impeach the verdict; *Rigg's Case*, 4 C. 51; *Nelm's Case*, 13 S. & M. 500. But he is competent to show the misconduct of the officer in charge of the jury to the extent of impeach- ing the verdict; *Nelm's Case*, *supra*.

256. *Juror is incompetent to sustain or impeach the verdict.* A juror is incompetent to give testimony to sustain or impeach the verdict; *Organ's Case*, 4 C. 78; *Pope & Jacob's Case*, 7 G. 121.

257. *Competency of jurors summoned to assess damages.* Whether jurors summoned to assess damages to the owner of land, occasioned by the location of a railway on it, are competent to impeach the verdict by showing that they acted on erroneous principles; *Quære? N. O. J. & G. N. R. R. Co. v. McBride*, 9 G. 32.

3. Impeachment and Confirmation of Witnesses.

258. *By proof of general character.* An examination into the general character of a witness is not allowable; the examination must be confined to his general character for truth and veracity; *Newman v. Mackin*, 13 S. & M. 383.

259. *Proof of character in indictment for rape.* On the trial of an indictment for rape, it is competent for the State to prove, in the first instance, without any assailing evidence being introduced, the good character of the prosecutrix for veracity and chastity, if she be a witness; *Turney's Case*, 8 S. & M. 104.

260. *Impeachment in bastardy case.* In a bastardy case the prosecutrix may be asked, on cross-examination, if about the time of conception she had not sexual intercourse with other men. This is allowed to show the impossibility of fixing the paternity of the child in case there were other connections about that time; but she cannot, for the purpose of assailing her credibility, be inter-rogated as to her want of chastity at other times. *Anonymous Case*, 8 G. 54. And in such case it is incompetent to show, in im- peachment of the prosecutrix, by the testi- mony of professional men, that impregnation is highly improbable from a single act of co- ition; *Ib.*

261. *By question showing bias.* In a prose- cution for murder, the mother of the defend- ant, who is a witness for him, may be asked on cross-examination, if to a person and at a time and place designated, she did not say "that if the prisoner did not kill the deceased, she would not own him for her son." And if she deny making this statement, a witness may be introduced to show that she did make it; *Newcomb's Case*, 8 G. 383. But the bias cannot be shown till after the witness has been examined; *Mullins v. Cottrell*, 41 M. 291.

262. *By showing contradictory statements.* A witness on cross-examination may be asked if he did not on a former designated occasion, state, that he knew nothing of the matter in controversy between the parties; *Goode v. Linecum*, 1 H. 281; S. P., *Head's Case*, 44 M. 731. But in such a case it is not com- petent to re-establish his credibility by showing that he has made the same statements as those made on the trial, to other witnesses; *Head's Case*, *supra*.

263. *Corroborating and impeaching proof.* Where two witnesses are in direct conflict on the main point in controversy, and one is sus- tained in every instance when he testifies as to material but incidental facts, by the other witnesses cognizant of them, and the other is contradicted in many instances by the other

witnesses, the former is sustained and the latter discredited, as to the main fact on which they differed; *Fox v. Matthews*, 4 G. 433.

264. *Witness discredited by circumstances.* In this case the complainant, who was a married woman, claimed title to a slave under a deed alleged to have been executed in 1818; and in support of her case, read in evidence the deposition of a witness which stated clearly and positively the execution of the deed and the delivery of the slave under it. The defendants denied the execution of the deed, and asserted that before its date, the property had been given by the grantor to the husband, under whom they claimed title—and had held possession for many years. The court reviewed the evidence,—that in favor of defendants consisting only of circumstances which were inconsistent with plaintiff's title—and reach the conclusion that those circumstances were sufficient to overturn the positive statements of complainant's witness; *Woods v. Sturdevant*, 9 G. 68.

See TRUSTS AND TRUSTEES, 24. ATTORNEY AT LAW, 43.

265. *Deposition of notary contradicted: Case in judgment.* The record of a notary, showing notice of protest of a note, which, under the statute (H. & H., 609, § 33), may be read in evidence, is but the deposition of the notary, and may be impeached by proof of particular facts, such as, 1st. By showing that the notary was in the habit of altering his records on the application of parties interested, 2d. That the particular record in evidence had been altered by him in a material part. 3d. That he procured his blank affidavits in order to be attached to his record of the protest of notes, and that these were months afterwards attached, and that when this was done he was sworn by the justice of the peace not to any one in particular, but to all at once. 4th. That he offered to a witness, to swear that notice in another case was sent to a particular post office, when he had on two former occasions sworn that the notice in question had been sent to a different post office; *Wood v. Am. Life Ins. Co.*, 7 H. 609.

266. *Impeachment and corroboration of notary's deposition: Case in judgment.* A deposition of a notary was read in evidence, which proved demand and personal service of notice on the endorser. The defendant then read in evidence the notary's deposition, taken a year before this, in which he stated he had no recollection of protesting the note. The plaintiff then proved, in order to sustain the notary, that at the time the first deposition was taken, the record of the notary was lost, and that when the other was taken the record was before him. The defendant then, in rebuttal, proposed to prove that the notary was in the habit, when he made protests, of leaving his memorandum in relation to the service of notice, in blank, and filling it up afterwards; *Held*, that this was competent evidence; *Seltzer v. Fuller*, 6 S. & M. 185.

267. *Corroboration by failure to call con-*

tradictory witness. The fact that witnesses evidently friendly to the party, were not introduced (it appearing that they were cognizant of the facts), to contradict another witness, is a circumstance tending to strengthen the testimony of that witness; *Calhoun v. Burnett*, 40 M. 599.

268. *Witness refusing to answer criminal questions.* The fact that a witness refuses to answer a criminal question, is the ground of drawing no inference prejudicial to his credibility, and courts are careful so to inform the jury; *Rocco's Case*, 8 G. 357.

269. *Contradicting one's own witness.* A party introducing a witness may contradict him as to material facts stated by him, by calling other witnesses to prove the contrary, for the object of such testimony is not to impeach or discredit the witness, though that may be the consequential and incidental effect of it. But it is well settled that a party cannot impeach his own witness by general evidence, nor can he on re-examination, impeach him by asking him if he is interested in the result of the suit; *Fairley v. Fairley*, 9 G. 280. But the court cannot instruct the jury that a party, by introducing a witness endorses him: it can only charge that he cannot impeach him; *Jarnigan v. Fleming*, 43 M. 710.

4. Examination of Witnesses.

A. GENERALLY.

270. *Allowing witness to be examined after argument.* It is in the discretion of the court to allow or refuse a witness to be examined after the cause has been argued and the jury charged; *Witherspoon v. Cain*, W. 407. Generally, additional witnesses should not be allowed, after the evidence is closed; but the court may admit them in furtherance of justice; but this is a matter of discretion, for which an appellate court would not reverse, except in an extreme case, where the injustice committed by a departure from the rule was manifest and great; *Hoover v. Pierce*, 4 C. 627.

271. *Witness cannot repeat his evidence to jury after retirement.* A witness cannot be allowed to repeat over to the jury in their retirement, the testimony he gave in open court. Should they doubt, after their retirement, as to the testimony of a witness, they may hear him again, but it must be in open court; *Offit v. Vick*, W. 99.

272. *Right of party and witness to object to criminalizing question.* A party introducing a witness, has no right to object to the propounding of a question to him, the answer to which might criminate the witness. If the witness do not object, the question, if otherwise unobjectionable, is competent; *Newcomb's Case*, 8 G. 383.

272a. *Asking witness criminalizing question: Duty of court.* It is competent on cross-examination to ask a witness "What is your avocation?" and the other party has no right to object to it; the witness may decline to answer where it would tend to criminate him, or bring him into disgrace

or reproach; but this is the privilege of the witness, of which it is the duty of the court to advise him; *Head's Case*, 44 M. 731.

273. *When his answer subjects him to civil responsibility.* The clerk who issues in blank a commission to take the deposition of a witness, is a competent witness to prove that it was so issued in blank, as to the name of the commissioner, and that other names had been inserted after it was issued by him. His answer stating the issuance of it in blank, will not subject him to a criminal prosecution, nor to a penalty, nor will it be derogatory to his character; and if it could render him liable civilly for damages, this is no reason for excusing him; *Hemp-hill v. McBride*, 12 S. & M. 620.

274. *Effect of answer admitting fact imposing penalty.* When the answer of a witness to a question, would render him liable to a penalty, &c., this is no ground for excluding him as a witness in the cause; it can have no other effect than to excuse him from answering the objectionable question; *Ib.*

274a. *Extent of re-examination: Discretion of the court.* As a general rule, a party calling a witness is bound at his peril to interrogate the witness on the examination in chief, in the first instance, as to all material matters; and if any material question be omitted, it cannot be put in the examination in reply; the rule on that point is, that no new question can be put, unconnected with the subject of the cross-examination, and which does not tend to explain it. But courts of original jurisdiction have a discretion to depart from this rule, when the facts or circumstances of a particular case warrant it; and an appellate court will not reverse for a departure from the rule, except in extreme cases; *Sartorius' Case*, 2 C. 602.

274b. *Putting witness under the rule.* Where a witness who has been directed to withdraw during the examination of the other witnesses, violates the order of the court, and remains present during such examination, it is a matter in the discretion of the court below to allow him to be examined or not; and the High Court will not interfere with its exercise, except where it has been manifestly abused; *Ib.*

274c. *Deceased witness.* Where a party to a suit, who is a competent witness, has been once examined, and then dies, his testimony may be proven on another trial, just as that of any other witness; *Russell v. Moore*, 8 S. & M. 700. It is not necessary to prove the precise words used by a deceased witness on a former trial; the substance of his testimony, if proved, is sufficient; *Smith v. Natchez Steamboat Co.*, 1 H. 479.

B. LEADING QUESTIONS.

275. *When propounded and when not.* Leading questions, as a general rule, are not to be propounded to a witness on his examination in chief. But there are exceptions to this rule: 1st. Where the witness is manifestly reluctant and hostile to the party call-

ing him. 2d. Where he has exhausted his memory without stating the particular fact required,—when it is a proper name or other fact, which cannot be arrived at by a general inquiry. 3d. Where the witness is a child of tender years, whose attention cannot be otherwise called to the point. Leading questions should not be allowed, even on cross-examination, where it is manifest the witness is in the interest of the party propounding them; *Turney's Case*, 8 S. & M. 104.

276. *Discretion of court as to allowing leading questions.* But the allowance of leading questions in the examination in chief, is a matter in the discretion of the court before whom the trial is had; but this discretion is not an absolute and arbitrary discretion, but is subject to legal rules, and it exists only in the exception to the general rule, forbidding the propounding of leading questions. When these exceptions do not apply, there is no discretion in the court to allow leading questions, and they must be excluded; and where the record shows that the exception did not exist, and that a leading question was, nevertheless, allowed, the Appellate Court has the right to interpose and correct the error; *Ib.*

277. *Same: Introductory matter.* If in the examination of a witness, the object be to direct his mind with more expedition to what is material, and if the question propounded relate merely to introductory matter, it is not objectionable, though in form it be leading; *Stringfellow's Case*, 4 C. 157.

See DEPOSITION, . 3.

278. *What is a leading question?* A leading question is one which directly suggests the answer which is desired, or which embodies a material fact and admits of an answer by a simple affirmative or negative, though neither the negative nor affirmative answer be directly suggested; *Ib.*; *S. P., Torrance v. Hurst*, W. 403.

279. *Same.* A question is leading which suggests to the witness the answer desired, or which embodies a material fact, and may be answered by a simple affirmative or negative, or which involves an answer bearing immediately on the merits of the case, and indicates to the witness a representation which best accords with the interests of the party propounding the question. And it is also within the rule prohibiting leading questions, if a question be propounded which assumes a fact to be proven which has not been proven; *Turney's Case*, 8 S. & M. 104.

280. *Instances of question held leading.* On a trial of an indictment for rape, the prosecutrix stated that the violence had been committed on her seven months previous to the finding of the indictment, which latter period was, so far as the record showed, the first date at which she had made the disclosure of the injury done to her. It also appeared that the prisoner had been her guardian from a very early age, and was her stepfather, and that she was sixteen years old at the time of the alleged crime. She was asked by the

prosecution, "Did the prisoner then or at any subsequent time say anything to you in relation to the matter to dissuade you from disclosing it? State when and where and what he said:" *Held*, that this question was leading and illegal. And the following questions were also held illegal and leading: "Did the prisoner, at any time subsequent to the transaction, say anything to you about what punishment the laws of Mississippi would impose on you, or him, or on both? State it all." 2d. "If the prisoner, in any antecedent conversations, offered property or other advancement to you to attach you to him, say so;" *Ib*.

281. *Same*. Under the authority of *Turney's Case*, *supra*, which the court says lays down a more stringent rule against leading questions than the court announced in this case (see *ante*, 277, 278), the following question was held illegal and leading: "Did you carry property from Bunch's Bend, in Issaquena county, as the property of Decatur Whitley?" In this case the indictment was for the murder of Decatur Whitley, and there was no direct proof that he had been killed or that the killing was in Issaquena county. The question was intended to show that Decatur Whitley was in Issaquena county about the time of the killing, and from that to raise an inference in favor of the venue. And it was held that if the answer could conduce to that proof, it was leading and illegal; *Stringfellow's Case*, 4 C. 157.

C. CROSS-EXAMINATION.

282. *Right to cross-examine exists in all cases*. The right of a party to cross-examine a witness who has been introduced and examined by his antagonist, is founded on the clearest principles of reason and justice, and is rarely if ever denied. There is nothing in the nature of an investigation in relation to the propriety of a change of venue in a criminal case, which abridges or limits the right of cross-examination, and in such proceedings it should be allowed; *Mask's Case*, 3 G. 405.

283. *Same: Extends to the whole case*. When a witness is introduced on the stand, it is for the purpose of telling the whole truth of the matter relevant to the issue; and his whole testimony, whether given in response to interrogatories propounded by the party introducing him, or the other, is the testimony of the former. And hence the right of cross-examination, being allowed for the purpose of eliciting the whole truth from the witness, is not restricted to what the witness has testified to in his direct examination, but extends to every matter relevant to the issue; *Ib*.

284. *Leading questions on cross-examination*. Leading questions are generally allowable on cross-examination, but if it be manifest that the witness is in the interest of the party making the cross-examination, they should not be allowed; *Turney's Case*, 8 S. & M. 104.

5. Miscellaneous Matters about Witnesses.

285. *Cases of incompetency*. There are

four cases in which witnesses are incompetent: 1st. When the witness is insane or an idiot. 2d. When he is an atheist, or does not believe in a future state of rewards and punishment. 3d. When he has been convicted of an infamous offence. 4th. When he is interested in the result of the suit; *Phebe v. Prince*, W. 131.

286. *Plaintiff as witness*. A plaintiff is not a competent witness to sustain his account, by his own account books; *West v. Poindexter*, W. 303.

287. *Owner witness for his slave*. The owner is a competent witness for his slave, who is prosecuted for a capital offence; *Isam's Case*, 6 H. 35.

288. *Physician as an expert*. A physician may be examined as an expert, though he is not a graduate, and has no license to practice from any medical board; *N. O. J. & G. N. R. R. Co., v. Allbritton*, 9 G. 242.

289. *Erroneous instruction as to interest of witness*. The jury have a right to consider the interest of a witness, in determining his credibility; and it will therefore be error for the court to instruct, even since the Act of 1857 (see *ante*, 211), that they cannot disregard the evidence of an interested witness, unless his manner and conduct in giving in his testimony, and the testimony of the other witnesses in the cause, satisfy them that he has sworn falsely; *Ib*.

289a. *Refreshing memory of witness*. When a witness speaks in his deposition of a fact, as within his recollection, but states he only remembers the date of it, by reference to a letter written by him, which is in his possession, but does not attach the letter or a copy of it to his deposition, his answer will, nevertheless, be competent; *Henderson v.asley*, 11 S. & M. 9.

289b. *Preliminary examination of witness as to character*. The court will not, unless under peculiar circumstances, undertake to determine by a preliminary examination, whether a witness to character has sufficient knowledge to enable him to testify; *Powers v. Presgroves*, 9 G. 227.

289c. *Executor as a witness*. The executor of a will, who is also the principal legatee and devisee under it, is a competent witness to sustain the will, under our statute, Rev. Code of 1857, § 510, section 17; *Kelley v. Miles*, 10 G. 17.

289d. *Party as a witness against a decedent*. The proviso to art. 190, p. 510, of the Rev. Code of 1857, which prohibits a party from establishing his own claim against the estate of a decedent, by his own oath, to a greater amount than \$50, extends not only to cases where the claim sought to be established is a fixed debt, but also to all cases in which the surviving party litigates with the representatives of the deceased party, any right or claim whatever, and the survivor in such a suit (when the amount in controversy is over \$50) cannot be a witness to establish any fact in support of his demand, if he be plaintiff, or if he be defendant, to defend the demand of his adversary (citing *Griffin v.*

Lower, 8 G. 342); *Lamar v. Williams*, 10 G. 342; *S. P., Oley v. McAfee*, 9 G. 348, and *ante*, 214.

In a case where the surviving partner pleaded *non est factum* to a note made by the deceased partner, upon the ground that the latter acted without authority in making the note, the liability of the deceased partner not being disputed, the plaintiff in a suit on the note against the survivor, is competent to prove the declarations made by the deceased partner, which went to show that the note was a partnership transaction. For in that case, the effect of the testimony is not to establish the plaintiff's claim against a deceased person, but against the survivor. But it was said, the rule might be different, if the issue involved the liability of the deceased partner; *Faler v. Jordan*, 44 M. 283. See *ante*, 211 to 214a.

289e. *Interested witness under Act of 1857: How examined.* Though persons interested are competent under the Act of 1857, yet they must be examined orally in court; their depositions cannot be taken; *Anderson v. Gregg*, 44 M. 170.

VII. Practice and Rulings in Relation to the Introduction and Exclusion of Evidence.

1. Order of Introducing Evidence.

290. *Party has election as to order of introduction.* A party is not confined to any particular order in the introduction of his evidence, but may elect as to the order in which he will introduce it, unless a foundation must be first laid so as to introduce secondary evidence; *Baughan v. Graham*, 1 H. 220. But if he offer evidence which is competent only when other evidence necessary to its relevancy is also introduced, and it is objected to, though for a wrong reason, and he except, it will not be error if during the progress of the trial the necessary supplementary evidence be not offered; *Torrey v. Fisk*, 10 S. & M. 590. Hence, if the defendant offer to show that he signed the note sued on in blank as to the name of the payee, and delivered it with a restriction that it was to be filled up with a particular name, and this evidence is excluded, and the defendant do not show during the trial that the person taking it knew of the restriction and its violation, there will be no error; *Torrey v. Fisk*, *supra*. And hence, also, if the vendee, under a deed with a general warranty of title, in an action for the purchase money, offer in evidence a deed made by a sheriff, who sold the land under an execution against the vendor, having a lien prior to the sale to him, and it be rejected for any alleged defect in form or substance, the exclusion will be no ground of reversal, unless the vendee also offered evidence to show that he had been actually evicted under said sale; *Heath v. Newman*, 71 S. & M. 201.

291. *Same.* It is a well settled rule of practice, that parties are not restricted as to the order in which they may choose to present

their evidence. In an action therefore against a person alleged to be a partner of the maker of the note sued on, and who has denied under oath, the partnership and the note, it is not necessary to precede the introduction in evidence of the note by proof of the existence of the partnership, or by proof that the note was made by the ostensible partner, on account of the firm, or for its benefit; but the plaintiff may introduce the note first, and if on the trial he fail to show these necessary facts, the note will be irrelevant evidence, and will be excluded from the jury on the motion of the defendant; *Lea v. Guice*, 13 S. & M. 656. See *Skinner v. Collier*, *post*, 298.

292. *Same.* So, in an action of ejectment, a party may introduce in evidence a deed conveying the premises, without first showing title in the grantor; *Welborn v. Anderson*, 8 G. 155. And so on the trial of an issue on the plea of payment, the defendant may commence the interrogation of the witness by asking him about a sale which is the consideration of the indebtedness claimed by defendant, for this may be proper introductory matter to prove payment; *Tinnin v. Garrett*, 4 S. & M. 207.

293. *Same.* And it is not necessary that the evidence when offered should be *per se* relevant, if in fact it be capable of being made relevant by other evidence and is actually made so before the case is closed; *Lake v. Munford*, 4 S. & M. 312.

294. *Same: But its relevancy should be explained.* But if evidence be offered which of itself appears to be foreign to the issue on trial, it is necessary that its relevancy be then shown to the court, either by explanation as to its bearing on the case, or by introducing other evidence connecting it with the *res gestæ*, otherwise the most prejudicial evidence might go to the jury, the effect of which, it might be impossible to destroy by instructions from the court to the jury to disregard it. And this rule is applied with great strictness in criminal cases; *Dyson's Case*, 4 C. 362. And where the evidence is apparently irrelevant and incompetent and can be made competent only by supplementary evidence, it is the duty of the party offering it to show the existence of the supplementary evidence, or else his proposed evidence will be held inadmissible; and hence, evidence of the unsoundness of a slave is inadmissible to reduce the price of the slave in an action for the purchase money, unless it be shown that the vendor warranted the soundness; *Fondren v. Duffee*, 10 G. 324.

294a. *Rule as to evidence in chief and rebutter.* But the rule allowing a party to introduce evidence in the order he may choose, does not permit him to omit evidence in the opening of his case and bring it in afterwards in rebutter. Hence, where the plaintiff in an action on a bill of exchange omitted in the opening of his case to introduce evidence showing an excuse for non-presentment, he will only be allowed afterwards to introduce it, in the discretion of the court; *Wood v. Gibbs*, 6 G. 559.

2. Rulings on Admission and Rejection of Evidence, and objections to it.

A. TO SHOW ERROR IN EXCLUDING, ITS RELEVANCY MUST APPEAR.

295. *Exclusion: Relevancy.* To constitute error in ruling out evidence, its relevancy must be shown; *Townsend v. Blauvelt*, 5 H. 503; *Cole v. Harman*, 8 S. & M. 562; *Torrey v. Fisk*, 10 S. & M. 590; *Heath v. Newman*, 11 S. & M. 201; *Dyson's Case*, 4 C. 362. Thus, where the law required six weeks' notice to be given of a lease of school lands for ninety-nine years, but only thirty days' notice for a leasing for a shorter period, evidence offered by a lessee sued for the purchase money of the lease, and defending on the ground of the invalidity of the lease, caused by the notice being for only thirty days, may be rejected, unless evidence also be offered to show that the lease was for ninety-nine years; *Cole v. Harman*, *supra*. For further instances, see *ante*, 290-294.

B. WHEN OFFERED, ITS RELEVANCY NEED NOT *per se* APPEAR.

296. *Relevancy need not appear when offered.* It is not necessary that evidence, when offered to the jury, should *per se* be competent, if, in fact, it be capable of being made competent, and is so made by other evidence, before the case is closed; *Lake v. Munford*, 4 S. & M. 312. But if it apparently be foreign to the issue, its relevancy and connection should be shown, either by explanation to the court or by the introduction of evidence showing its relevancy; *Dyson's Case*, *supra*.

297. *When relevant but incomplete.* Evidence when relevant to the issue, should be received, though it is incomplete without the proof of a further fact, which it does not tend to prove; *Williams v. Newberry*, 3 G. 256. Thus, in trespass for the tortious taking of a slave, the plaintiff may prove the amount expended in retaking the slave, without previously showing that the expenditure was necessary or reasonable; *Id.* And so a deed containing a latent ambiguity, may be introduced before the ambiguity is explained, but on failure to explain it during the trial, it should be excluded; *Hanna v. Renfro*, 3 G. 125. See *post*, sub-division G.

C. WHEN OBJECTIONS TO EVIDENCE MUST BE MADE.

298. *Must be made when introduced.* If no objection be made to the admission of evidence when it is introduced, objections to it are considered as waived; *Skinner v. Collier*, 4 H. 396. It will be too late to raise the objection on a motion for a new trial; *Union B'k v. Graves*, 12 S. & M. 130. And permitting evidence to go to the jury without objection, is a waiver of objection to its competency, and a waiver of all proof which ought regularly to be made to render it competent. Thus, if on a plea of *non est factum*, the plaintiff prove the defendant's signature to the bond, and then read it in evidence, without objection, this will be a waiver of the

necessity of proving the character in which the plaintiff sues; *Clanton v. Laird*, 12 S. & M. 568.

This case cites *Thornton v. Alliston*, 12 S. & M. 124, which, so far as this point is concerned, is but the dissenting opinion of Judge Clayton, who cites as authority for the position, *Carter v. Taylor*, 6 S. & M. 367, which last case holds that on plea of *non est factum*, sworn to, if defendant permit the plaintiff to read in evidence the note without objection, it was a waiver of further proof of execution. But these cases are to be construed with the cases allowing the plaintiff to elect the order of introducing his proof. See *ante*, 290 to 294, and especially with *Lea v. Guice*, 13 S. & M. 656, digested in 291 *ante*.

298a. *Same.* And if parol evidence be allowed to go to the jury to establish a fact for which written evidence exists, it will be too late to object by charges to the jury that the parol evidence is insufficient; *Edge v. Keith*, 13 S. & M. 295.

D. WHEN OBJECTION MAY BE GENERAL.

299. *What a general objection reaches.* A general objection to the introduction in evidence of a writing, will reach every objection apparent on its face, but not objections arising *dehors* the instrument. Hence, when the law admitted the record of a notary public to establish notice, in case the notary did not reside in the county where the evidence was offered, if the record show when it is offered, that the notary resided in that county, a general objection to its admissibility is sufficient; *Wood v. American Life Ins. Co.*, 7 H. 609. But if evidence be excluded on a general objection, when a specific one was proper, the action of the court will be presumed correct, unless the record show affirmatively that the exclusion was improper; *Dyson's Case*, 4 C. 362. See *post*, 301.

E. WHEN OBJECTIONS MUST BE SPECIFIC.

300. *General objections entitled to little weight.* General objections to the admission of documentary evidence, overruled in the court below, are entitled to but little consideration in the High Court, for it often happens that if specific objections were made, they might be removed or obviated by other testimony; *Routh v. Agricultural Bank*, 12 S. & M. 161. If the objection arose upon matter *dehors* the instrument, it must be specific; *Wood v. Am. Life Ins. Co.*, 7 H. 609.

301. *Objections which may be obviated must be specific.* Objections to the introduction of evidence, which, from their nature, may be obviated by the party offering it, must be distinctly stated on the trial, otherwise they will not be noticed; *Morris v. Henderson*, 8 G. 492; *Wesling v. Noonan*, 2 G. 599. Where an unrecorded deed, without further proof of its execution than the certificate of acknowledgment, was offered in evidence, and the objection to it was general, it was held that the objection could not avail, because the execution of the deed might have been otherwise

proven, *Morris v. Henderson. supra.* And so where a general objection was made to the introduction in evidence of a deposition, it was held that it should have been specific, since, if the particular objection had been pointed out, it might have been obviated entirely by removing that objection, or by procuring other evidence to supply the place of the deposition; *Westling v. Noonan*, 2 G. 599.

301a. *And only the specified objections will be noticed.* Where a party objected to the admission in evidence of a record from the Probate Court, decreeing a sale of lands of a deceased person, and of the deed made in pursuance thereof, upon the grounds, first, that it did not appear that due notice had been given to the heirs; and second, that the decree was void, because it did not sufficiently describe the land; he will not be permitted in the High Court to allege for the first time as a further objection, that it did not appear that the sale had ever been confirmed; *Monk v. Horne*, 9 G. 100. *This seems to overrule Wood v. Am. Life Ins. Co., ante*, 299, as the objections in this case appeared on the face of the document; and to establish in all cases the necessity of making the objection to evidence specific.

301b. *Same.* The objections must be so specific as to present distinctly to the court, the precise point relied on by the objector; and hence, an objection to the introduction in evidence of a deed made by a Chickasaw Indian, "that it was not made and certified to, according to the requirements" of the treaty with the Chickasaw Indians, is bad. The objection should have pointed out distinctly and specifically in what respect the deed and certificate were not in accordance with the treaty; *N. O. J. & G. N. R. R. Co. v. Moya*, 10 G. 374.

301c. *When objections to depositions must be made.* If exceptions be filed to depositions but a few moments before the trial commences, it is the duty of the exceptor to bring them to the notice of the adverse party, and have them disposed of before the trial commences, or else he will be held to have waived them; see art. 221, p. 515, Rev. Code of 1857; *Hearndon v. Bryant*, 10 G. 335.

F. EFFECT OF FAILURE TO OBJECT TO EVIDENCE.

302. *Failure to object is a waiver of its illegality.* That the effect of a failure to object to illegal evidence, when it is offered, is a waiver of its illegality; see *ante*, sub-divisions, C, D, E.

303. *Same: Further waiver.* The failure to object to illegal evidence is not only a waiver of all objections to its competency; *Edge v. Keith*, 13 S. & M. 295, but it is a waiver of any right to object to other evidence which would be illegal, except when connected with and based on legal evidence of the character of that which was admitted without objection. Thus, where a record of the decree of the Probate Court, ordering a sale of land, which shows on its face that the decree was illegal and void, is admitted in evidence without ob-

jection, the purchaser claiming under the sale has also the right to introduce in evidence the deed made to him, in pursuance of the sale; *Commercial Bank of Manchester v. Martin*, 9 S. & M. 613.

G. COMPETENT EVIDENCE, WHEN OFFERED, MUST BE ADMITTED.

304. *Error to exclude competent evidence.* It is error to exclude competent evidence from the jury; *Roberts v. Singleton*, 2 U. 438; and this, though it may be insufficient to make out the claim or defence; *Moody v. Harper*, 3 C. 484; *Philips v. Burrus*, 13 S. & M. 31. But it is not error to exclude competent evidence, which is merely cumulative; and when its admission would not add to the strength of the evidence already introduced on that point; *Townsend v. Blewett*, 5 H. 503. Nor is it error to exclude legal evidence on a point already sufficiently established without it; *Atwood v. Meredith*, 8 G. 635; *Drake v. Surget*, 7 G. 458. Nor is it error, if the evidence offered and excluded would not have changed the result; *Cogan v. Frisby*, 7 G. 178. Evidence to establish a material fact, should not be excluded from the jury, because, in the opinion of the court, there is not enough of it to establish the *factum probandum*; the jury are the judges of that; *Simmons v. Cutreer*, 12 S. & M. 594.

305. *Relevant, but incomplete evidence may be rejected.* If evidence be offered to impeach a patent, which on the whole does not conduce to establish its illegality, it may be rejected, though it does establish a part of several facts, the whole of which, if proven, would invalidate the patent. Hence, under the Pre-emption Act of Congress, of 1834, it being necessary, in order to establish the right of a pre-emptor, to prove both settlement on the land, and the cultivation of a part of it, and that proof of these should be made both before the register and receiver, it was held, in an action of ejectment, where the pre-emption right was set up against a patent, that evidence offered to establish settlement alone, and that proof was made before the register only, might be rejected; *Fulton v. McAfee*, 5 H. 751.

305a. *Deed rejected because insufficient.* Where plaintiff offers in evidence a deed, as a distinct and sufficient ground of his title, the sufficiency of the deed to show the title may, upon objection to its admissibility as evidence, be then considered by the court; and if it be insufficient, may be excluded from the jury; though the more regular practice would be, to admit it in evidence, and for the court afterwards to judge of its sufficiency; and on this ground, when the plaintiff offers in evidence a deed, which shows title out of him and in another, it may be excluded from the jury; *Davis v. Herndon*, 10 G. 484.

H. EFFECT OF ADMITTING ILLEGAL EVIDENCE.

306. *Admission of irrelevant evidence, error.* The admission of irrelevant evidence is error, if it be likely to mislead the jury. *Dougherty v. Vanderpool*, 6 G. 165. And

or this reason, when a depository of money without hire was sued for an alleged balance, due on the deposit, and he was allowed to introduce his cash book, and to prove that his clerks made false entries in it, and that they had stolen his money, it was held that this evidence was error. *Ib.* But if illegal evidence be admitted, the error will be cured by a declaration of the court to the jury to disregard it; *Herndon v. Henderson*, 41 M. 584.

307. *Illegal evidence.* When no ground of error. If illegal evidence be introduced to establish a point already sufficiently proven, and on which there is no conflicting evidence, it will be no ground for setting aside the verdict; *Graves v. Miss. & Alabama R. R. Co.*, 6 H. 548; *Davis v. Black*, 5 S. & M. 226; *S. P., Fore v. Williams*, 6 G. 533; *Hand v. Grant*, 5 S. & M. 508. *Aliter*, if the point on which the evidence was introduced was doubtful; *Davis v. Black*, *supra*. In *Barringer v. Nesbit*, 1 S. & M. 22, it was said, "The decisions are not uniform as to the proper course to be taken by the Appellate Court, when improper evidence has been admitted, if there be also sufficient legal evidence to justify the verdict without regard to that which is exceptionable; the weight of reason and authority is with the rule, that a new trial will not be granted under such circumstances, when the court is satisfied that justice has been done and there is little reason to believe that a different result would ensue upon a second trial. In a doubtful case the rule would be different;" *S. P., McMullen v. Mayo*, 8 S. & M. 298. Nor will a new trial be granted, if the illegal evidence be immaterial and the verdict well justified without it; *Mary Washington Female College v. McIntosh*, 8 G. 671; nor for the admission of illegal evidence which was immaterial and irrelevant and could have had no influence upon the verdict; *Pritchard v. Myers*, 3 S. & M. 42; nor where it was merely cumulative, and it be clear that if it had been excluded, the result would have been the same; *Routh v. Agricultural Bank*, 12 S. & M. 161.

3. Evidence must be Relevant and Pertinent to the Issue.

308. *Evidence must be pertinent to the issue.* Evidence offered, must be pertinent to the issue, and if excluded, its pertinency must be shown, or there will be no error; *Cole v. Harman*, 8 S. & M. 562; and if it be apparently foreign to the issue, its relevancy must be then shown; *Dyson's Case*, 4 C. 362.

309. *Same: Instances.* In an action against a railway company, by the owner of a mule killed by the engine of the company, the plaintiff must prove negligence, but the proof must be confined to that trespass; evidence of negligence at other times and places would be irrelevant; *Miss. Central R. R. Co. v. Miller*, 40 M. 45.

310. *Same: Another instance: Admission of party.* If the defendant claim title to the property in dispute under a gift from his father, his admission that his mother had never

given him anything is irrelevant and inadmissible; *Dunlap v. Hearn*, 8 G. 471.

311. *Same: Another instance: Trial of the right to property.* On the trial of an issue, involving the right of the claimant to property levied on under execution, evidence of the nature and character of the debt on which the judgment is founded, is irrelevant; hence, where the wife of the debtor was claimant of the property levied on, it is irrelevant and incompetent to show that the judgment was rendered for the price of a gin-stand purchased for the wife's plantation; *Atwood v. Meredith*, 8 G. 635.

312. *Same: Evidence to show motive: Case in judgment.* Evidence of a fact, which is entirely innocent and lawful, is irrelevant and incompetent to show wanton and malicious motive; and for this reason it was held error to admit in evidence, that the defendant had instituted and dismissed a suit for the recovery of a slave, as evidence that his prior tortious taking of the slave was malicious; *Williams v. Newberry*, 3 G. 256.

4. Evidence as Influenced by the Pleadings, Variance and the Contrary.

313. *Variance.* When the plaintiff declares on a special agreement, he is bound to prove the contract as laid in his declaration, or else he cannot recover. And, if he also add the common counts, and at the trial prove a special agreement, but materially different from the one declared on, he cannot recover on any of the counts. He cannot recover on the special counts on account of the variance, nor in the common counts, because a special contract has been proven; *Drake v. Surget*, 7 G. 458; *S. P., Phipps v. Ingraham*, 41 M. 256.

314. *Same.* And if any part of the contract proved, be different from that laid in the declaration, the variance is fatal; for a contract is an entire and indivisible thing and a variance in one material point, makes the contract sued on, and the contract proven, different; *Ib.*

315. *Same.* In a declaration upon a special agreement, the entire consideration must be stated, and the entire act to be done, in virtue of such consideration, together with the time, manner and circumstances; the consideration is material and descriptive, and must, with all the other parts of the agreement, be strictly proven as declared on in the declaration; *Ib.*

316. *Same: Case in judgment.* If in a declaration against a warehouse-man, to recover the value of goods stored with him and destroyed by fire, it be averred, that the defendant received the goods on storage "for a certain reasonable reward to be paid to him by the plaintiff," and the proof be, that the defendant was to receive a stipulated price, the variance will be fatal. And so if the declaration aver that the goods were to remain in the custody of the defendant, until they were ordered to be shipped by the plaintiff, and the proof show there was no agreement as to the time during which they were

to remain in the defendant's custody, the variance is fatal; *Ib.*

318. *Same.* Proof of materials furnished, cannot be made under a count for work and labor done; *Richardson v. O'Neal*, W. 469.

319. *Same: Instances of variance.* If the declaration describe the note sued on as a personal liability of the defendant, and the note offered in evidence be made by the defendant as agent, and do not impose a personal liability, the variance will be fatal; *Leach v. Blow*, 8 S. & M. 21. So if the declaration describe a bill single, as a promissory note, the variance will be fatal; *Pierce v. Lacy*, 1 C. 193. And a declaration on a contract for rent, stating an agreement to pay \$100 therefor, is not sustained by proof that the agreement was to make a certain fence, in satisfaction of the rent, and that the defendant failed to make the fence, and that the making of the fence was worth \$100,—the variance being material; *Phipps v. Ingraham*, 41 M. 256.

320. *Same: Variance in actions of tort.* Where an action *ex delicto* is founded on a contract, the agreement must, as in other cases, be proved as alleged; *Tutt v. McLeod*, 3 H. 223.

321. *Same: Instances where difference is no variance.* The words "in liquidation," attached to a partnership signature to a note sued on, is no part of the signature, and if omitted in the declaration, constitute no ground for variance; *Fairchild v. Grand Gulf Bank*, 5 H. 597. So where the instrument declared on, differs from the one offered in evidence, in such a manner as it is not likely that any detriment would occur in that or another action from its admission, the variance is immaterial. Thus, where in a motion against a sheriff for a failure to pay over money collected on executions, a difference between the execution offered in evidence, and the one described in the declaration of sixty-two cents in the amount of the taxed costs, is immaterial; *Fulcord v. Hamberlin*, 4 S. & M. 649.

322. *Same: Other instances.* Where the declaration avers an express promise to pay rent, and that the defendant occupied the premises; and the proof is, that there was an express promise to pay rent, but there was no occupation by defendant, the variance is immaterial; *Stier v. Sturgett*, 10 S. & M. 154. And so where the action is for a stipulated rent for a house and lot, a recovery cannot be defeated by the tenant showing that the price agreed to be paid was for the rent of the lot alone, and not for the house and lot; *Ib.* So where the declaration was in the name of P., as administrator *de bonis non* of S., as plaintiff, and described the bond sued on as payable to plaintiff, as administrator as aforesaid, and the bond upon oyer craved is found to be payable to P., as administrator of S., the variance was held immaterial; *Kingkendall v. Perry*, 3 C. 228.

323. *Same: Case in judgment.* In an action of assumpsit for money loaned, the plain-

tiff may introduce under the common counts, an instrument in writing, signed by defendant, acknowledging the reception of so much money for a slave, and making a conveyance of the slave to the plaintiff, which was to be void on repayment of the money; that instrument is evidence of the indebtedness, and will entitle the plaintiff to recover, if there be no proof of payment of the money; *Coor v. Grace*, 10 S. & M. 434. And so evidence of an arbitration, settling the title to the property in controversy, is admissible in evidence under the general issue in replevin; *Newell v. Newell*, 5 G. 385.

326. *Objections on account of variance.* A variance between the declaration and the instrument sued on, cannot be taken advantage of by demurrer, except only in those cases in which oyer is demandable; *Robertson v. Banks*, 1 S. & M. 666. Where oyer is not demandable, the proper mode to object is to move to exclude the proof; *Stier v. Surget*, 10 S. & M. 154.

327. *Amendments allowable to obviate variance.* The court in the exercise of a sound discretion, will generally allow amendments to obviate objections on the ground of variance; *Robertson v. Banks*, 1 S. & M. 666.

328. *Evidence contradicting the pleadings.* Evidence is not allowable to contradict facts admitted by the pleadings; *Parkhurst v. McGraw*, 2 C. 134.

328a. *Proof of unnecessary averments.* The decisions in relation to the necessity of proving unnecessary averments in the declaration, are not uniform; but it seems, except when the averment is descriptive of the subject matter to which it relates, it will be unnecessary to prove it, if the converse of it were pleaded and proven, it would be no answer or defence. Hence, if the declaration against a guarantor of a promissory note aver demand and notice, the averment may be treated as surplusage, and need not be proven; *Thrasher v. Ely*, 2 S. & M. 139; *S. P., Hundley v. Buckner*, 6 S. & M. 70.

VIII. Bills of Exception.

See BILLS OF EXCEPTION. HIGH COURT, 116. *et seq.*

329. *Taken to the admission of evidence.* A bill of exceptions taken to the admission of evidence, should set out all the evidence in the case, so that the High Court may see all the attendant circumstances, otherwise, the action of the court below will be presumed correct, *Organ's Case*, 4 C. 78. The High Court cannot determine that the admission was error, unless all the evidence be set out, if in connection with any other evidence, the admitted evidence be proper; *State v. Farish*, 1 C. 483.

330. *Same: Case in judgment.* The bill should also set out the evidence admitted, or else the action of the court will be presumed correct; *Townsend v. Blewitt*, 5 H. 503. On a trial for rape, a witness was asked if he had not, at a certain time, authorized his wife to offer the prosecutrix a home, and in what

manner he authorized it? and the record, without setting out his answer, stated in general terms that the witness proceeded to answer in the affirmative, and to state the reasons he had communicated to his wife: *Held*, that the record did not disclose the answers of the witness, and the High Court could not judge of their legality; *Turney's Case*, 8 S. & M. 104.

331. For decisions in relation to bills of exception, to the exclusion and admissibility of evidence, see *BILLS OF EXCEPTION*, 14 to 20.

IX. Hearsay Evidence, and Belief of Witness.

332. *Inadmissible.* Hearsay evidence is inadmissible; *Wells v. Shipp*, W. 353; it is not admissible in a prosecution for fornication; *Overstreet's Case*, 3 H. 328. See post 377, 379.

333. *Belief of witness.* A witness must testify from his own knowledge. His statement that so far as he knew or believed the property in controversy belonged to the plaintiff, is incompetent; *Wells v. Shipp*, W. 353. And the answer of a witness should not be allowed to go to the jury, if it appear from any part of his deposition, that he had no personal knowledge of the matter testified to, and did not derive his knowledge from the admissions of a party whose admission was competent evidence; *Melius v. Houston*, 41 M. 59.

334. *Opinion of witness.* In a suit respecting the title to personal property, a witness will not be permitted to testify "that the plaintiff" or "defendant" "never owned the property in controversy;" nor "that the property is mine," such evidence being the mere opinion of the witness, as to a conclusion of law; *Dunlap v. Hearn*, 8 G. 471. And the opinion of a partner as to who are his associates, is not competent evidence; *Atwood v. Meredith*, 8 G. 635. And impressions, opinions, and faint recollections of a witness are inadmissible without the facts on which they are founded; *Torrance v. Hurst*, W. 403.

335. *Affidavit to knowledge and belief.* If an affidavit of a notary to his notarial record be "to the best of his knowledge and belief," it is sufficient; for perjury may be assigned on the affidavit, if the facts stated are not true; *Harris v. Herberton*, 5 H. 575.

X. The Testimony of Experts.

336. *Expert evidence in bastardy case.* It is incompetent to show by the testimony of professional persons, in impeachment of the mother's testimony in a prosecution for bastardy, that it is highly improbable that impregnation can be produced by the first act of coition; such testimony is too uncertain, indefinite, and hypothetical, to form the basis of judicial action; and it depends on circumstances and conditions entirely secret, hidden and unknown as facts; *Anonymous Case*, 8 G. 54.

337. *Expert evidence considered.* In this case it was announced that courts had gone quite far enough in subjecting the life, liberty

and property of citizens to the mere speculative opinions of men claiming to be experts in matters of science; *Ib*.

338. *Opinion of experts as to handwriting.* The opinion of an expert is competent evidence to go to the jury, on an issue involving the genuineness of a written instrument, although such expert be unacquainted with the handwriting of the writer of the instrument; but such evidence is intrinsically weak, and ought to be received and weighed by the jury with great caution; *Moye v. Herndon*, 1 G. 110.

338a. *Expert evidence in criminal case.* When the dead body or remains have been discovered and identified, and the immediate cause of the death remains unknown, the sworn observations and opinions of physicians and other scientific persons are often of the greatest value in explaining the means of the death; *Pitt's Case*, 43 M. 472.

338b. *Same: Case in judgment.* A person in good health died suddenly, and the symptoms and appearances indicated the narcotic poison of Jamestown weed, or *stramonium*, but were also similar to those occasioned by disease of the heart, or congestion of the brain or stomach. The testimony of several physicians, who had examined the contents of the stomach, but without analysis, was conflicting, and left it in doubt, with the probabilities equally balanced, whether the deceased died of disease or poison; *Held*, that these facts, though accompanied by a confession of the deceased that he had administered Jamestown weed, were insufficient to warrant conviction; *Ib*.

339. *Who is an expert.* The opinions of any person skilled in any science, art or trade are admissible in evidence, in relation to matters connected with his profession. The means of detecting counterfeit bank bills, by an inspection of the devices and marks used in etching and engraving such instruments, is an art, and a person skilled therein may give in evidence his opinion in relation to the genuineness of a bank bill, without being acquainted with the handwriting of the president or cashier of the bank, whose names are signed to the bill; *Jones v. Finch*, 8 G. 461.

340. *A physician need not be a graduate.* It is not necessary that a physician should be a graduate of any medical college, or have a license to practice from any medical board, in order to render him competent to testify, as an expert, in relation to matters connected with his profession; *N. O. J. & G. N. R. Co. v. Albrinton*, 9 G. 242. But the rule allowing experts to testify as to their opinion, does not extend so as to allow a person who has never studied or practised the science of surgery, but who has seen six or eight gunshot wounds, and as many made by sharp instruments on the human body, to give his opinion as to whether a wound was made by a gunshot or a sharp instrument; *Caleb's Case*, 10 G. 721.

XI. Onus Probandi.

341. *Party must prove the grounds of his defence or action though negative.* A party

must prove by legal evidence his grounds of action or defence. Neither party is bound to disprove the allegations of the other, but must prove his own, though they involve a negative. Hence, a party alleging want of title in his adversary, as a ground of action or defence, must prove it; *Kyle v. Calmes*, 1 H. 121; and so if he allege illegality in a contract, he must negative, by his proof, the existence of facts which would render it legal; *Merrill v. Melchior*, 1 G. 516; and if his right be founded on a negative allegation, he must prove it; *Kerr v. Freeman*, 4 G. 292. Thus, where a bill is filed to cancel a deed, upon the ground that it was never executed, the complainant must prove its non-execution, or his bill will be dismissed; *Ib.*

342. *Burden of proof on him who asserts the affirmation of the issue.* The burden of proof is on him who asserts the affirmative of the issue; and when there is no plea denying the cause of action in the declaration, but only pleas setting up affirmative matter in avoidance of the declaration, if there be no proof either way, the verdict should be for the plaintiff, and for the amount shown to be due by the declaration (in actions *ex contractu*, and where no unliquidated damages are to be proven); *Winn v. Skipwith*, 14 S. & M. 14.

343. *Same: Case in judgment.* In an action on a penal bond, conditioned for the payment of money, and also for the payment by the obligor of a note given by an obligee to a third person, the amount of the note not being specified, the declaration averred the amount of the note to be \$5,000, and assigned as a breach of the condition of the bond that the defendant had not paid this note. The defendant by his plea, alleged performance in this; "that he, the defendant, had paid the note in the plaintiff's declaration, according to the effect of the covenant." No proof was offered on either side, except the covenant was read to the jury and a verdict was rendered for the plaintiff for \$5,000: *Held*, that the plea, though not correct in form, was good after verdict, and that it put in issue only the non-performance of the covenant as stated in the declaration, and that the burden of proof was on the defendant pleading performance, and the verdict must stand; *Ib.*

344. *Same: When general performance is pleaded.* If to an action on a penal bond to recover damages for a breach of the condition, the defendant plead general performance, and on that issue is joined, the burden of proof is on the plaintiff to show a breach of the condition: *Aliter*, where the plea is a special performance; *Holliday v. Cooper*, 1 S. & M. 633.

345. *Affirmative averment coupled with negative plea.* An affirmative averment of immaterial matter in the replication, coupled with a denial of the defence affirmatively pleaded, will not change the *onus* of proof from the defendant to the plaintiff; *Fox v. Hilliard*, 6 G. 160.

346. *Traverse of garnishee's answer.* If the plaintiff traverse the garnishee's answer,

denying indebtedness, the *onus probandi* is on him, even though the answer admits a former indebtedness, and states its transfer before service of garnishment. The answer is evidence of the transfer and that it was *bona fide*, until the contrary is shown; *Thomas v. Sturges*, 3 G. 261; *S. P. Williams v. Jones*, 42 M. 270. See GARNISHMENT, 20, 21.

347. *Onus probandi as affected by recital in a deed.* The whole of a deed must be taken and construed together, even those parts which are historical merely; and hence, if in a deed settling personal property on a *femme covert*, by her mother, it be recited that the property settled was bought from the husband by the mother, this does not impose on the wife, in a controversy with the husband's creditors, the burden of showing by evidence *aliumde*, the sale by her husband to her mother, there being no other evidence that the property was ever his, except the recital in the deed which also showed, that he had conveyed it; *Palmer v. Cross*, 1 S. & M. 48.

XII. The Sufficiency and Force of Evidence.

348. *Mere preponderance will not do.* The jury are not authorized to find for the plaintiff on the ground of mere preponderance of evidence, unless the evidence is sufficient to prove to their satisfaction all the facts upon which the plaintiff's right to recover depends; *Duncan v. Watson*, 6 C. 187.

349. *It must satisfy the minds of the jury: Nothing more required.* Evidence which satisfies the mind of the jury, is all that is required in any case. Such evidence is sufficient to establish fraud; and nothing more is meant in the books when it is said that fraud must be "clearly proven;" *Doe v. Dignowitty*, 4 S. & M. 57.

350. *Proof of an account.* It is not necessary to prove every item in an account by direct evidence. The jury may infer the correctness of the account from circumstances; *Peck v. Thompson*, 1 C. 367. And so, in an action against a common carrier to recover the value of the contents of a trunk of clothing lost by him, it is not necessary to specify by proof all the items in the trunk; but the witness may testify as to his general recollection of the contents, and their value; *Southern Express Co. v. Wolfe*, 41 M. 79.

351. *Sufficiency: Instance: Non est factum.* Where *non est factum* is pleaded, proof of the handwriting of the alleged maker is sufficient to overturn the plea, if there be no other offered; *Sumpter v. Geron*, 4 H. 263. And in such a case the failure to introduce proof of the handwriting, where it is presumable it is in the power of the party setting up the deed, to do it, is a circumstance against him, if the proof in favor of the deed be otherwise uncertain or doubtful; *Lock v. Jayne*, 10 G. 157.

352. *Same: Instance: Identity of dates and amounts of two instruments: Proof of consideration.* Where the date and amount of a note correspond exactly with the date and amount of a certificate of stock issued by the

payee to the maker, this correspondence in the absence of all contrary proof, is sufficient to authorize a jury to find that the sale of the stock by the payee to the maker was the consideration of the note *Barringer v. Nesbit*, 1 S. & M. 22.

353. *Same*. Where an attempt is made to prove the failure of consideration of a bill of exchange dated 7th December, 1840, for \$90, a deposition of a witness taken to impeach it, which speaks of a bill as having been drawn in the fall or winter of 1840, between the same parties, and for the same sum, but gives no precise date, does not sufficiently identify that bill with the one sued on, as to make his evidence competent; *Heaverin v. Donnell*, 7 S. & M. 244.

354. *Identity of money, in action against depository*. Where the issue to be tried is whether the defendant received the money deposited with his clerk by the plaintiff, and it is shown on behalf of plaintiff that a parcel of money, about equal in amount to the sum deposited, was found by the defendant in his safe, about the time the deposit was made, and that he did not then claim it as his own; it is not necessary for the plaintiff to prove further the identity of the particular coins and bank bills thus found with those deposited by him. It is sufficient if he prove to the satisfaction of the jury, that the money so found belonged to him; *Dougherty v. Vanderpool*, 6 G. 165.

355. *Proof of malice in tortious taking*. The institution and subsequent dismissal by the defendant, of a suit to recover a slave, is no evidence that his prior tortious taking of the slave was malicious; *Williams v. Newberry*, 3 G. 256.

356. *Proof of citizenship*. Proof that a free white person has been residing in this State and keeping house for twelve months, is sufficient to show that he is a citizen of the State, in the absence of all proof tending to show that he was a transient person or a mere sojourner; *Trotter v. Dobbs*, 9 G. 198.

357. *Proof that a person is white*. In 1859, proof that a party to a suit, married in the State, and kept a boarding-house and hired slaves, was sufficient in the absence of all proof to the contrary, to show that he was a free white person; *Id.*

358. *Proof of physician's account*. A plaintiff suing on an account for medical services, must prove it to the satisfaction of the jury; and it will be error to charge the jury that they have a right to infer that the account is correct, if most of the items have been proven. The plaintiff must prove his account either by direct and positive evidence, or that he kept correct books, and that the account sued on is correctly transcribed; *Moore v. Joyce*, 1 C. 584; S. P., *Simmons v. Means*, 8 S. & M. 397; *Hazlip v. Leggett*, 6 S. & M. 326. Nor is it sufficient to establish such an account, to prove that the plaintiff was seen going and returning from the defendant's house, with the superadded proof, that the items of charges were reasonable and customary. The additional evidence of the correct-

ness of plaintiff's account is also required; *Simmons v. Means*, *supra*. But as to evidence of copies of his books, see *ante*, 45, 46.

359. *Same*. A physician sued on an open account, for medical services rendered defendant's intestate, from 1836 to 1842, amounting to \$140. He proved by a witness, who was intestate's regular physician, that witness had seen plaintiff in attendance at intestate's house on two or three occasions; that plaintiff had been called by intestate in consultation two or three times with witness; that he knew nothing of the particular items; that intestate and plaintiff were intimate friends, and that intestate had told witness that plaintiff was his family physician in witness' absence; that intestate's family and slaves numbered over one hundred persons, and that the fees charged were regular prices: *Held*, that this was insufficient to sustain a verdict for the account; *Hazlip v. Leggett*, 6 S. & M. 326. In this case it was also said, that the proof that he kept correct books, and the account sued on was a correct copy, would have strengthened the evidence.

360. *Effect of negative testimony*. The testimony of a witness (who was present and near enough to hear all that was said by the deceased) to the effect that he did not hear certain words evincing a desire to make a nuncupative will, the speaking of which by deceased was testified to by another witness, who was also present; and further, that he was sure that no such words were spoken, being negative in its character, is not entitled to the same weight as the positive testimony of the other witness; yet its legitimate effect is to leave in doubt the existence of the *animus testandi*, clear and indisputable evidence of which is essential to the establishment of a nuncupative will; *Lucas v. Goff*, 4 G. 629.

As to sufficiency of proof in case of FRAUD, WILLS, &c., see those titles.

XIII. Subscribing Witness.

361. *Subscribing witness becoming incompetent*. Where a subscribing witness has, since his attestation, become incompetent, his handwriting may be proven; *Tinnin v. Price*, 2 G. 422.

362. *Dispensed with from lapse of time*. A deed thirty years old may be established by proof of the handwriting of a subscribing witness, without showing his death or absence from the State; *Nixon v. Porter*, 5 G. 697. See *ante*, 59, 60.

363. *Must be produced, and when he may be omitted*. Where there is a subscribing witness, he must be produced, or his absence satisfactorily accounted for; as by proving that he is dead, cannot be found, or has gone beyond the jurisdiction of the court; and proof that he had absconded, was reported dead, and had not afterwards been heard from, is sufficient to account for his absence. When his absence has been accounted for, the instrument may be proven by proof of the handwriting of the subscribing witness; or by proof of acknowledgment of the obligor

or maker that he owed the debt or executed the deed, and also by proof of the handwriting of the obligor or maker; *Downs v. Downs*, 2 H. 915; *Chaplain v. Briscoe*, 11 S. & M. 372.

See DRED, 33.

364. *One sufficient.* Only one subscribing witness to a deed is necessary, and if there be more than one, proof by one alone is sufficient; *Shirley v. Fearne*, 4 G. 653.

365. *Who is a subscribing witness.* Where the names of persons not parties to nor interested in a deed, are found subscribed to it at the place where subscribing witnesses usually sign their names, they will be considered as subscribing witnesses, though that fact does not appear otherwise than from the fact that their names are subscribed in the proper place for subscribing witnesses; *Chaplain v. Briscoe*, 11 S. & M. 372.

See WILL, 37 to 45.

XIV. Miscellaneous.

366. *Proof of jurisdictional facts.* The answer of a person who has been appointed guardian of a minor in one county, to a petition for the appointment of a guardian in another county, for the same minor, though it recites the jurisdictional facts necessary to justify the appointment of the petitioner, is not evidence of the existence of those facts; other proof is necessary to show that the court had jurisdiction; *Farrer v. Clark*, 7 C. 195.

See JUDGMENT, 7 to 12. PROBATE COURT, 46a to 47.

367. *Endorsement of credit on a note.* This endorsement on a note, dated 5th July, 1852, viz. "Six months' further time is given on the within note, and interest paid to January 3d, 1853," and signed by the holder, is evidence of an agreement with the principal for delay, and of prepayment of interest as a consideration therefor, and will release the surety; *Dubuisson v. Folkes*, 1 G. 432.

368. *Same: Effect of endorsement.* The plaintiff read the note sued on to the jury, and an endorsement of a credit thereon, in the following words: "Received on this note \$1236, it being the proceeds of forty bales of cotton, shipped to Liverpool on account thereof." The defendant then offered to prove "the value at Tchula and Yazoo city, of the forty bales of cotton mentioned in the plea as delivered to the plaintiff, and that the same was much more at these points than the sum credited on the note. The court below rejected this evidence: Held, that this was error, as no special contract in regard to the cotton was proven; *Phillips v. Com'l Bank of Manchester*, 1 S. & M. 636.

369. *Affidavit: Form of.* Every affidavit taken in the progress of a suit, must bear on its face the title of the suit, and show the proceedings to which it is intended to apply; *Saunders v. Erwin*, 2 H. 732.

370. *Judge must be sworn.* If a judge know facts, material to the issue before him, he cannot give judgment on his private knowledge; he must like a juror, be sworn to give evidence, so that the privilege of cross-exam-

ination may be allowed; *Smith v. Moore*, 3 H. 40.

371. *Value of slave inferred when not proven.* Where a slave is proven to have been sold by plaintiff to defendant, and there is no proof of the price agreed on, and no proof of the value of the slave, the sale itself is a presumption of value, and the jury ought to find the average value of such property at the time of the sale; *Lewis v. Farrish*, 1 H. 547.

372. *Proof of handwriting.* If a witness has received letters on subjects of business, which can be proven to have been written by a particular person, or has received letters of such a nature, that it is probable they were written by the hand from which they profess to come, he may be permitted to speak of that person's handwriting. So, when a letter is written and signed in the name of the president of an express company, on the business of the company, and to a person interested therein, and the letter state that a certain agent of the company will be sent to a particular place, at a particular time, to attend to the business of the company, and that this agent will report to the person to whom the letter is addressed, the arriving of such agent at the time and place designated in the letter, and his reporting to the person to whom it was addressed, is evidence that such letter was written by the president of the company; *Southern Express Co. v. Thornton*, 41 M. 216.

373. *Same: By expert.* The opinions of an expert are, though he be unacquainted with the handwriting of the party, competent evidence as to the genuineness of writing alleged to be his; but such evidence is intrinsically weak, and should be weighed with caution; *Moye v. Herndon*, 1 G. 110.

374. *Character of plaintiff in an action of slander.* In an action of slander, evidence of the general character alone of the plaintiff is admissible, and evidence of particular rumors against the plaintiff, circulating among a minority of his neighbors, is inadmissible. This proof of character must be made by inquiries as to the general reputation of the party, where he is best known, and as to what is generally said of him by those among whom he dwells, and with whom he is conversant; and ordinarily the witness ought to come from the neighborhood of the party, whose character is under investigation; *Powers v. Presgroves*, 9 G. 227.

375. *Same: Province of court in such cases.* The court will not, unless under peculiar circumstances, undertake to determine by a preliminary examination, whether a witness to character has sufficient knowledge to enable him to testify, and hence, what is the neighborhood of the party whose character is the subject of inquiry, whether it be circumscribed or extended, and what weight is to be given to the witnesses, living near or remote, and the sufficiency of their knowledge of his character, are matters to be considered and determined by the jury; *Id.*

376. *Time of acquisition of witness' knowl-*

edge. A witness may be examined in impeachment of the character of another witness, on a trial for murder, though he never heard it assailed until after the homicide was committed; *Mask's Case*, 7 G. 77.

377. *Declarations of a slave as to his disease.* The declaration made to his master by a slave whilst he was laboring under a disease, "that he was sick and had a pain in his chest," is admissible in evidence in a suit by the master against the person selling him the slave, with warranty of soundness. Such declarations are not hearsay evidence, but are verbal acts, indicating the nature and character of the disease under which the slave is laboring, and being made to the master, who is interested in the welfare of the slave, they are presumed to be honest, and though not conclusive, are yet admissible as evidence, and entitled to such weight as the nature of the case, and all the circumstances, show them entitled to; *Fondren v. Durfee*, 10 G. 324.

378. *Slander: Withdrawal of plea of justification.* When a plea of justification has been pleaded to an action of slander and withdrawn, it is no longer a part of the proceedings, and is not admissible in evidence before the jury; *Gilmore v. Borders*, 2 H. 824.

379. *Boundary proven by reputation.* Proof of a private boundary may be made by reputation; but the proof must show the line with reasonable certainty; *Nixon v. Porter*, 5 G. 697.

380. *Latitude allowed in cases of fraud.* In issues involving the question of fraudulent intent in the conveyance of property, it is frequently necessary to consider collateral matters not involved in the issue; and the connection in business, and the relationship of the parties, become important; and hence, it may be shown that the grantor and grantee were partners in the property conveyed; *Strong v. Hines*, 6 G. 201.

For proof generally in cases of this sort, see FRAUDULENT ASSIGNMENT.

381. *Evidence of wealth of defendant in trespass.* In an action for an assault and battery, it is competent to introduce evidence showing the wealth of the defendant, for in assessing damages, the jury may go farther than allowing mere compensation for the injury, and may give an additional sum, by way of punishment, to the defendant for his wrongful act, to operate as example and to deter others from acts of violence and oppression; and this cannot be done so as to operate as a proper punishment to defendant, unless his pecuniary condition be proven; for what would be a proper punishment to a poor man, would be trivial to a rich one. And when there are several joint defendants and some are poor, they cannot complain that the damages are increased by the wealth of a co-defendant; since the rule in such cases is that all the defendants are liable, for all the damages which may be lawfully assessed against any one of them; *Bell v. Morrison*, 5 C. 68.

382. *Evidence of pretium affectionis.* Evidence of the *pretium affectionis* is not admis-

sible to increase the recovery in an action by a debtor against a sheriff, for seizing under execution, a slave exempt by law from execution; *Moseley v. Anderson*, 40 M. 49.

383. *Proof of malice in trespass.* Evidence to show that a trespass was wanton and malicious, may be introduced in order to increase the damages; *Williams v. Newberry*, 3 G. 256.

384. *Proof of negligence against railway for trespass.* In an action against a railway company, by the owner of a mule killed by the cars of the company, negligence on the part of the defendant must be proven, but the proof must be confined to that trespass; the plaintiff cannot show, that at other times, other employees of the company, were guilty of negligence in running their engines; *Miss. Central R. R. Co. v. Miller*, 40 M. 45.

385. *Answer in chancery as evidence.* An answer in chancery to a bill of discovery and injunction, filed pending an action at law, is not evidence in the action at law, except against the party making it. A party cannot make evidence in favor of himself, either written or verbal; *Bien v. Weatherspoon*, 1 H. 28.

386. *Trial for rape: Introduction of record of guardianship of prisoner.* On a trial for rape, the entire record of the guardianship of the prisoner for his ward, the prosecutrix, including his accounts, were offered in evidence to show when he was appointed guardian, and how long he continued to act as such; *Held*, to be legal. But C. J. Sharkey dissented on the ground that it tended to prejudice the prisoner, by showing that he had wasted the property of the ward; he holding that the order of appointment was sufficient to show when the guardianship commenced, and that from that it would be presumed that he continued as such until it was shown that he was removed; *Turney's Case*, 8 S. & M. 104.

387. *Demurrer to evidence.* When plaintiff's evidence is wholly insufficient to prove the material allegations of his declaration, the defendant should demur to the evidence; *N. O. J. & G. N. R. R. Co. v. Enochs*, 42 M. 603.

See DEMURRER TO EVIDENCE.

Exceptions.

See BILL OF EXCEPTIONS. HIGH COURT, subdivision Bill of Exceptions.

Executor, de son tort.

See EXECUTOR AND ADMINISTRATOR, 222, 228.

Execution.

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I. Form of, Issuance and Teste.

1. *Must follow judgment.* An execution must accord with the judgment on which it is founded; a separate execution against one defendant cannot emanate from a judgment against two or more; *Conn v. Pender*, 1 S. & M. 386.

2. *Same: Where judgment is appealed from and affirmed as to part.* Where a judgment has been rendered on a forthcoming bond, and all the defendants but one has prosecuted a writ of error thereto, and that judgment is affirmed against the plaintiffs in error and their sureties on the writ of error bond, an execution issued on the mandate from the High Court, should be against the plaintiffs in error only and their sureties, and should not embrace the defendant to the judgment, who did not join in the writ of error, for he was no party to the judgment in the High Court. The plaintiff would be entitled to a separate execution against that defendant; *Morton v. Simmons*, 2 S. & M. 601.

3. *How issued on mandate from High Court.* Where the High Court has rendered a judgment on writ of error, or appeal, and a mandate is returned to the court below, it is the duty of the clerk of the inferior court to issue execution in pursuance of the mandate so returned; *Morton v. Simmons*, *supra*. And that is the proper mode of enforcing the judgment of the High Court; *Montgomery v. McGimpsey*, 7 S. & M. 557.

4. *Must be against, and in favor of a party to the record.* As a general rule no execution can ever issue in favor of or against a person who is not a party to the judgment originally, nor has been made so by some subsequent proceeding; *Treadwell v. Herndon*, 41 M. 38. And if issued in violation of this rule, it will be superseded; *Miller v. Ewing*, 8 S. & M. 421.

5. *Execution against administrator without revivor.* An execution issued against an administrator, without revivor, and after the lapse of a year and a day from the date of the judgment, is irregular, and will be quashed on motion, or on *audita querela*; *Hicks v. Murphy*, W. 66; S. P.; *Wilson v. Kirkland*, 1b. 155; *Hubert v. Williams*, 1b. 175.

6. *Execution against administrator is against personalty only.* An execution can be issued against an administrator, to be levied on the goods and chattels of intestate only; it cannot be issued against the realty, which

belongs to the heirs; *Treadwell v. Herndon*, 41 M. 38. See post, 8.

7. *How issued when judgment has been revived.* When a judgment has been revived in favor of, or against a new party, the execution should be issued on the original judgment, since the judgment of revivor is but an award of execution of the former; *Eastin v. Van Dorn*, W. 214.

8. *Variance: Execution against heirs.* A decree in chancery directed a sum of money therein recovered of B. & C. heirs of F. to be levied of the goods and chattels, lands and tenements of which F. died possessed. An execution was issued directing the levy of the money to be made of the goods and chattels of B. & C., or of the goods and chattels of which F. died possessed. A sale of land descended from F. was made under the execution and it was purchased by the complainant; *Held*, 1st. That there was a variance between the decree and the execution which rendered the latter voidable but not void; 2d. That the purchase made by the complainant, though a party to the suit, was good till set aside, and that no person could question its validity but the parties, and they only in a direct and not in a collateral proceeding; *Stark v. Gildart*, 4 H. 267.

9. *Variance.* An execution issued upon a judgment is not properly a part of the record of that judgment, and a variance between that and the judgment does not affect the judgment; *Stephens v. Roby*, 5 C. 744.

10. *Clerical error.* A clerical error in an execution does not vitiate it, and hence an execution on a judgment in favor of the president and directors of the Planters' Bank, issued in the name of the president and directors of the Planters, omitting the word "Bank," will be good; *Barker v. Planters' Bank*, 5 H. 566.

11. *Two executions at same time.* At common law two operative executions cannot be predicated on the same judgment at the same time; *McGehee v. Hundly*, 5 H. 625; but by the statute of 1822 (H. & H. 629 § 2), the plaintiff may sue out a second execution at his own costs, if the first be not returned and executed; *Jennings v. Dennis*, 6 S. & M. 379. Under this statute, a levy and sale under the second execution, before the return of the first is legal; (*McGehee v. Hundly supra*, cited and explained to be not inconsistent with this); *Alexander v. Polk*, 10 G. 737. This statute re-enacted in Rev. Code of 1857, p. 526, art. 269.

12. *Where no execution issued for a year and a day.* If no execution be issued for a year and a day after the rendition of the judgment, an execution issued afterwards, without revivor by *scire facias* will be irregular and will be quashed; *Bacon v. Red*, 5 C. 469. But such execution is voidable only, and not void, and a sale thereunder, is good (though, as in this case, the plaintiff be the purchaser); *Mitchell v. Evans*, 5 H. 548.

13. *Alias execution.* Where a *fi. fa.* has been sued out within a year and a day, and is not executed, a new *fi. fa.* may be taken

out at any time afterwards, without revivor by *sci. fa.*, if the first execution be returned and filed and continuances regularly entered. And these continuances are now presumed to be entered without any formal entry on the roll; *Bank of Mississippi v. Catlett*, 5 H. 175. *Alias* executions may in such cases, continue until barred by the statute of limitation; *Abbey v. Com'l B'k of N. O.*, 2 G. 434.

And where property has been levied on by a *fi. fa.* and not sold, and a *vendi.* issues and the property cannot be found, or being found, is insufficient, an *alias fi. fa.* may issue; *Locke v. Brady*, 1 G. 21. See *post*, 97.

14. *When made returnable.* All executions must be made returnable to the next succeeding term of the Circuit Court after they are issued, unless they be issued within fifteen days of that term, and in that event they must be made returnable to the term next succeeding that. And if an execution be issued not within these fifteen days and be made returnable to the second term afterwards, it will be a nullity after the first succeeding term, and a sale under it thereafter will be void, just as if the sale had been made after the return day of the execution; *Lehr v. Rogers*, 3 S. & M. 468. And an execution issued within fifteen days of the next term and made returnable to that term, is absolutely void, and can have no effect to stop the running of the statute of limitations; *Harris v. West*, 3 C. 156.

15. *Execution without a return day.* An execution issued without any return day mentioned in it, is not void, but only voidable; *Brown v. Thomas*, 4 C. 335.

II. Executions Issued after the Death of Parties.

16. *Sale under execution issued after defendant's death.* A sale of personalty made under an execution issued and tested after the defendant's death, and without revivor of the judgment against the administrator, is not void, but only voidable, and cannot be attacked collaterally; *Drake v. Collins*, 5 H. 253. And so of realty; *Smith v. Winston*, 2 H. 601.

The execution is not void but only irregular and voidable, and until avoided it is deemed and held valid; and hence, a sale under it, of realty or personalty, passes the title. And such a sale will not be avoided or set aside by a court of equity, merely because the heirs had no notice, if it appear that the judgment was a valid claim against the defendant and no injustice has been done to the heirs; *Harper v. Hill*, 6 G. 63. (*Sed vide Cook v. Tombs*, digested in *Revivor*, 21.) The issuance of such an execution is irregular, and it makes no difference in this respect that a former execution was issued before defendant's death; *Davis v. Helm*, 3 S. & M. 17. See *Revivor*, 21.

17. *Same: How avoided.* An execution bearing teste after the defendant's death will be quashed on motion, before any sale has been made under it, but not afterwards. The

motion to quash should generally be made by the administrator of the deceased defendant; but a party who has purchased property from the defendant or from the administrator or at sheriff's sale, and which is seized under the execution, is so far in privity with the administrator as to be authorized to make the motion to quash; *Harrington v. O'Reilly*, 9 S. & M. 216.

18. *When tested before defendant's death.* But if the execution though issued after the defendant's death, bear teste before his death, it will be regular and valid, it being considered as issued at the date of the teste; *Davis v. Helm*, 3 S. & M. 17. See *post*, 93.

19. *Where one of several defendants dies before teste.* If one of several defendants dies before the date of the teste of an execution, the execution must be issued against all, but it will be irregular to levy it on the property of the deceased defendant, but it may be levied on the property of the survivors; *Ib.* See *post*, 21.

20. *Where defendant dies after issuance of execution.* Where the defendant dies after the issuance of an execution, and before levy, the execution may be perfected by levy and sale, or forthcoming bond, without revivor; *Thompson v. Ross*, 4 C. 198. See *post*, 80.

21. *Statute.* By Rev. Code of 1857, 526, art. 269, it is provided, that "if one or more of several defendants shall have died before the issuance of an execution, and no revivor has been had, the fact of the death shall be noted on the writ, and the property of the survivors only shall in such case be liable to the execution." But the failure to note the death, will not vitiate the execution as to the other defendants, as the object of the notice was to prevent the levy on the deceased defendant's property, a matter in which the survivors had no interest; *Wade v. Watt*, 41 M. 248.

III. Levy of Executions.

1. Generally, and Levy on Sureties and Endorsers.

22. *Indemnity of sheriff.* It is right and proper, that the plaintiff in execution have the privilege of levying his execution on all property that in good faith he believes to be subject to it, being held liable in damages if he commit a trespass, by levying on the property of a stranger; and it is also right and proper that he should fully indemnify the officer whose assistance he invokes, against all loss or damage he may incur by executing the process according to the plaintiff's directions; *Forniquet v. Tegarden*, 2 C. 96.

See *BOND OF INDEMNITY*.

23. *Levy: When sheriff has several executions.* If the sheriff have several executions in his hands against the same defendant, the levy of one on the defendant's property is not in effect a levy of all; *Banks v. Evans*, 10 S. & M. 35. And so where there are two executions in the hands of the sheriff, and he returns on one that he has levied it on certain personalty, which he has sold, and that the money is claimed by the plaintiff in the

other, and that he brings it into court; and on the other execution, as to that property, the sheriff returns "Levied" (on that property, naming it), "under an execution" (naming the other execution), "advertised and sold the same, * * * Money claimed by plaintiff in this execution, and brought into court to be applied:" Held, there was no levy of the last execution on the property; *Bibb v. Jones*, 7 H. 397.

24. *Levy on sureties and endorser.* The Act of 1837 (H. & H., 595) requires an affidavit stating the want of property by the principal debtor in the judgment, before the property of the surety or endorser can be levied on; but it does not require a similar affidavit as to the insolvency of the first endorser before the second endorser's property is levied on, but the statute requires the sheriff to proceed against the endorser in the order in which they are liable, and being directory to the sheriff, it will be presumed that he did his duty in exhausting a prior endorser before he proceeded against a subsequent one, unless the contrary appear; *Hamblin v. Foster*, 4 S. & M. 139.

This statute re-enacted in Rev. Code of 1857, p. 357, art. 16, and p. 363, art. 5.

24a. *When affidavit filed.* But the affidavit will be filed in due time, if it be made before the levy and left with the sheriff, who, after the sale filed it with the papers in the cause; *Doe v. Pritchard*, 11 S. & M. 327.

25. *Same.* When the fact of the suretyship of one of the defendants does not appear on the record, the sheriff may levy his execution on the surety's estate without an affidavit of the insolvency of the principal, unless the surety first make and file an affidavit of his suretyship; *Work v. Harper*, 2 G. 107.

26. *Same: Who can make objection.* It cannot be objected, by a mere stranger not claiming under the surety, but adversely to him, that the surety's land was levied on and sold without an affidavit of the insolvency of the principal, as required by the Act of 1837; *Hyman v. Seaman*, 4 G. 185.

26a. *Surety's right to compel exhaustion of a principal.* It is not a matter of discretion with the sheriff when he has an execution in his hands against principal and surety, whether he will exhaust the property of the principal before proceeding against the surety; the statute is imperative, and if he refuses so to act, he may be compelled to do so by petition from the surety to the judge, and a supersedeas of the execution as to him, upon a showing that the principal has sufficient property to satisfy the execution; *Moss v. Agricultural Bank*, 4 S. & M. 726.

27. *Same: Bill by endorser to restrain levy on his property.* A bill by an endorser to restrain a levy on his property, upon the ground that the principal debtor has sufficient property out of which to satisfy the judgment, should designate the property so owned by the principal so clearly as to enable the sheriff to make the levy. A description of land as "lying in Townships 22 and 23, range 7 west, on the bank of Bogue Phalia, in Wash-

ington county," is not sufficiently certain and specific in such a case; *Gibson v. Hughes*, 6 H. 315.

See further on this subject, **PRINCIPAL AND SURETY**, 41 to 46.

For remedy for excessive levy, see *post*, 96.

2. How the Levy is Made.

28. *Levy on personality.* To make a valid levy of an execution on personality, the property must be taken into possession by the officer. Hence, if a sheriff having an execution, go to the defendant's gin-house and see a quantity of cotton there, supposed to be about 75 bales, and is told by the defendant that he has 75 other bales at a warehouse, but the sheriff take neither lot in possession, yet return the execution "levied on 150 bales of cotton," the levy will be bad; *Banks v. Evans*, 10 S. & M. 35. And if an attachment be levied on personality without taking it into possession, the levy will be void, and the judgment also void as to that property; *Gates v. Flint*, 10 G. 365.

29. *Same.* On the trial of a motion against a sheriff for a failure to make a return of a levy on six bales of cotton, ginned, but not packed, it was proven by a witness that the deputy sheriff, whilst executing the attachment, called his attention to some ginned cotton in the pick-room of defendant, and asked the amount of it, and on receiving a reply, made a note of it on paper, and that this cotton was subsequently removed by another deputy sheriff, and sold as perishable property: Held, this was sufficient to show the levy, and the sheriff's failure to return it was a false return; *Garrett v. Hamblin*, 11 S. & M. 219.

30. *Levy on realty.* There is no particular manner prescribed by law in which a levy of an execution on land shall be made. The sheriff does not, as in case of a levy on personality, take the property in possession, and it seems that all that is necessary to constitute a valid levy on land, is that the sheriff should manifest, by some overt act, his intention to levy or raise the money out of the land, and his advertisement of the land for sale under the execution, is such overt act. At all events, it is evidence from which a levy will be presumed, when a sale has been made and a deed executed to the purchaser; *Hamblen v. Hamblen*, 4 G. 455.

3. On what Property and Interests a Levy can be Made.

31. *Equity of redemption: Interest of mortgagor, and grantor in deed in trust.* Equities and rights to redeem are not subject to execution at common law, and hence the right of a mortgagor in personality, after condition broken, and of the grantor in a deed in trust, are not subject to sale under execution against the mortgagor or grantor; *Thornhill v. Gilmer*, 4 S. & M. 153. The rule is the same, whether realty or personality be the subject of the mortgage; *Wolfe v. Dowell*, 13 S. & M. 103. And the interest of the mortgagor before condition broken, is equally exempt from seizure under execu-

tion; *Wolfe v. Dowell*, *supra*; *Boarman v. Catlett*, 13 S. & M. 149; *Henry v. Fullerton*, 13 S. & M. 631; *Cantzon v. Dorr*, 5 C. 245; *Baldwin v. Jenkins*, 1 C. 206; *Prewett v. Dobbs*, 13 S. & M. 431; *Marlow v. Johnson*, 2 G. 128. And it makes no difference in this respect that the judgment is founded on the mortgage debt; nor will the fact, in a case free from fraud, that the property was sold under such judgment, at the instance of the mortgagor, be any bar to his right to foreclose; *Goodwin v. Anderson*, 5 S. & M. 730; *Baldwin v. Jenkins*, *supra*. But if the mortgage debt has been fully paid and extinguished, then, though there has been no reconveyance or entry of satisfaction on the record, the mortgagor having a complete equity, his interest is liable to execution; *Wolfe v. Dowell*, 13 S. & M. 103; *Boarman v. Catlett*, *ib.* 149; *Henry v. Fullerton*, *ib.* 631. And it is incumbent on the purchaser at such sheriff's sale, to show payment of the mortgage; *Henry v. Fullerton*, *supra*; *S. P.*, *Harman v. James*, 7 S. & M. 111. And a levy on an equity of redemption in personalty, should be set aside on motion in the court from which the execution emanated; *Com'l B'k of Manchester v. Waters*, 10 S. & M. 559. (Contra, *Hunter v. Hunter*, W. 194, overruled by the above cases.) But under the statute allowing any limited interest of the tenant in goods on the demised premises to be distrained, the mortgagor's interest may be attached for rent; *Prewett v. Dobbs*, *supra*.

See MORTGAGE, 76a. *Sed vide* TRUSTS AND TRUSTEES, 44 to 46, as to the rule under Rev. Code of 1857.

32. *Same: Interest of vendee having a title bond only.* For the same reason the interest of a vendee having a title bond only in land, is not subject to sale under execution when any part of the purchase money remains unpaid; *Goodwin v. Anderson*, 5 S. & M. 730; *Harmon v. James*, 7 S. & M. 111; *Delafield v. Anderson*, *ib.* 630. But if he has paid all the purchase money, the land is liable, the vendee having a complete equity; *Thompson v. Wheatley*, 5 S. & M. 499; *Moody v. Farr*, 6 S. & M. 100. See MORTGAGE, 7, *et seq.*

32a. *Same: The remedy in such cases.* The remedy in such cases is for the judgment creditor to file a bill against the mortgagor and mortgagee, to compel a settlement between them, and for a sale of the property to pay the mortgage debt, and the application of the surplus to the judgment; *Wright v. Henderson*, 7 H. 539; *Hopkins v. Carey*, 1 C. 54.

32b. *Grantor may sell equity of redemption, exempt from judgment lien.* A deed in trust was executed, conveying a slave as security for a debt; after this, judgment was rendered against the grantor, and he then conveyed the slave by another deed in trust: *Held*, that the right under the second deed was superior to the judgment as it was no lien on the equity of redemption; *Hoskins v. Johnson*, 2 G. 128.

32c. *When interest of mortgagor may be levied on.* If, however, the mortgage be executed on land to secure a contingent prospect-

ive liability of the mortgagor, which may never become absolute, and reserve the right of possession and enjoyment of the premises in the mortgagor, until default be made in the payment of the liability, the interest of the mortgagor may be seized and sold under execution, and the title thus conveyed will be good except as against the mortgagee; *Huntington v. Cotton*, 2 G. 253.

33. *Perfect equity may be sold, but imperfect cannot.* An equitable title to land, which is not complete and perfect, and especially an imperfect equity of a complicated character, cannot be sold under execution at law. The creditor must resort to chancery in order to reach such an equity. It is only when the debtor has a perfect equitable title, and the dry, naked legal title is outstanding in a trustee, that his interest is subject to execution (citing *Thompson v. Wheatley*, 5 S. & M. 499; *Goodwin v. Anderson*, *ib.* 730); *Hopkins v. Carey*, 1 C. 54.

33a. *Interest held under certificate of entry.* The interest of a purchaser of land from the United States, who has only a certificate of entry and before any patent issues to him, is liable to seizure and sale under execution against him; *Huntingdon v. Grandland*, 4 G. 453; *Martin v. Nash*, 2 G. 324; *Landsey v. Henderson*, 5 C. 502.

34. *Same: Statute H. C. 610, § 29.* By the statute (H. C. 610, § 29) it is provided that "estates of every kind holden or possessed in trust, shall be subject to like debts and charges of the person to whose use, or to whose benefit, they are, or shall be respectively holden or possessed, as they would have been subject to if those persons had owned the like interest in the thing holden or possessed, as they own or shall own in the uses or trusts thereof." But the statute does not authorize the levy of an execution on a trust estate for the debts of the *cestui que trust*, except only in cases where the *cestui que trust* is the owner of the whole beneficial interest, with only a naked legal title outstanding in a trustee (citing *Boarman v. Catlett*, 13 S. & M. 149; *Wolfe v. Dowell*, *ib.* 103); *Presley v. Rodgers*, 2 C. 520.

35. *Same: Case in judgment.* A slave was conveyed to trustees for the separate use of the wife during her life; and after her death, remainder to her children: *Held*, that the wife's estate, after the death of her husband, was a mere equity, and not liable to be seized under an execution at law against her, as the whole beneficial interest was not in her, but her rights were mingled with the rights of the remainderman; *ib.*

36. *Same: Another instance.* Property given to a widow, but clothed with a trust for the support and education of the testator's children, is not liable to be sold under execution for the widow's debts, until the full execution of her trust. Whether it would then be liable: *Quære?* *Lucas v. Lockhart*, 10 S. & M. 466.

37. *May be levied on a legacy.* An execution against an executor may be levied on personalty bequeathed to a legatee, even

after its delivery by the executor to the legatee, and also after the legatee's death; (*Turner v. Chambers*, 10 S. & M. 308, which held, that the only remedy of the creditor in such case, was a bill against the legatee to refund, overruled; and *Brooks v. Lewis*, 1 H. 207, and *Vanhouten v. Reilly*, 6 S. & M. 440, which held that an execution against an administrator might be levied on the share of a distributee after distribution; and that, it might be levied all on one share, confirmed;) *Smith v. The State*, 13 S. & M. 140.

38. *Interest of distributee not liable till distribution.* A judgment creditor of a distributee cannot levy his execution upon a portion of the undistributed personalty of the estate, although the interest of the debtor in the estate is of greater value than the property seized; *Hancock v. Titus*, 10 G. 224.

39. *Execution can only be levied on property of a defendant.* A judgment, and all process emanating from it, binds parties only. And execution, therefore, on a judgment against a surety cannot be levied on the property of the principal, against whom there is no judgment. And this rule is not changed by the statute (H. C. 324), which makes it the duty of the sheriff having an execution for the purchase money of seminary lands, to levy it on the lands, for that statute does not apply except where the purchaser is a party to the judgment. But if such levy and sale be made, it will be void and confer no title; and if the creditor be the purchaser, he will not be bound to credit the executor with the amount of his bid; *Smith v. The State*, 13 S. & M. 140.

40. *Levy on contingent interest of debtor.* The remainder or reversion in a live chattel is a pure contingency, and a bare possibility whether it will exist or not when the remainder or reversion shall take effect. A sale of it would be a pure gaming transaction, and for this reason, such remainder, it seems, would not be subject to seizure and sale under execution against the remainderman; *Sale v. Saunders*, 2 C. 24.

41. *Interest of tenant at sufferance not liable.* The right of a tenant at sufferance cannot be sold under execution; *Wildy v. Bonny*, 4 C. 35.

42. *Levy on partner's interest for his separate debt.* An execution against a partner may be levied on his individual interest in the firm property; and the levy is made by seizing all the partnership assets, if necessary, to pay the debt, and the sheriff becomes a tenant in common with the other partners; and if a sale be made, the sheriff sells the legal interest of the debtor copartner, which is the partner's proportionate share of the property sold, and not his share of what remains after settling the partnership accounts. If the solvent partner wishes to restrain the sale to the actual interest of the debtor partner, he may file a bill in equity and enjoin the sale until an account is taken; *Saunders v. Young*, 2 G. 111.

See PARTNERSHIP, 41 to 47.

IV. Lien: and How Lost, Postponed, and Preserved.

See JUDGMENT, 82 to 118.

42a. *Effect of delay.* Mere delay in suing out an execution which does not amount to fraud, does not prejudice the lien of a judgment, as where the stay expires before the rendition of another judgment, which is asserted to have on that account a prior lien; *Foule v. Campbell*, 7 H. 377; and so where the plaintiff's attorney stayed the execution without authority, a delay of six months in suing out another was not such evidence of fraud as would postpone the lien, especially as the plaintiff was a non-resident and it did not appear when he first heard of the stay; *Doe ex dem. Reynold's v. Ingersoll*, 11 S. & M. 249. And even when the delay has the effect to postpone, it does not destroy the lien. Hence, when the junior judgment has been paid, the lien of the elder judgment, which was postponed to it, is restored to its priority; *Doe v. Ingersoll*, *supra*.

42b. *As to power of an attorney to grant indulgence to postpone lien*, see ATTORNEY AT LAW, 22.

43. *Lost by delay.* The lien of a judgment, under the Act of 1824, is a mere security for the debt, to be pursued with diligence and in good faith. If a prior judgment creditor voluntarily suspend his execution until a junior execution shall be levied, he will lose his priority, and the proceeds of the levy and sale will go to the satisfaction of the junior execution; *Michie v. Planters' Bank*, 4 H. 130. But the lien of the prior judgment will become dormant only by the act or negligence of the plaintiff. The negligence or omission of duty of the sheriff will not affect it; *Talbert v. Melton*, 9 S. & M. 9; *S. P., Banks v. Evans*, 10 S. & M. 35. Nor will it be lost where execution is enjoined; *Lynn v. Gridly*, W. 548; nor where the delay was occasioned by the effect of the valuation law; *Pickens v. Marlow*, 2 S. & M. 428. And the return on the execution, "Money not made by order of plaintiff" even when confirmed by the testimony of the sheriff, is not competent evidence to show laches on part of plaintiff so as to postpone his lien; *Talbert v. Melton*, *supra*. But in *Martin v. Lofland*, 8 S. & M. 352, it was held, that the return "held up by plaintiff" will be *prima facie* evidence that it was so held up, so as to postpone the lien, which is, therefore, overruled by *Talbert v. Melton* on that point; but *Martin v. Lofland* was again before the court in 10 S. & M. 317, and seems there to be confirmed. The lien will not be lost except where the negligence of the plaintiff has been gross; *Robinson v. Green*, 6 H. 223.

See JUDGMENT, 97 to 104.

44. *Where both creditors have been in default.* If the execution of the senior judgment has been stayed, so as to lose its priority as against a junior one, and then the junior judgment has been stayed so as to lose its priority, then in a controversy between the two the lien of the oldest judgment will

prevail, as each party has been in default. Thus where A. recovered judgment in October, 1843, and stayed the execution till after May, 1844, in which last month M. recovered a judgment against the same defendant, and on which execution issued, and was stayed on 5th October, 1844, and afterwards executions were issued on both, and levied on same property, it was held that the oldest was entitled to prior satisfaction; *Martin v. Lofland*, 8 S. & M. 352; S. P., in S. C., 10 S. & M. 317.

See JUDGMENT, 105.

45. *Release of levy under one of two executions for same debt.* A judgment creditor issued two executions to different counties; the originil was levied with a junior execution, on certain property of defendant. He released the levy under the duplicate execution, and it was held that this did not affect his right to prior satisfaction out of the property levied on under the first; *Jennings v. Dennis*, 6 S. & M. 379.

46. *Oldest entitled to prior lien.* Where money has been levied under several executions, that is entitled to be first satisfied, which issued on the oldest judgment, unless it has been destroyed by a delay in fraud of the rights of the others, though the senior execution was not levied, until after the levy of the junior execution; *Grand Gulf B'k v. Henderson*, 5 H. 292; S. P., *Robinson v. Green*, 6 H. 223. And this is the rule where both judgments were entered on the same day, the one first entered being entitled to prior satisfaction; *Biggam v. Merritt*, W. 430; *Smith v. Ship*, 1 H. 237; *Reed v. Haviland*, 9 G. 323.

47. *Lien postponed by failure to give indemnifying bond.* If there be two executions in the hands of the sheriff of equal lien, and he requires an indemnifying bond before making a levy, and one creditor refuse and the other give it, and thereupon a levy and sale is made under both executions, but not enough is produced to satisfy both, the creditor giving the indemnifying bond will be entitled to be first paid, since but for his giving the bond there would have been no sale, and the party refusing, if deprived of the proceeds, is only thereby placed in that position which he elected to take by his refusal; *Townsend v. Henry*, 4 C. 203; see *Jennings v. Dennis*, digested in Judgment, 110.

48. *Lien lost by illegal entry of satisfaction.* When an execution has been returned "satisfied," but this return is afterwards set aside because improper, the lien of the judgment is so far suspended during the time the entry remains unannulled, as to protect a purchaser of property from the defendant in execution; *Sevier v. McWhorter*, 5 C. 442.

See JUDGMENT, 111.

48a. *Lien created by levy of an execution.* The lien created by the levy of an execution can only be defeated by a lien existing anterior to the levy; hence the enrolment of another judgment made after the levy of an execution, creates no lien superior to that

created by the levy; *Botters v. Eddrington*, 1 G. 580.

49. *Lien not lost by sale under a junior judgment.* Under the Act of 1824, judgments have liens according to their date; and a sale under a junior judgment will not *per se* divest the lien of the elder in cases where there has been no act of the plaintiff in the first execution to make his lien dormant; *Andrews v. Wilkes*, 6 H. 554; *Hand v. Grant*, 10 S. & M. 514; and the junior judgment in such case will be entitled to the proceeds; *Hand v. Grant*, 10 S. & M. 514; *Robinson v. Green*, 6 H. 223.

See JUDGMENT, 110.

Under the Enrolment Act of 1846, the rule would be different. The sheriff by that act is required, when he makes sale under an execution, to apply the proceeds to that judgment on the judgment roll, which was first enrolled, and a sale under a junior execution would therefore divest all liens. See JUDGMENT, 90. SHERIFF AND SHERIFF'S SALE, 84. The rule under the Act of 1857, is the same; See JUDGMENT, 92, 97a.

50. *No lien on growing crop.* By the Act of 1840 (Session Laws, p. 79), the levy of an execution on a growing or ungathered crop was prohibited, and under that provision a judgment is no lien on the crop until it is gathered, and if sold by the debtor before it is gathered, the purchaser takes it exempt from the lien; *Planters' B'k v. Walker*, 3 S. & M. 409.

For further decisions on judgment liens, see JUDGMENT, subdivision Liens, 97 to 101.

V. Satisfaction of Execution.

See JUDGMENT, 76 to 81.

1. By Levy on Personalty.

51. *Levy on personalty is prima facie satisfaction to the amount of its value.* The levy of an execution on personal property of value sufficient to pay it, is *prima facie* evidence of its satisfaction, which prevails till the contrary is shown, and if the property be of less value, then it is *prima facie* satisfaction to the extent of the value. And it is actual satisfaction, if the officer has wasted or misappropriated the property, so that the defendant is deprived of it; *Kershaw v. Merchants' B'k of N. Y.*, 7 H. 386; *Bibb v. Jones*, 7 H. 397; *Smith v. Walker*, 10 S. & M. 584; *Brown v. Kidd*, 5 G. 291; *Shelton v. Hamilton*, 1 C. 496; *Walker v. McDowell*, 4 S. & M. 118.

52. *How this presumption is destroyed.* The sale by the sheriff is the true test of value, and where such sale is made, the satisfaction extends only to the amount of the proceeds; *Pickens v. Marlow*, 2 S. & M. 428; *Peale v. Bolton*, 2 C. 630. The presumptive satisfaction arises from the further presumption that the defendant has been deprived of the property, and where it can be shown that the levy was legally removed, or that the defendant regained possession of the property, in any way, however illegal, the presumption is destroyed. Thus, if sheriff permit the de-

defendant to sell the property, there is no satisfaction, even though he pay the proceeds of the sale, being depreciated currency, to the sheriff; *Morton v. Walker*, 7 H. 554. So, if the property be delivered to a claimant, who has made oath and given bond according to law; *Walker v. McDowell*, 4 S. & M. 118. And so, if in fact the defendant were never deprived of the property; *Banks v. Evans*, 10 S. & M. 35. And so, if it be shown that the property was applied to judgments which were older liens on it; *Smith v. Walker*, 10 S. & M. 584. But the issuance of an alias *fi. fa.* does not destroy the presumption; *Brown v. Kidd*, 5 G. 291. See *post*, 95.

53. *Same* The levy being only constructively payment, upon the ground that a wrong shall not be committed on the defendant by depriving him of his property twice for the same debt, if it appear in any way that he was not deprived of the property, there is no satisfaction. Thus, where a levy was made on slaves in 1861, and they were permitted by the sheriff to remain with the defendant until they were emancipated—he agreeing to keep the slaves, and assenting to the failure of the sheriff to sell—the loss of emancipation must fall on him, and there is no satisfaction; *Wade v. Watt*, 41 M. 248.

54. *Levy expressly for cost.* The return on a *fi. fa.*, “Levied this and other *fi. fa.*’s on six slaves, to make the sheriff’s fees,” does not create a presumption of satisfaction of any part of the plaintiff’s debt, but only of the sheriff’s cost; *Bibb v. Jones*, 7 H. 397.

2. By Levy on Realty.

55. *Levy on realty creates no presumption of satisfaction.* The levy of an execution on real estate, changes neither the possession nor the property, and is no satisfaction of the execution, unless consummated by sale; *Beazley v. Prentiss*, 13 S. & M. 97. And the sale is the true test of the value of the land; *Pickens v. Marlow*, 2 S. & M. 428; *Peale v. Botton*, 2 C. 630.

3. What kind of Currency may be paid on Executions.

56. *Nothing but legal tender a satisfaction.* An execution commands a sheriff to levy so much money—this means legal money—gold and silver—and if he receive anything else—as bank notes—in discharge of the execution, it is illegal, and no discharge of the debtor who voluntarily pays it; *Gasquet v. Warren*, 2 S. & M. 514; *Wood v. Robinson*, 3 S. & M. 271; *Planter’s Bk v. Scott*, 5 H. 246; *Morton v. Walker*, 7 H. 554; *Bright v. Ross*, 11 S. & M. 289; *Anketell v. Torrey*, 7 S. & M. 467; *Cutlett v. Alexander*, 4 H. 404. Nor is the execution satisfied, if the sheriff receive on it, a debt due to himself; *Anderson v. Carlisle*, 7 H. 408. And if the sheriff return on an execution, that he received payment, and satisfaction of it in bank notes, this is no satisfaction, and an alias execution should be awarded; *Tutt v. Fulgham*, 5 H. 621. If the payment be not voluntary, but the sheriff sells the defendant’s property for bank notes, the case might be different, as the levy itself

would in that case be a satisfaction; *Morton v. Walker*, 7 H. 554. See *ante*, 51.

57. *Where attorney takes other things than money.* In this case the court decided that a receipt given to the defendant by the plaintiff’s attorney, who recovered the judgment, being for a debt due by the attorney to the defendant, is no satisfaction, and not binding on the plaintiff, and say, “without plaintiff’s consent nothing is a satisfaction of the judgment but lawful money;” *Keller v. Scott*, 2 S. & M. 81.

58. *But payment in bank notes good, if plaintiff consent.* If the sheriff receive depreciated bank notes in satisfaction of the execution, by plaintiff’s consent, either expressed or implied, it is a good satisfaction; and the following circumstances were held legal evidence, tending to show such consent. The sheriff collected the execution in Union Bank notes, and notified plaintiff’s attorney of that fact, who made no objection to it; about the same time the plaintiff was in the habit of receiving from his agents and attorneys, without objection, the same kind of funds, and these notes about that time constituted the circulating medium of the State, and were generally received by execution creditors, and the money had been collected four years before a motion was made against the sheriff on that account; *Anketell v. Torrey*, 7 S. & M. 467. And an acquiescence in the act of the sheriff in receiving bank notes for six years without any disavowal of it, is evidence of plaintiff’s consent for the sheriff to receive it, and binding; *Prewett v. Standifer*, 8 S. & M. 493 (citing *Anketell v. Torrey*, *supra*).

59. *Same: Another instance.* If the plaintiff acquiesces in the act of the sheriff in taking depreciated bank notes on his execution for a long time, it will bind him. In this case, the plaintiff’s attorney expressly told the sheriff not to take the depreciated currency, and after its reception by the sheriff, the attorney disavowed the act. Another attorney, in the absence of the plaintiff’s attorney, seeing the execution returned satisfied, acting from motives of friendship for the plaintiff’s attorney, but without his knowledge or consent, made a motion against the sheriff for his failure to pay over the money thus returned as collected, and recovered judgment against the sheriff on said motion. Five years after this, the plaintiff made the motion to set aside the entry of satisfaction in the execution; and it was held that these circumstances showed an acquiescence in the act of the sheriff in receiving the bank notes; that the plaintiff was bound by the act of the attorney, in moving against the sheriff, and recovering judgment against him; and this was an act which evinced a determination to withdraw the disavowal first made, and accompanied by the long acquiescence, it bound the plaintiff; *Bright v. Ross*, 11 S. & M. 289. But the suit against the sheriff was also held not to be *per se* such a case of election as would absolutely preclude the plaintiff from afterwards pursuing

his remedy against the defendant, but only a mere circumstance tending to show consent and ratification of the sheriff's act; *Ib.*

4. Satisfaction when Proceeds of Sheriff's Sale Misapplied.

60. *Proceeds of sale misapplied.* Where the sheriff illegally appropriates, the proceeds of a sale of property levied on, to a junior judgment, the senior judgment is, nevertheless, satisfied, and will be so entered. And this rule was applied where there were two executions against different defendants for the same debt, and a sale was had under one judgment and the proceeds misapplied to another, and on this showing, at the instance of the defendant in the extinguished execution, who applied to have it entered satisfied, it was so ordered; *Planters' Bank v. Spencer*, 3 S. & M. 305. But this doctrine only applies where the senior execution, which would have been entitled to the proceeds if it had actually been levied, was, in fact, so levied on the property, producing the money; and this, even though the sheriff had the senior execution in his hands when the sale was made; for it is not true that the levy of one of several executions in the sheriff's hands is a levy of all (citing and declaring consistent with this *Planters' Bank v. Spencer*, 3 S. & M. 305); *Banks v. Evans*, 10 S. & M. 35. The rule under the Enrolment of Acts of 1844 and 1857; would probably be different.

See JUDGMENT, 92, 97a.

61. *Same.* And where the sheriff has several executions in his hands which are levied on real and personal property, and the personalty is sold, producing enough to pay all the judgments so levied, this is a satisfaction of all, notwithstanding the sheriff may misappropriate the money, or a part of it, to an execution in his hands against the same party, and which was not levied. And if, by such misapplication, a deficit remains in the payment of the executions levied, and a sale of the realty is made to raise the deficit, the sale will be void, if the purchaser have notice of the facts; and if the misapplication was made at the instance of the agent of the purchaser of the realty, this is notice to the principal and renders the sale void (citing *Planters' Bank v. Spencer*, 3 S. & M. 305); *Doe v. Ingersoll*, 11 S. & M. 249.

62. *Sheriff's right to apply money raised under one fi. fa. to another.* The sheriff has no right to apply the money raised by a sale of property made under one execution to the payment of another execution in his hands, though not levied, and if he do so, the execution under which the sale was made will, nevertheless, be satisfied to the extent of the sum raised by the sale under it; *Doe v. Ingersoll*, *supra*. The rule is different under the Enrolment Act of 1846, which requires the sheriff to apply the proceeds of a sale under any execution, to the payment of the judgment first enrolled against the defendant. Whether this is the rule under the Act of 1857; *Quære?* It probably is.

See JUDGMENT, 92, 97a. SHERIFF AND SHERIFF'S SALE, 81, *et seq.*

5. Miscellaneous.

63. *Payment to sheriff after return day.* The sheriff has no power to receive payment of an execution after the return day thereof, and if he do, he will not be liable therefor in his official character as sheriff, but only as the private agent of the plaintiff; *Edwards v. Ingraham*, 2 G. 272. Nor will such payment be a satisfaction of the judgment; *Haralson v. Holcombe*, 10 S. & M. 581. And a sale made by the sheriff after return day, is void; *Lehr v. Rogers*, 3 S. & M. 468; *Kane v. Preston*, 2 C. 133.

64. *But good if acquiesced in by plaintiff.* But if the plaintiff confirm such payment to the sheriff, it will be good, and his acquiescence in it for five years, under circumstances which show he knew of the payment, and the endorsement of it by the sheriff on the execution, as when he sued out another execution for the balance unpaid, and collected the money, is equivalent to confirmation (citing *Anketell v. Torrey*, 7 S. & M. 467; *ante*, 58); *Haralson v. Holcomb*, *supra*.

See SHERIFF AND SHERIFF'S SALE, 77, 78.

65. *Payment of execution by third party.* A person not a party to an execution, may advance money on it, and by agreement at the time have it assigned to himself, and thus keep it alive and in force; but if he pay the execution, in whole or in part, without an agreement that it is not to operate as a discharge, or without taking an assignment, the execution will be satisfied to the extent of the payment, and no agreement or assignment made afterwards will enable him to enforce it; *Morris v. Lake*, 9 S. & M. 521.

66. *Same rule when sheriff pays the execution.* And this rule extends to voluntary payments made by the sheriff to the plaintiff in execution, where he has become responsible to pay the execution, on account of his neglect to make due return of it. And the rule is not changed by the statute (H. & H. 298, §28). Which, in such cases, allows a recovery against the sheriff, and provides that on his payment of the judgment so recovered against him, he will be entitled to the benefit of the execution in respect to which he made default. The payment of the judgment against the sheriff, is a different thing from the payment of the judgment or execution against the debtor. And the statute will not be extended beyond the letter, but will receive a close construction; *Morris v. Lake*, *supra*; S. P., *Rollins v. Thompson*, 13 S. & M. 522.

See SHERIFF AND SHERIFF'S SALE, 144, 145.

68. *Proceedings to determine whether a judgment has been satisfied or not.* The court from which an execution emanates, may, without the intervention of a jury, determine on motion, whether it has been satisfied or not; *Planters' Bk v. Spencer*, 3 S. & M. 305; S. P., *Anderson v. Carlisle*, 7 H. 408. But entry of satisfaction of an execution cannot be made without notice of the motion being given to the plaintiff; *Haley v. Williams*, 8 S. & M. 487; S. P., *Mann v. Nichols*, 1 S. & M. 257.

See VALUATION LAW, 4, 8.

VI. Sales Under Execution.

1. Sales under Junior Judgments.

69. *Case in judgment.* Land was levied on and a stay of twelve months allowed under the valuation law, because it did not sell for two-thirds of its appraised value. During the stay, other lands of the defendant were levied on and sold, under a junior execution: *Held*, that this sale did not affect the right of the judgment creditor in the first execution to sell that land, if the land levied on by him and appraised should not sell for enough to pay his judgment; *Pickens v. Marlow*, 2 S. & M. 428. But prior to the Enrolment Act of 1846, the levy and sale under a junior judgment did not divest the lien of the older, and the junior judgment was entitled to the proceeds of the sale made under it; *Hand v. Grant*, 10 S. & M. 514. See *ante*. 49.

See SHERIFF AND SHERIFF'S SALE, 83, 84, 85.

2. Sales Under Satisfied Judgments.

70. *Such sale not void.* An execution, though paid, is not void when the satisfaction is not entered of record, and a *bona fide* purchase, made under such execution, will be protected, but a party having notice of the satisfaction, is not a *bona fide* purchaser; *Morton v. Grenada Academy*, 8 S. & M. 773; *S. P., Doe v. Ingersoll*, 11 S. & M. 249; *ante*, 61; *Doe v. Snyder*, 3 H. 66. And notice to the purchaser after the sale but before payment of his bid, is too late, and will not make the purchase *mala fide*; *Ib.*

71. *Same: Quære? Satisfaction destroys lien.* Whether an execution issued on a satisfied judgment is void or only voidable; *Quære?* But whether void or not, it is certain that the lien of the judgment is discharged by payment; and a sale under such execution, if valid at all, cannot relate back with its lien farther than the time when the execution went into the sheriff's hands; *Banks v. Evans*, 10 S. & M. 35; *Doe v. Ingersoll*, 11 S. & M. 249. In the last case it was said the lien does not extend beyond the date of the sale. And if the purchaser have notice of the satisfaction, the sale is void; *Doe v. Ingersoll*, *ante*, 61.

3. Miscellaneous.

72. *Power of sheriff to sell: Irregularities.* A sale of realty by a sheriff is not the exercise of a naked statutory power uncoupled with an interest, but it is the exercise of a power conferred by the judgment and execution; and hence, irregularities of the sheriff in concluding the sale, such as a failure to give notice according to law, will not vitiate the sale, but the sheriff will be responsible in damages; per Sharkey, C. J.; *Minor v. President and Selectmen of Natchez*, 4 S. & M. 602. See SHERIFF AND SHERIFF'S SALE, 95, *et seq.*

73. *Recitals in sheriff's deed and return.* The recitals in a sheriff's deed and return as to giving notice of the sale, are *prima*

facie evidence of their truth. But, *Quære*, as to whether this can be rebutted by proof? per Clayton, J. *Ib.*

74. *Effect of irregular notice: Case in judgment.* The United States marshal levied on land under an execution, and sold it, after "giving legal notice," as stated in the return, "by publication in a newspaper for 30 days." The statute requires notice to be given by posting at five public places in the county, unless the defendant in execution should request publication to be made in a newspaper. The United States Court adopted this statute, but with an amendment contained in the rule of court making the adoption, to the effect that the postings should be at three public places only. The court below, in an action of ejectment by the purchaser, rejected the deed and the return: *Held*, per Sharkey, C. J., and Clayton, J. (Thacher, J., being interested), that the judgment of the court below should be reversed—the chief justice for the reason stated in 72, *ante*, and Justice Clayton for the reason stated in 73, *ante*; the latter also holding that the United States Court could only adopt the statute as a whole and as it exists, without amendment or alteration; *Ib.* And in *Drake v. Collins*, 5 H. 253, it was held that the sheriff's return, stating that he gave notice according to law, was at least *prima facie* evidence that legal notice has been given.

75. *One of several defendants may purchase.* If there be several defendants in an execution, one of them may lawfully become the purchaser of property of another sold under it; *Doe v. Parker*, 3 S. & M. 114.

76. *Where sheriff's deed is made to a different party from the one stated in the return.* Where it appears by the sheriff's return on an execution, that the land sold under it was bid off by a different person from the one to whom the sheriff's deed is made, it will, after the lapse of fifteen years, without such bidder setting up any claim to the land, be presumed that the deed was properly made to the grantee named in it; *Cooper v. Granberry*, 4 G. 117.

77. *Sale after return day.* A sale made under an execution, after the return day thereof, is void; *Lehr v. Rogers*, 3 S. & M. 468; *Kane v. Preston*, 2 C. 133; *S. P., Haralson v. Holcomb*, 10 S. & M. 581; *ante*, 63.

See SHERIFF AND SHERIFF'S SALE, 77, 78.

78. *Sale under several executions: Irregularity in one.* Where property is sold under several executions, if the proceedings under one be regular, the sale will be valid, though all the others be irregular; *Banks v. Evans*, 10 S. & M. 35.

See SHERIFF AND SHERIFF'S SALE, 104.

79. *Realty sold to pay costs.* When realty and personalty are levied on, and the personalty sells for enough to pay all but the costs, the realty may be sold to pay the costs; *Doe v. Ingersoll*, 11 S. & M. 249.

80. *Death of party after issuance.* Whether if after the issuance of an execution, the plaintiff die, the execution from thenceforth

becomes inoperative; *Quære?* But a forthcoming bond given to the dead plaintiff as obligee, is void; *Smith v. Montgomery*, 11 S. & M. 284. If the defendant die after issuance of execution, it may be perfected by levy and sale, and forthcoming bond without revivor; *Thompson v. Ross*, 4 C. 198. See *ante*, 19, 21.

80a. *As to effect of subsequent reversal on the sale*, see *SHERIFF AND SHERIFF'S SALE*, 122, 123.

VII. Irregular: Void and Voidable Executions.

81. *Void Executions: Instances.* An execution on the original judgment after forthcoming bond taken and forfeited, is void; *Witherspoon v. Spring*, 3 H. 60. An execution returnable to the second term, when not issued within fifteen days of the next term, is void after the next term; *Lehr v. Rogers*, 3 S. & M. 468 (see *ante*, 14); and if issued within fifteen days of next term and made returnable to that term, it is void; *Harris v. West*, 3 C. 156 (see *ante*, 14).

82. *Voidable Executions: Instances.* For instances when variance between execution and judgment, makes the former only voidable; see *ante*, 8, 9. An execution issuing after a year and a day from the judgment, without revivor, is only voidable; *Mitchell v. Evans*, 5 H. 548; *Bacon v. Reed*, 5 C. 469; *ante*, 12. An execution with no return day in it, is voidable only, and not void; *Brown v. Thomas*, 4 C. 335. An execution issuing on a judgment which has been paid, but not entered satisfied, is only voidable; *Doe v. Snyder*, 3 H. 66; *Morton v. Grenada Academy*, 8 S. & M. 773; *Binks v. Evans*, 10 S. & M. 35 (*ante*, 70, 71). An execution issued and tested after the defendant's death and without revivor, is only voidable; *Hicks v. Murphy*, W. 66; *Wilson v. Kirkland*, lb. 155; *Hubert v. Williams*, lb. 175; *Drake v. Collins*, 5 H. 553; *Mitchell v. Evans*, 5 H. 548; *Smith v. Winston*, 2 H. 601; *Harrington v. O'Reilly*, 9 S. & M. 216; *Davis v. Helm*, 3 S. & M. 17; *Harper v. Hill*, 6 G. 33. See *ante*, 17, 18. See *post*, 93.

VIII. Return of Executions.

83. *Return day: Act of 1838.* The Act of 1838 gave the sheriff till the middle of the term of the court in which to make return of executions; and if the term be twelve days, a return on the seventh day will be too late; *Steen v. Briggs*, 3 S. & M. 326.

84. *Sheriff's liability for a failure to return.* A sheriff failing to return an execution at the proper time is thereby made liable for the debt, whether the defendant had any property in his county or not; *Id.*; S. P., *Morehead v. Halliday*, 1 S. & M. 625. See *SHERIFF AND SHERIFF'S SALES*, 52.

85. *Proceedings for failure.* A motion against a sheriff for a failure to return an execution, may be made at the return term of the execution, or afterwards; *Steen v. Briggs*, 3 S. & M. 326.

86. *Setting aside return of satisfaction.* A motion to set aside a return on an execution must be on notice to the sheriff or defendant. *Mann v. Nichols*, 1 S. & M. 257.

See *SHERIFF AND SHERIFF'S SALES*, 53.

For the effect of amendment, form, impeaching, and setting aside, and time of sheriff's return, see *SHERIFF AND SHERIFF'S SALE*, 42 to 57.

IX. Quashal of Executions.

87. *Quashal for excessive charges of costs.* After a forthcoming bond has been taken and forfeited, an execution will not be quashed for exorbitant charges in the bill of costs; *Clark v. Anderson*, 2 H. 852.

88. *Quashal of execution issued without revivor.* For this see *ante*, 17.

89. *Power and duty of court to quash.* Executions, until sales are made under them, whereby new interests have accrued, are always under the control of the court from which they emanated, and should be quashed if improvidently issued; as courts should see that their process is not abused; *Harrington v. O'Reilly*, 9 S. & M. 216.

90. *Effect of quashal.* The quashal of a voidable execution will not vitiate a sale previously made under it; *Doe v. Snyder*, 3 H. 66.

X. Miscellaneous.

91. *Judgment no lien on a growing crop.* By the Act of 1840, Session Laws, p. 79, the levy of an execution upon a growing and un-gathered crop was prohibited, and under that provision a judgment is no lien on a crop until it is gathered, and if sold by the debtor before that time, no lien attaches to it at all; *Planters' Bank v. Walker*, 3 S. & M. 409.

92. *Claim of property by third person.* Where a claimant's bond has been executed, and the property delivered to the claimant, the plaintiff in execution is not bound to pursue his remedy against the claimant, but may yield to his claim, and proceed with the execution, as if no claim had been made; *Walker v. McDowell*, 4 S. & M. 118.

See *TRIAL OF THE RIGHT OF PROPERTY*.

93. *Admission of irregular execution in evidence.* An execution which ought to be quashed is not admissible in evidence. Hence, if in a trial of the right to property levied on under the statute, and the execution levied be irregular, by virtue of its being tested after the death of the defendant, it is not admissible in evidence to show the plaintiff's right; *Harrington v. O'Reilly*, 9 S. & M. 216.

94. *Where execution is wrong as to interest.* If an execution direct the collection of a higher rate of interest than is due on the judgment, the remedy is not in chancery, but by application to the court from which it emanated; *Robb v. Halsey*, 11 S. & M. 140.

95. *Superseding of execution.* Whether upon superseding a judgment by writ of error, personal property levied on, but not sold, when the supersedeas issues, may legally be

restored to the defendant, or whether the sheriff should proceed to sell it; *Quære?* But whether the sheriff has a right to restore it to the defendant or not; yet if he do so, this destroys the presumption of satisfaction arising from the levy. And under the well known practice in this State, to restore to the defendant the property levied on, when the execution is superseded, if the sheriff return on an execution "superseded," and do not further return that he sold the property levied on under it, and it appear in the record otherwise than from the returns that a writ of error with supersedeas was issued, it will be presumed that he restored it to the defendant in execution, especially if it also appear from the record that a part of the property levied on was sold under other executions against the defendant; *Walker v. McDowell*, 4 S. & M. 118.

See *ante*, 51 to 53. SUPERSEDEAS.

96. *Excessive levy*. To justify the court in superseding an execution on the ground of excessive levy, the excess must be so glaring as to indicate a disposition to abuse the process of the court; *Walker v. Gilbert*, 13 S. & M. 693.

97. *Vendi. exonas*. Where slaves were levied on, and permitted to remain in defendant's possession till they were emancipated, an *alias* execution may issue without any *vendi*, being issued to sell the slaves; *Wade v. Watt*, 41 M. 248.

98. *Effect of declaration of insolvency on levy*. A declaration of insolvency made after the levy, but before sale, will not prevent a sale of the property thus seized, and the application of the proceeds to that execution in preference to others; *Bass v. Heard*, 4 G. 131.

Executor and Administrator.

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I. Appointment of Administrators and Executors.

1. Who has the Prior Right to Administration.

1. *Husband and wife's right.* The husband has the first right to administer on his wife's estate; *Lee v. Bennet*, 3 G. 119.

And the widow is entitled by statute, to a preference over all others to the administration of her husband's estate; *Muirhead v. Muirhead*, 6 S. & M. 451; S. P., *Jordan v. Ball*, 44 M. 194.

But the husband will not be entitled to the administration of his wife's estate, as against the distributee or her guardian, if by the terms of the marriage contract, the husband is excluded from all interest in the wife's estate. And a stipulation in such a contract, securing to the wife a separate estate in the property and its profits, and providing "that the property should remain, as if the marriage had never taken place," deprives him of all interest in her property after her death. The principle in such cases being, that the administration shall go to him who has the largest interest in the estate; *Fowler v. Kell*, 14 S. & M. 68 (citing *Langan v. Bowman*, 12 S. & M. 715, and *post*, 5); S. P., *Jordan v. Ball*, 44 M. 194.

2. *Husband's right as representative of the wife.* The right of the next of kin to administer on an intestate's estate, is strictly personal; and if the next of kin be a *femme covert*, she, and not her husband, is entitled to the administration, which should be granted to her alone, and not to her jointly with her husband; and it will not therefore be error for the court to grant letters of administration to an entire stranger, who is suitable and well qualified, to the exclusion of the husband of the next of kin; *Richards v. Mills*, 2 G. 450. See *post*, 212, for his power to act for wife when she is administratrix, &c.

3. *Effect of renunciation of the widow's right.* The preference right of the widow to letters of administration *de bonis non*, is not lost by her having renounced her right to the original administration which had been granted her. In this case the widow applied for letters of administration *de bonis non*, the estate being vacant; *Pendleton v. Pendleton*, 6 S. & M. 448. See *post*, 5, 8.

4. *The right of the next of kin is a legal one.* By statute, husband or wife, and the distributees, have a legal right to administer; but as to others, the appointment is a matter in the sound discretion of the court; *Byrd v. Gibson*, 1 H. 568. The right cannot be denied unless the applicant be under 21 years of age, of unsound mind, incapable in law of contracting, or convicted of some infamous crime; and the judge cannot refuse administration to the next of kin, because he knows,

privately, that the applicant has *mania-a-potu*. The judge must be sworn to give evidence; *Smith v. Moore*, 3 H. 40.

5. *Contest between next of kin: The one entitled to largest share preferred.* Where two distributees apply for administration, he is to be preferred (*ceteris paribus*) who is entitled to the largest distributive share. And this rule is applicable, when the applicants are the representatives of distributees, as guardians for them. And relationship to the intestate, on the part of the applicant representing the lesser interest, if so remote as to exclude him from distribution, makes no difference; nor does the fact that he is a creditor; *Langan v. Bowman*, 12 S. & M. 715. See *ante*, 1; S. P., *Jordan v. Ball*, 44 M. 194.

6. *Right of relatives, after next of kin.* If the next of kin entitled to distribution be under age, the right to administer devolves on those who are in the next degree of kindred to the intestate, after the distributees; *Richard v. Mills*, 2 G. 450.

7. *That next of kin is a creditor, is no reason for rejecting his right.* It is no reason for rejecting the preferred right of the widow to administration, that she asserts a claim against the estate, which the distributees contest; *Pendleton v. Pendleton*, 6 S. & M. 448.

8. *Renunciation of right: Form of.* A request by a widow to a distributee, to take out letters on her husband's estate, accompanied by a verbal renunciation of her right, made privately and not in court, is not binding on her, though acted on by the distributee. She has the right to apply within sixty days from her husband's death, for letters, and to have the letters granted to the distributee revoked; *Muirhead v. Muirhead*, 6 S. & M. 451. The right is lost if no application be made within sixty days; and if letters have been improvidently granted within that time, the application to revoke must be made within sixty days; *Jordan v. Ball*, 44 M. 194.

2. Miscellaneous as to Appointment of Administrator.

9. *Appointment after the lapse of twenty-seven years.* An administrator appointed after the lapse of twenty-seven years from the intestate's death, is a mere naked trustee for the distributees, the presumption being that there is no debts; and if the right of the distributees to sue for property in such case be barred, his right will also be barred; *Manly v. Kidd*, 4 G. 141.

10. *Effect of appointing a debtor of intestate.* By the common law the appointment by a testator of a debtor as executor, extinguished the debt; but the appointment of a debtor as administrator, only suspended the remedy; *Kelsey v. Smith*, 1 H. 68.

11. *Administrator durante minoritate.* If the next of kin or widow be a minor, the court may grant letters *durante minoritate*; and in such case the court may appoint a suitable stranger over a creditor; *Pitcher v. Armat*, 5 H. 288.

11a. *Grant of letters in vacation: Re-grant.* Whether a grant of letters of administration made in vacation, and acquiesced in by all the parties interested, is void; *Quære?* But if the person so appointed, afterwards have himself re-appointed in term time, upon the ground that the first appointment was void, he will be estopped to deny that the first appointment was void, and that the true administration commenced with the last appointment; and hence, all statutes of limitations which commenced to run from the grant of letters of administration, will commence from the last grant; *Brown v. Hill*, 4 C. 643.

11b. *Joining another with next of kin.* Where no executor has been appointed, the universal legatee in the will is entitled to administration; and it is not improper that others should be joined with him at his request; *Jordan v. Ball*, 44 M. 194.

3. The Grant of Letters is Local entirely.

12. *Gives no power beyond the jurisdiction of the grant.* Every grant of administration is strictly confined in its operation and authority to the limits of the State in which it is made, and does not *de jure* extend to other States, and it confers no power to collect assets in another State. Whatever operation may be allowed it in another State, is a mere matter of courtesy; *Riley v. Moseley*, 44 M. 37. But if an administrator actually collect assets in another State without an ancillary administration there, and bring them within this State, and subject them voluntarily to the jurisdiction of the Probate Court here, the assets will be administered according to the same rule as assets situated here at the intestate's death. And hence, the administrator is not entitled to any expenses he may have incurred in going to such foreign State and collecting the assets there; *Satterwhite v. Littlefield*, 13 S. & M. 302.

S. P. Where a person brought property here at the request of the heirs, and then administered on it, it was held that he was not entitled to charge for the expenses of bringing it here; *Roberts v. Rogers*, 6 C. 152.

See PROBATE COURT, 39. See *post*, 16a.

13. *Same: Right of administrator to sue in another jurisdiction.* If an administrator has, in virtue of his administration, reduced into his possession personal property of the intestate situated within the State which made the grant, and so has acquired the legal title and possession thereof according to the laws of that country, then, if that property should be afterwards found in another country, or be carried away and concealed against his will, he may maintain a suit for it outside of the jurisdiction of his appointment, without taking out new letters; for he is to all intents and purposes the owner of such property, although he is so in his character of trustee for others; *Kilpatrick v. Bush*, 1 C. 199.

14. *Same: Modification of the rule.* But the rule is different where the administrator himself wrongfully removes the property into

a new jurisdiction; for whilst in the new jurisdiction he would be declared a trustee for the distributee as to the property so wrongfully carried there, yet this would be on the ground of a tortious conversion of the property, and that would not constitute him a trustee in respect to third persons. For in the new jurisdiction he would not be liable to be sued by creditors of the intestate, either as administrator or personally; nor would the property be liable there to creditors. And it is equally clear that he would have no right in that jurisdiction to bring suits as administrator to recover the property so removed by him, for his grant of letters in the domicile of his intestate had no extra-territorial force or effect whatever. His title thus acquired is local and limited, and is conferred only for the purpose of enabling him to discharge a trust created by the local law in reference to property there situated; and his wrongful removal of the property to another jurisdiction, is a forfeiture of his title and an abandonment of his trust. It therefore follows that if in such foreign jurisdiction a party obtaining adverse possession of property so wrongfully brought there by an administrator, should retain it for a period long enough to bar such administrator's right to recover if he were allowed to sue, this will not, on that account, bar the right of an infant distributee; but the statute will be applied in such a case precisely as if no administrator had ever been appointed; *Ib*.

15. *Same.* A grant of letters of administration has no extra-territorial force, outside of the State in which the grant is made. And the administrator can neither sue nor be sued in a foreign jurisdiction. And a foreign administrator cannot be proceeded against as a non-resident in the courts of this State, with a view to subject property of the estate situated here to the payment of the plaintiff's demand; *Boyd v. Lambeth*, 2 C. 433; S. P., *Winter v. Winter*, W. 211. See *post*, 231, 232.

16. *Effect of grant.* Where the property was brought from a foreign jurisdiction, and there was no property here at intestate's death. See PROBATE COURT, 39.

16a. *Payment to foreign administrator.* Payment here, by an administrator, of a debt due to a foreign administrator, is ordinarily invalid, and does not entitle the domestic administrator to credit therefor. But upon the principles settled in *Satterwhite v. Littlefield* (*ante*, 12), if the administrator here can show that the foreign administrator accounted for such payment in the court wherein he was appointed, this will be a good discharge of the debt so paid, and will entitle him to the credit; *Anderson v. Gregg*, 44 M. 170.

16b. *Power and duty as to foreign assets.* An administrator here has no power to collect assets in another State; and he cannot make a legal demand and presentment of a bill due to his intestate and payable in a foreign State; *Ib*. See *post*, 299; S. P., *Riley v. Mosley*, 44 M. 37.

16c. *Payment in the foreign jurisdiction.* But if the debtor be in the jurisdiction in

which letters are granted, he may pay the debt to the administrator there, for he may then be compelled to make payment; *Riley v. Moseley*, 44 M. 37.

16d. *Same: Case in judgment.* In 1863 A. sold land to B. lying in this State, where both the vendor and vendee resided. Shortly afterwards A. went to Memphis, Tennessee, temporarily, carrying, however, with him several thousand dollars in money, and also the note of B., and during his absence there A. died; and letters of administration were granted by the Probate Court in that State, to W. In 1865, B. lived in Memphis, doing business there, and there paid to W., the administrator of A., his note for the land: *Held*, that the Probate Court in Tennessee had authority to grant letters of administration on A.'s estate, and that the payment made by B. of his note was good and valid; *Ib.*

4. Appointment and Qualification of Executors.

17. *Appointment by construction.* The appointment of an executor may be either express or constructive; where there is no express appointment, if by any word or circumlocution, the testator recommend or commit to one or more the charge and office, or other rights which appertain to an executor, it is tantamount to an express appointment of an executor; *Grant v. Spann*, 5 G. 294.

18. *Same.* Where no executor has been expressly nominated by the testator, an authority given to a trustee, legatee, or other person named in the will, to collect and pay off the debts due to and by the testator, is equivalent to the appointment of such person as executor; but this authority to collect and pay debts need not be express, if the duties imposed, or the authority conferred, necessarily imply the right to receive the testator's goods, and collect and pay his debts; *Ib.*

19. *Same: Case in judgment.* The testator devised his whole estate to a trustee, in trust, for the benefit of his wife and children, and directed that his property should not be divided until his debts were paid, and then that his widow should receive one-third of his estate, to be held by her during her natural life, and that the balance of his estate should be divided among his children; no express appointment of an executor was made: *Held*, that the trustee's right to the immediate possession of the estate, which was to be continued until the debts were paid, at which time he was bound to distribute it according to the directions of the will, negatived the idea that he was to receive the property through the hands of an administrator, and implied the authority to collect and pay the debts, and therefore, he was executor by constructive appointment; *Ib.*

20. *Same: Judgment of court that there has been a constructive appointment.* Upon production of a will for probate, the Probate Court acquires full jurisdiction of the case; and if there be no express appointment of an executor, that court has the exclusive right

in the first instance, to determine whether there has been a constructive appointment or not; and if the court should err in its decision, its judgment cannot be attacked in a proceeding instituted by a distributee to revoke the letters testamentary granted to one whom the court has adjudged to be executor by construction, and to procure a grant of letters of administration with the will annexed, to the petitioner; *Ib.*

21. *Legal age of executor.* Eighteen years is the legal age of an executor; and if a testator direct that his son shall be executor when he becomes of age, he will be entitled to act as soon as he arrives at eighteen years of age; *Christopher v. Cox*, 3 C. 162.

II. Administrator ad Colligendum.

22. *Irregular appointment of.* Although it is irregular to appoint an administrator *ad colligendum*, without notice to an acting executor, yet if at the same time, the letters testamentary of the executor be properly revoked, he has no further interest, and cannot complain; *Morris v. Morris*, 5 C. 847. As to power of the Probate Court to appoint a collector, see PROBATE COURT, 216, 41.

23. *Collector's power.* A collector has no power to pay debts or to make distribution; *Henderson v. Clarke*, 5 C. 436.

III. Administrator de bonis non.

1. Appointment of.

24. *When necessary: Death of administrator in chief.* When an administrator dies before complete administration, letters should be granted to an administrator *de bonis non*. The administrator or executor of the first administrator has no authority to intermeddle with the estate; *Hendrick v. Snodgrass*, W. 86; except to settle the accounts of the deceased administrator; *Phipps v. Probate Judge*, 5 H. 59; *Steen v. Steen*, 1 C. 361; *Jones v. Irvine*, 1 C. 361; *Prestige v. Pendleton*, 6 C. 379.

See PROBATE COURT, 40.

25. *The right of next of kin to the appointment*, see *ante*, 3.

2. His Powers and Rights.

26. *Extends only to unadministered assets.* The rights and powers of an administrator *de bonis non*, are limited to the administration of the goods and chattels left unadministered; he cannot make a deed to realty sold by his predecessor; *Davis v. Brandon*, 1 H. 154. But he may enforce a sale made by his predecessor, and collect the purchase money; and may enforce the statutory lien created by such sale; *Prestridge v. Pendleton*, 2 C. 80; *Miller v. Helm*, 2 S. & M. 687. Balances found due by the administrator in chief, if for distribution, and if there be no creditors' claim thereon, should be decreed to be paid to the distributee, and not to the administrator *de bonis non*; *Gray v. Harris*, 43 M. 421.

27. *Same: Instances.* He has no right to proceed against his predecessor for a *devas-*

taut, nor for mal-administration; his commission extends only to the unadministered assets; *Kelsey v. Smith*, 1 H. 68; *Prosser v. Yerby*, 1 H. 87; *Judge of Probate v. Green*, 1 H. 146; *Stubblefield v. McRaven*, 5 S. & M. 130; *Rives v. Patty*, 43 M. 338. But he may sue the first administrator on his bond for specific unadministered property, which, upon demand, he has failed to deliver up; *Prosser v. Yerby*, *supra*; *Rives v. Patty*, *supra*. He is also entitled to have delivered to him the choses in action of the estate, which were not collected by the administrator in chief, and to an injunction restraining his predecessor from collecting such as he may have in his hands. But is not the former administrator not entitled to retain money coming to his hands, from collections made after his discharge, in satisfaction of a balance due him on his final account; *Quære?* *Stubblefield v. McRaven*, *supra*. He has no right to sue his predecessor on his bond, for a balance in money due by him on his final account, but creditors and distributees may; *Byrd v. Holloway*, 6 S. & M. 323; *Rives v. Patty*, 43 M. 338. Nor can he sue the administrator in chief on his bond, for settling a claim due the estate, by taking in payment of it his own debt; but if this were done fraudulently, the debtor would still remain liable to the administrator *de bonis non*; *Judge of Probate v. Green*, 1 H. 146. He cannot sue for maladministration by his predecessor, as: 1st, for a failure to inventory property; 2d, for a failure to take good security; 3d, for balance in money due on his final account; *Prosser v. Yerby*, 1 H. 87.

28. *Same*. It is settled rule that an administrator *de bonis non* can maintain suit only, for such goods, chattels, and credits as remain unadministered by a former administrator; whether the former administrator acted agreeably to law or not; whether he committed a *devastavit* or not, are matters with which the administrator *de bonis non* has no concern. The creditors and distributees are alone interested in that inquiry; *Scott v. Searles*, 14 S. & M. 94.

29. *Same: What are unadministered assets: Illegal disposition of assets*. Where the property of the intestate has been legally disposed of by the administrator in chief, in proper course of administration, the administrator *de bonis non* has no right to interfere with it; but if such disposition were " " or fraudulent, and, therefore, not a valid act of administration, the property remains subject to the control of the administrator *de bonis non*, and is assets in his hands, as, though it had never been sold; *Forniquet v. Forstall*, 5 G. 87 (citing *Prosser v. Leatherman*, 4 H. 237; *Müller v. Helm*, 2 S. & M. 687; *Scott v. Searles*, 7 ib. 505); *Searles v. Scott*, 14 ib. 94.

30. *Same*. An administrator *de bonis non* is the representative of the decedent, and not of the original administrator, and he is only bound by the administrative acts of the original administrator, so far as they are equal and valid, and he is not bound by a

fraudulent disposition of assets made by the original administrator; *Ib*.

31. *Same*. He is (as well as the former administrator) a trustee, for the creditors, of all the assets which are subject to the payment of debts, and it is his right and duty to secure all such assets, and appropriate them to the benefit of creditors; and he may, therefore, sue for and recover property illegally disposed of by his predecessor; and when the estate has been declared insolvent, he may bring a bill to set aside a sale of realty fraudulently and illegally made by his predecessor; *Ib*.

32. *Same: Instances*. And though an administrator may assign a note for the legal purposes of administration, yet if he assign it illegally for his own benefit, it is unadministered assets; *Prosser v. Leatherman*, 4 H. 237; *Müller v. Helm*, 2 S. & M. 687; *Scott v. Searles*, 7 S. & M. 498. Whether, however, the mere act of the administrator, without fraud (he being solvent), in taking a claim against himself, in payment of a debt due the estate, makes the payment void; *Quære?* *Judge of Probate v. Green*, 1 H. 146. But if the administrator in his final account has fully accounted for a note which has been illegally disposed of by him, and he has been fully discharged on due notice, with a balance in his favor, this is a full administration of the note, and it will no longer be assets in the hands of the administrator *de bonis non*; and in such a case the administrator *de bonis non* would be without remedy, though the final account be fraudulent, except upon a bill to annul the settlement for fraud; *Searles v. Scott*, 14 S. & M. 94.

33. *Same: Instances of illegal sale of slaves*. A sale of slaves made without an order of court is invalid; and not being a valid act of administration, the slaves remain unadministered assets, and can be recovered by the administrator *de bonis non*; *Hull v. Clark*, 14 S. & M. 187 (citing *Byrd v. Holloway*, 6 id. 323); S. P., as to any void sale made by the administrator in chief; *Prestridge v. Pendleton*, 2 C. 80.

34. *Same: Delivering note to a distributee*. The delivery by an administrator of a note due the intestate to a distributee, is not such an act of administration as will prevent an administrator *de bonis non*, from maintaining suit to collect it. It is still unadministered assets, and if the note be secured by mortgage, the administrator *de bonis non* may maintain a bill to foreclose the mortgage, notwithstanding, the guardian of the distributee has recovered judgment at law on the note; *Morse v. Clayton*, 13 S. & M. 373.

35. *Collecting debt illegally*. If the administrator fraudulently receive in payment of a debt due the estate, a claim held by the debtor on the administrator, the payment is void, and the administrator *de bonis non* may recover the debt again; but *Quære?* as to this, if the transaction were without fraud, and the administrator solvent; *Probate Judge v. Green*, 1 H. 146.

36. *Right to sue for debt by the adminis-*

trator in chief. It is the duty by statute of an administrator to retain on his inventory a debt due by himself to the intestate. If he fail to do so, it is a breach of his bond, and the administrator may sue him for the debt, since in that case it still remains unadministered assets; *Kelsey v. Smith*, 1 H. 68.

36a. *Judgment and collection by sheriff, as acts of administration.* An administrator who has recovered a judgment on a claim due the estate, on which the money has been collected by the sheriff, does not lose his right thereto by his subsequent removal from office and the appointment of an administrator *de bonis non*. Upon collection by the sheriff, the judgment ceases to be unadministered assets, and hence cannot go to the administrator *de bonis non*; and being administered assets, the administrator is accountable, and he may therefore collect the money from the sheriff by motion after his removal; *Gray v. Keill*, 14 S. & M. 186; and the rule is the same, where the attorney of the administrator collected the money before his removal; *Sloan v. Johnson*, 14 S. & M. 47. And if the administrator return in his inventory cash on hand, it is thereby administered assets, for which the administrator *de bonis non* cannot sue; *Prosser v. Yerby*, 1 H. 87.

3. Privity between Administrator in Chief and Administrator *de bonis non*.

37. *Revivor necessary.* There is no privity between the administrator in chief and the administrator *de bonis non*. Hence, an execution issued after the revocation of the letters of the former upon a judgment rendered against him, cannot be levied on assets in the hands of the latter, without a revivor of the judgment against him; nor can such judgment be made the foundation of a suit against the administrator *de bonis non* for a *devastavit*; *Ruff v. Smith*, 2 G. 59.

38. *There is a privity in some cases: Admission.* In many respects there is no privity between the administrator in chief and the administrator *de bonis non*, but in many others, the acts of the administrator, within the sphere of his duty and power, are obligatory on his successor so far as to charge the estate; for the estate comes to the hands of the administrator *de bonis non*, charged by those acts of the administrator in chief, which he might legitimately do whilst the estate was in his hands; and admissions made by the administrator in chief in good faith, in reference to such acts, bind the estate, and are admissible in evidence against the administrator *de bonis non*, though the first administrator be a competent witness to establish the facts sought to be proven by the admission; *Duncan v. Watson*, 6 C. 187.

39. *Privity between as to suits and judgments.* Under the statutes of this State, the administrator *de bonis non*, is in full privity with the previous administrator, and he may prosecute and defend a writ of error to a judgment rendered in favor of or against the previous administrator without revivor; *Mayer v. McLure*, 7 G. 389 (citing *N. O. J. & G.*

N. R. R. Co. v. Rollins, Ib. 384). Yet at common law, if a suit were brought against an administrator and he died, it could not be revived against the administrator *de bonis non*, and this was the rule in this State until the year 1846; for the former statute (H. C. 692, 841-2) which allowed revivor in favor of and against the *representatives of a deceased party*, was held not to apply to a case where the action was against an administrator in chief, and he died, for it was said the administrator *de bonis non* was not a representative of the previous administrator; *Portevant v. Penaleton*, 1 C. 25.

See *SCIRE FACIAS*, 12a.

40. *Practice on writ of error.* When a writ of error is sued out after the death of the first administrator, and after the appointment of an administrator *de bonis non*, a *scire facias ad audiendum errores*, may properly issue from the High Court to notify the latter of the pendency of the writ; *Mayer v. McLure*, 7 G. 389.

IV. Administrator of Deceased Administrator or Executor.

41. *Has no power to administer the estate.* An administrator of a deceased administrator has no power to administer the estate of the first decedent. He can only administer the estate of his own intestate, and hence he is not liable to be sued on his bond for an act of mal-administration committed by his intestate. To enable the distributee to recover on the bond of the administrator of a deceased administrator of his ancestor's estate, he must not only show a breach of the bond of the first administrator, by regular suit and judgment, and then a breach of the bond of the administrator of the deceased administrator, by showing that he has assets, and has been guilty of a *devastavit* by a failure to apply the assets of the deceased administrator to the payment of the debt so established by the judgment; *Probate Judge v. Philips*, 5 H. 59.

42. *Liable to settle the accounts of his intestate.* But an administrator of a deceased administrator (the latter having died without a final settlement of his accounts) is bound to render a final account for his intestate of the latter's administration; *Jones v. Irvine*, 1 C. 361; *Steen v. Steen*, 3 C. 513; *Prestige v. Pendleton*, 6 C. 379. And it seems where there is no administrator of the deceased administrator, chancery would have jurisdiction to enforce payment of a general residuary legacy; *Jones v. Irvine*, *supra*. And upon rendering such an account, the Probate Court may allow the administrator of the deceased administrator to retain on account of an indebtedness of the first intestate's estate to the deceased administrator, a note belonging to the estate, and payable to the deceased administrator; and if the note be payable to bearer, the legal title by such order allowing its retention passes to the administrator of the deceased administrator; *Prestige v. Pendleton*, 6 C. 379.

42a *No power to object to execution against*

his intestate as administrator. An administrator has no power to object to the validity or legality of an execution issued against his intestate as administrator of a third person, and it will be error for the court to quash such an execution on his motion; *Henderson v. Winchester*, 2 G. 290.

V. Administrator, with the Will Annexed.

43. *Appointment of.* A non-resident executor, who has failed to propound the will for probate and to ask for letters for a year after the testator's death, need not be summoned on an application, by the parties interested, to probate the will and for letters *c. t. a.*; and an appointment so made will not be erroneous; *Cox v. Cox*, 1 S. & M. 292.

44. *Powers of.* When the testator directs his executors, as such, and not *nominatim*, to do a certain act, at all events, giving them no discretion in the matter, the power survives; and on the death of the executor, it may be exercised by the administrator *de bonis non*, with the will annexed; *King v. Talbert*, 7 G. 367 (citing *Bartlett v. Sutherland*, 3 G. 395, for which, see *post*, 243, 244, 245, 246).

45. *Same: Case in judgment.* The testator, by the first clause in his will, directed that his property should be kept together, and that the expenses of his family and the education of his children should be paid out of his effects. By the third clause, he directed that his farm should be continued, and for this purpose he directed his executors to sell the farm and land then owned by him, and purchase another in a more suitable location. By the fourth clause, he directed that the surplus proceeds of his farm should be invested in property in such other manner as his executors should deem best for the interest of his family. By the fifth clause, he provided that his property should be equally divided among his children upon the marriage of his widow; and by the last clause, he appointed R. and H. his executors. The will was not executed so as to pass real estate. After the death of both the executors, and whilst the widow remained unmarried, one of the testator's children applied for a division of the estate: *Held*,

1. That the invalidity of the direction to sell the farm did not affect the directions to keep the property together and continue the plantation; and that the executors, under the power vested in them by the fourth clause, to invest the proceeds of the farm in other property, might purchase another plantation.

2. That the duties imposed to keep the property together and continue the farm, and to purchase another in a more suitable location, were to be discharged, at all events, by the executors as such, and not *nominatim*, and upon their death survive to the administrator *de bonis non*; *King v. Talbert*, 7 G. 367.

See LEGACY, 12.

45a. *Where sale is discretionary.* But if

the direction be to sell, and if, in the executor's opinion, it should be advisable, this is a discretionary power, and can be exercised only by him; it cannot be exercised by the administrator *c. t. a.*; *Montgomery v. Milliken*, 5 S. & M. 151.

VI. Accounts.

See PROBATE COURT, sub-division Accounts, 197, *et seq.*

1. Accounts Generally.

46. *Presumed to be returned officially.* Accounts and appraisements returned to the Probate Court by an administrator are presumed to be in his official character, though not so stated on their face; *Stewart v. Richardson*, 3 G. 313.

47. *Account returned for settlement is a suit.* The account of an executor or administrator propounded for settlement in the Probate Court, is a suit within the meaning of art. 190, p. 510, of the Rev. Code of 1857, to establish a claim in favor of the accountant against the estate of a deceased person; and the accountant is not therefore a competent witness to establish any item of credit in his account, nor to exonerate himself from any sum with which the heirs and legatees may allege he is chargeable; *Haralson v. White*, 9 G. 178.

48. *Vouchers to accounts. Receipt of sheriff.* The receipt of a sheriff given to an executor, which shows on its face that an execution against the decedent was then in the hands of the sheriff, and that it was paid by the administrator, is *prima facie* evidence of the existence of the judgment, and a sufficient voucher to authorize an allowance for the payment; *Ib.*

48a. *Same: Unprobated claim.* If an administrator pay an unprobated open account against his intestate, he must show by proof that it is a valid claim against the intestate in its inception, and was never paid by him in his lifetime; *Ib.* See *post*, sub-division Probate of Claims, 290 to 297.

49. *Same: Probate of claim having credits.* Where an open account is probated against a decedent for a balance, after deducting the payments credited thereon, the executor will be entitled to an allowance only for the balance probated, unless he show that the credits were also paid by him; *Ib.*

2. Annual Accounts.

50. As to the conclusiveness of annual accounts, see PROBATE COURT, 174, 175, 197. See, also, *post*, 52.

3. Final Accounts.

A. WHEN A FINAL ACCOUNT SHOULD BE MADE.

51. *Same.* As a general rule, an administrator should not make a final settlement of the estate, so long as there remains uncollected claims due to the estate, and unpaid debts due by it; but the rule would be different, if the debts were all paid, and the dis-

tributees were willing to take the claims due the estate, under an assignment from the administrator; or if the administrator had made himself liable for them by negligence. If an administrator make a final settlement, leaving a debt, of which he has notice, unpaid, it would be a *devastavit*; *Allison v. Abrams*, 40 M. 747. And a final settlement made, except only on the removal, resignation or death of the administrator, when there are debts unpaid of which the administrator had notice, though made on due notice to the heirs, and ordering distribution of the estate, and a discharge of the administrator, is not in fact a discharge of the administrator from his trust as to such unpaid debts; and he is still liable to be sued as administrator on such claim, and a judgment against him will bind the estate. His office and trust do not terminate without resignation or removal, until the full execution of his trust, which includes the payment of all the debts (citing *Henderson v. Winchester*, 2 G. 290); *Pollock v. Buie*, 43 M. 140. See *post*, 64.

A petition alleging that the debts are all paid, and that there remains an estate for distribution, is a *prima facie* showing that a final account should be rendered; *Treadwell v. Sorrell*, 1 C. 563.

See PROBATE COURT, 199.

52. *When estate ready for final settlement: When there is a will, &c.* A direction in a will, that the plantation be kept up, and that the children be educated and supported out of the proceeds, at the discretion of the executor, till the youngest child comes to full age, may more properly be carried out by a guardian than by an administrator *c. t. a.*; and where the debts are all collected and paid, the estate if administered by an administrator *c. t. a.*, will be ready for final settlement and delivery to a guardian; *Sprott v. Baldwin*, 5 G. 327.

B. FINAL ACCOUNT, HOW COMPELLED.

53. *Same.* The Probate Court may, of its own motion, issue citation to make an account; and if it do so, it may discharge the citation of its own motion; and a distributee cannot object to such discharge, or appeal from it. But the discharge does not prevent the distributee from commencing proceedings in his own name, to compel the administrator to account; the interest of no one being affected by the discharge of the administrator from the citation issued by the court; *Robinson v. Gholson*, 8 S. & M. 392; *S. P. Dowd v. Morgan*, 1 C. 587; for which see PROBATE COURT, 199.

C. THE NOTICE IN CASES OF FINAL ACCOUNTS.

54. *Distributee entitled to personal notice.* When a distributee resides in the county where the estate is administered, he is, under the Act of 1848 (H. C. 683, § 3), entitled to personal service of notice of a final settlement; *Robert's v. Roberts*, 5 G. 322. Now, however, by subsequent statute, he is entitled to personal notice wherever he resides in the State, and if a distributee be a minor, the

notice must also be served on his guardian; *Dogan v. Brown*, 44 M. 235.

55. *Notice when he is a non-resident.* As to this, see PROBATE COURT, 226, 227, 228, 229, 230.

56. *Final account without notice.* A final account rendered without due notice given to the distributee is void, and may be set aside at any time, and a new account ordered; *Neal v. Wellons*, 12 S. & M. 649; *Fort v. Battle*, 13 S. & M. 133; *Neylans v. Burge*, 14 S. & M. 201; *Rives v. Patty*, 43 M. 338; unless, perhaps, where the account is rendered in answer to a proceeding instituted by a distributee to compel it. But in such a case, if the account pending these proceedings, be referred to arbitrators, this is an abandonment of the proceedings; and if an award be made and confirmed by the court, it will not be binding as a final settlement (whatever effect it may have as an award), unless the confirmation be made on due notice to the parties; *Fort v. Battle, supra*.

57. *Same.* A final settlement made by an administrator, without having given the requisite notice, not only does not conclude the distributees as an account, but it does not discharge the administrator from his office as administrator, but he still occupies that relation, not only to the distributees but to the creditors of the estate; and he may continue to act as administrator and be proceeded against as if the final settlement had not been made. Such a final settlement amounts only to a partial or annual account; *Treadwell v. Herndon*, 41 M. 38. It is valued as a partial settlement, and *prima facie* correct; *Winborn v. King*, 6 G. 157. See PROBATE COURT, 46, 193.

58. *The notice must appear of record.* The notice must appear in the record; it cannot be proven by parol; *Fort v. Battle*, 13 S. & M. 133; *Winborn v. King*, 6 G. 157. See PROBATE COURT, 46b, 194.

59. *As to recitals in record of notice.* See PROBATE COURT, 47, 195.

60. *Waiver of notice by husband.* The husband has no power to waive notice for the wife of a final settlement of an estate of which she is a distributee; *Treadwell v. Herndon*, 41 M. 38 (citing *Atwood v. Meredith*, 8 G. 635, for which see HUSBAND AND WIFE, 10). But he can so far represent his wife in a final settlement, that, if she be an infant, no guardian *ad litem* is necessary for her; *Frisby v. Harrison*, 1 G. 452.

60a. *To whom notice must be given.* A final settlement made by an administrator in good faith upon notice to such parties as the court adjudges to be the only distributees, and payment to them of the assets, constitutes a valid discharge to the administrator; and the court has no jurisdiction thereafter to entertain a petition for distribution to a pretermitted distributee; *Lowry v. McMillan*, 6 G. 147.

See PROBATE COURT, 119, 23.

D. DECREE ON FINAL ACCOUNT.

61. *As to the effect generally of a decree*

allowing a final account, see PROBATE COURT, 190 to 197.

62. *As to form of decree on final account*, see PROBATE COURT, 196.

63. *As to an award on a final account*, see ante, 56.

64. *Extent of discharge by final account.* The office of a trustee ceases only with the final execution of his trusts, and hence the settlement by an administrator of his final account can be regarded as a discharge only so far as the matters correctly embraced in the account are concerned; it is no discharge or revocation of his office as trustee, as to specific property of the estate in his hands which is not accounted for or distributed; as to this, the control of the Probate Court over him and his functions as administrator, continue; and he is still competent to represent the estate in his character as administrator in a suit instituted by a creditor of the estate and pending at the time of the final settlement. The rule, however, is different where the Probate Court revokes his letters, or he voluntarily resigns his trust with the consent of the court; *Henderson v. Winchester*, 2 G. 290 (citing *Smith v. Hurd*, 7 H. 188 where it was held that an executor who has made a final settlement, will still be held to account to the court for all matters arising after such settlement, if he still act in the capacity of executor.) And he may after final settlement maintain an action as executor to enforce the collection of choses in action due to him in his trust capacity; *Grinstead v. Fonte*, 3 G. 120. The case of *Henderson v. Winchester* was cited and confirmed in *Denson v. Denson*, 4 G. 560; S. P., *Pollock v. Brie*, 43 M. 140, for which see ante, 51. See post, 330.

65. *Same: Application of the principle.* The collection by an executor of money due the estate on a note held by him when he rendered his final account, is a matter arising since the accounting, and such an act also causes him to sustain the character of executor, and therefore to remain liable to account further. A decree of the court allowing his final account does not so completely divest him of his executorial character as to prevent him from acting in reference to matters not settled by the account; *Smith v. Hurd*, 7 H. 188.

65a. *Suretyship when one of two executors makes a final settlement.* The legal title to a bill single, payable to two joint executors, upon the final settlement and discharge of one, is vested in the other, and he may maintain a suit on it in his own name; and it makes no difference in this respect, that the executors gave separate bonds, each administering a portion of the assets separately from the other, and that the bill single was taken by the discharged executor, in the course of his separate administration; *Grinstead v. Fonte*, 3 G. 120.

65b. *Supplemental final decree.* After a final decree has been passed, it will be highly improper for the court, even at the same term, to re-open it, on the *ex parte* petition of one of the parties, and make a second final decree,

making a new allowance; *Williams v. Williams*, 43 M. 430.

E. IMPEACHING DECREES ALLOWING FINAL ACCOUNTS.

66. *Power of administrator to impeach.* An administrator having, after final settlement, acquired (by assignment) the share of a distributee, cannot, as against his co-administrator, impeach the final account, on a mistake which was against the estate and in favor of the administrators; *Griffith v. Verner*, 5 H. 736.

As to power of administrators, executors, and guardians, to impeach their own final accounts, see PROBATE COURT, 175, 187, and post, 68.

67. *Cannot be impeached for mistake.* A final account rendered by an executor or administrator, cannot be set aside by the Probate Court, for any error or irregularity in the proceedings. The remedy is by writ of error or appeal. Whether it can be set aside in the Probate Court for fraud; *Quære?* It seems the remedy is in chancery; *Smith v. Hurd*, 7 H. 188. This decision was before the statute allowing bills of review in the Probate Court. As to how errors may be corrected by bill of review, see PROBATE COURT, 165, et seq. It is now also settled, that the Probate Court cannot set aside such a decree for fraud, and that the remedy is in chancery.

See PROBATE COURT, 22.

68. *Administrator, when estopped by final account to deny validity of sale of realty.* An administrator who has sold land for the payment of debts, under an order of the Probate Court, was sued by a creditor for a *devastavit*, in not applying the proceeds of the sale to the payment of his debt, and the administrator attempted to defend on the ground that the sale was void. But it was held that this was no defence, because, 1st. It appeared that the heirs had received the proceeds of the sale, and this was a ratification of it, and estopped the administrator to allege its invalidity. 2d. That the administrator had charged himself with the proceeds in his final account and he could not now escape responsibility when no proceedings had been commenced to avoid the sale; *Lee v. Gardiner*, 4 C. 521.

See PROBATE COURT, 190a, 187, GUARDIAN AND WARD, 15, et seq.

F. POWER OF COURT TO SURCHARGE.

69. *Same.* The Probate Court may surcharge the accounts of an administrator, &c., and add to his liability over what he has reported. But it cannot compel him to embrace in his account, under his oath, the corrections thus made. The correction is the act of the court and not of the administrator; *Trotter v. Trotter*, 40 M. 704.

G. EXCEPTIONS TO ACCOUNTS.

See PROBATE COURT, 148, 151.

70. *Remainderman may except.* Where an estate is devised to one for life, remainder to others, the remaindermen may except to any

item in the final account which affects their interest, but cannot except to such matters as affect the life estate only; *Byrd v. Wells*, 40 M. 711.

H. POWER OF COURT TO ORDER FINAL ACCOUNT AFTER REVOCATION OF LETTERS.

71. *Same.* The Probate Court has power to examine and allow a final account rendered by an administrator, after the revocation of his letters. The jurisdiction of the court as to his past acts, continues until he has made a final settlement and been discharged; *Denson v. Denson*, 4 G. 560; *Davis v. Cheves*, 3 G. 317; contra, *Washburn v. Dorsey*, 8 S. & M. 214, which is overruled by these cases. See PROBATE COURT, 219.

I. PROCEEDINGS ON FINAL ACCOUNTS.

71a. *Practice.* When an administrator has filed his final account, and exceptions thereto are filed, the proceedings are in the nature of a suit between the parties, the progress of which each must observe at his peril, and the administrator will not be allowed to complain that steps were taken in it without notice to him; *Gray v. Harris*, 43 M. 421.

VII. Appointment of Sheriff as Administrator.

72. *When appointment made.* Before a sheriff can be compelled to take the administration of an estate, it must be shown that the deceased had his mansion or known place of residence in the county, or that his estate, or the greater part of it, was situated there; and the creditor applying to have such appointment made, must also show and set forth in his petition clearly, that he is a creditor, and that he has a legal and valid claim against the estate. And if the intestate has been dead for a long time, so that the presumption would be that the debts were all barred by the statute of limitations, he should show that his claim is not barred; *Cocke v. Finley*, 7 C. 127. See post, 329a.

72a. *Sale of realty by sheriff as administrator.* To enable the sheriff, when appointed administrator, to sell land for the payment of debts, he must give bond to account for the proceeds, as other administrators are required to do; *Rucker v. Dyer*, 44 M. 591.

See PROBATE COURT, 51.

VIII. Ancillary Administration.

73. *Estoppel of administrator c. t. a. to deny foreign probate of the will.* A party who has procured an authenticated copy of a foreign will, to be recorded in this State, and taken out letters of administration with the will annexed, is estopped to deny that the will has been legally probated; *Lovelady v. Davis*, 4 G. 577.

74. *Jurisdiction of Probate Court to order payment of legacy in a foreign will.* A probate court in this State, wherein has been granted an administration ancillary to the primary administration granted in a sister State, has no power to compel the administrator with the will annexed thus appointed, to

pay a pecuniary legacy, which was directed by the will to be invested in a slave for the benefit of the legatee and his heirs. In such a case, the foreign executor in whom there is reposed a special confidence in reference to the legacy, is the proper party to be proceeded against; and, moreover, the legacy is a trust which the Probate Court cannot execute. Whether the Probate Court in this State can, in such case, enforce payment of a legacy given by a foreign will, where there is no trust; *Quære? Ib.*

See PROBATE COURT, 16d, 36, 37.

IX. Assets.

1. Choses in Action as Assets.

74a. *Same.* A bond "payable to the curator of D., or his legal representatives," belongs to the administrator of D., and not to his heirs; *Cushing v. Gibson*, W. 87.

But whilst debts due the estate are assets, the administrator is not liable therefor until he has collected them, or unless he has failed through negligence to collect them; and, if in the *bona fide* exercise of his power to compromise a debt, he extend the time of payment, he will not be liable for the money until after the expiration of the indulgence; *Berry v. Parkes*, 3 S. & M. 625; *S. P., Smith v. Hurst*, 8 S. & M. 682.

As to his liability for his own debt to intestate, see post, 248, et seq.

2. Land as Assets.

75. *Rule on this subject.* By the common law all the personal property of a decedent became liable for his debts on his death, but his real estate of freehold descended to the heir, and was only bound for the ancestor's debts due by specialty contracts, and in which he bound himself and his heirs. But this rule as to the realty has been changed both in England and in this State by statute; and now the real estate equally with the personalty is bound for the debts of a decedent; the only difference being that the personalty is first chargeable, and this is simply a rule of administration—the policy of the law being to make all of a decedent's property (not exempted by law from execution) liable for his debts.

Whilst, therefore, it is true, that on the death of the ancestor, his real estate descends to his heir, who is entitled to enjoy it until the contingency shall arise when the land will be needed for the payment of debts, still, he holds subject to this charge, which may be enforced whenever the deficiency in the personal assets to pay the debts is ascertained.

And this deficiency need not, in fact, exist at the time of the ancestor's death; it will be sufficient if it occur at any time afterwards, (without the fault of the creditor), by the destruction or loss of the personal property; and even, it seems, in case of waste of the personalty by the administrator; but, in this last case, the creditor must first prosecute the administrator to insolvency before he can resort to the realty; *Evans v. Fisher*, 40 M.

643; *S. P., Stigler v. Porter*, 42 M. 449; *Hollman v. Bennett*, 44 M. 322.

If the personal estate become insufficient to pay the debts by the *de vastavit* or neglect of the administrator, the heir or his vendee can insist on this as a defence to a petition by the administrator to sell the realty to pay debts. In such case the remedy of creditor is by action on the bond of the administrator; *Turner v. Ellis*, 2 C. 173.

In *Paine v. Pendleton*, 3 G. 320, a petition was filed by the administrator *debonis non*, to sell realty for the payment of debts, and it was shown by the heirs in opposition to the petition, that assets sufficient had come into the hands of the administrator in chief, and it was then shown by the petitioner that the administrator and his sureties were insolvent. The court say, "If the assets were wasted by the prior administrator, that would be no ground for selling the lands of the decedent for the payment of the debts, unless the creditors had exhausted all remedy in legal form against the administrator and his sureties. The remedy of the creditor would be against that administrator; and if he and his sureties on his bond were insolvent, * * * that would not, of itself, justify a sale of the lands. For the personal assets were sufficient to pay the debts; and if the Probate Court failed to require sufficient sureties to the administrator's bond, and in consequence thereof, the assets, which were sufficient, were collected and wasted by that administrator, there could be no reason or justice in charging the debts of the estate upon lands, * * * all legal remedies against the administrator and his sureties not being shown to be exhausted."

In *Webster v. Parker*, 42 M. 465, the same principle was recognized; but it was held inapplicable to a term for years, which was held to be personalty, and a primary fund for the payment of debts.

But it will be noted, that no case has been decided in which realty was ordered to be sold when the insufficiency of the personalty arose from the waste of the administrator.

76. *A term for years is assets.* A term for years is a mere chattel, and goes to the administrator and not to the heir; *Dillingham v. Jenkins*, 7 S. & M. 479; *Webster v. Parker*, 42 M. 465.

76a. *What debts lands may be sold for.* The lands of a decedent are only liable to be sold for debts existing at the time of his death. They are not liable for sale to pay the expenses of administration, or commissions allowed to the administrator; *Hollman v. Bennett*, 44 M. 323.

77. *Power of administrator over: Heirs may waive regular condemnation.* As a general rule, an administrator has no control or authority over the freehold estate of his intestate, yet it is subject to the payment of debts, before actual appropriation of it to that purpose; and the heir may waive his right in it, and a compliance with the conditions prescribed by law for the regular exercise by the administrator of his power over it, and

may consent to his acts appropriating it to the payment of the ancestor's debts; *Crowder v. Shackelford*, 6 G. 321 (citing *Lee v. Gardiner*, 4 C. 521, for which see *post*, 78, 198, 372; and *ante*, 68; *Kempe v. Pintard*, 3 G. 324, for which see *post*, 371).

78. *Rents of realty as assets.* After an administrator has received the rents of realty, and accounted for them in his annual accounts to the Probate Court as assets of the estate, he is estopped to allege that he received them without authority, and especially will this be the case when his accounts show that he has paid debts equal to the amount received for rents; *Crowder v. Shackelford*, 6 G. 321.

79. *Proceeds of realty sold to pay debts are assets: As of the time of intestate's death.* The proceeds of the sale of realty made by an administrator under an order of the court for the payment of debts, the personalty being insufficient, are assets, subject to administration, as of the time of the death of the intestate, and the administrator is liable on his bond for such assets as of that time. And hence, where the declaration against an administrator for a *devastavit*, alleges a waste by him of credits and moneys, which were of the deceased at the time of his death, it will be no departure from the declaration if the plaintiff state in his replication that the waste was of money received by the administrator from the sale of land to pay debts. Whether the proceeds of such a sale be legal or equitable assets, is immaterial, as all distinction in the administration of such assets is abolished; *Lee v. Gardiner*, 4 C. 521.

When the proceeds of such a sale are assets, though the sale were void, see *ante*, 68.

80. *Proceeds of sale made for a division, not assets.* The proceeds of a sale of land made under the order of the Probate Court for a division among the heirs, are not assets in the hands of the administrator for the payment of debts, without an order of the Probate Court condemning them for that purpose; *Johnston v. Union Bk of Tennessee*, 8 G. 526.

81. *Land cannot be condemned to pay a debt barred by statute.* No suit can be commenced against an administrator after the lapse of four years from his appointment, and when he applies after the lapse of that time, for an order to sell land to pay debts, claims not then in suit will be liable to that bar, which the heir may set up against the petition to sell. Whatever would be a good defence to an action at law on the claim, would be a good defence to its allowance by the Probate Court or the commissioner of insolvency; *Turner v. Ellis*, 2 C. 173. An administrator has no right to sell land to pay a debt barred by the statute; *Moody v. Harper*, 9 G. 599.

82. *Realty sold only on deficiency of personalty.* The Probate Court will order a sale of realty to pay debts only where there is a deficiency of personal assets; *McCoy v. Nichols*, 4 H. 31.

3. Miscellaneous.

83. *Slaves of wife under Act of 1839.* The husband, if he become administrator of the wife, will be compelled to inventory her slaves held under the Act of 1839; *Lanehart v. Jeter*, 7 G. 650.

84. *Presumption of assets.* In an action against an administrator in his individual capacity, suggesting a *devastavit*, the rendition of the judgment against him as administrator is not presumptive evidence of assets in his hands. The English rule on this subject is changed by our statute, which exempts an administrator from personal liability, beyond the assets in his hands, notwithstanding any omission or mistake in pleading; *Howard v. Cousins*, 7 H. 114. And it seems under our law nothing will create a presumption of assets; *Vick v. House*, 2 H. 617.

The failure of an administrator to declare an estate insolvent, is not evidence of assets in an action against him, suggesting a *devastavit*; *Howard v. Cousins*, *supra*.

See PROBATE COURT, 78.

85. *As to foreign assets*, see PROBATE COURT, 16h.

86. *Damages to realty.* The right to recover damages for a trespass committed to the realty of intestate in his lifetime, survives to the administrator; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374.

X. Bonds of Executors and Administrators.

1. Bond Required of Executor.

87. *Court may require bond from executor who is excused by the will.* Art. 54, p. 436, of the Rev. Code of 1857, provides that "Where the testator by will shall direct that his executor shall not be required to give bond, then none shall be required, unless the court at any time shall have good reason to suspect the executor of fraud or mal-administration." This statute, so far as it lays down a rule for requiring executors excused by the will from giving bond, only reiterates the rule which has always been recognized on that subject. And the court may, in the exercise of this power, require a bond, whenever it shall conclude, either from facts sworn to in the testimony, or facts known to the court officially, that there is ground to suspect fraud or mal-administration. And if bond be not given according to the order of the court, the letters may be revoked; *Clark v. Niles*, 42 M. 460.

See PROBATE COURT, 155, 156, 163.

2. Need not be Presented as a Claim Against a Decedent.

88. *Same.* An administrator's bond is a matter of public record, and it need not be presented to the administrator of an obligor, as a claim against the estate, and he is bound to take notice of it; *Gordon v. Gibbs*, 3 S. & M. 473.

3. Breaches of Bond, and Action for.

89. *Same: Bond.* The failure of an administrator to return an inventory, or the con-

version of the estate to his own use, or the squandering of the assets, is a breach of his bond; *Edmondson v. Roberts*, 2 H. 822.

It is the duty of an administrator to apply the assets in his hands, to the payment of his intestate's debts; and a suit on the administration bond by a judgment creditor, alleging a sufficiency of assets, and the failure of the administrator to pay his debt, is an action to recover for a breach of this duty; and hence, it is no answer to such an action, that the administrator has not wasted or misapplied the assets. His retention of the assets in his own hands, and his failure to apply them to the payment of the debt, constitute in law, a breach of the bond; *Cannon v. Cooper*, 10 G. 684.

But it is no breach of the bond, for the administrator to fail or refuse to distribute assets, until there has been a tender of a refunding bond; *Carmichael v. Browder*, 3 H. 252.

89a. *For whom bond is given.* The bond is intended as an indemnity for final administration, for those interested in the estate as legatees, distributees and creditors, and for none others; *Prosser v. Yerby*, 1 H. 87. See *post*, 211.

90. *Same: Assignment of breach.* An assignment of the breach of the condition of an administrator's bond "that he has not well and truly administered and accounted for the estate according to law; nor has he made, or caused to be made, a just and true account of his administration within twelve months; nor has he made such a showing as the law requires," is good; *Judge of Probate v. Thompson*, 2 H. 808.

But if it be assigned "that it appears by his inventory returned, that a large amount of goods and chattels came to his hands which he has never accounted for, nor paid over to the persons entitled to the same;" or, "that he received (a sum named) as assets, yet wasted and converted it to his own use, and would not account for the same to the Orphans' Court, nor for a fifth part of it to the use; nor would he pay over the same to the persons entitled by law to receive it," the breaches will be bad, unless it also be averred that there has been a final settlement, or the distributee has tendered a refunding bond; *Ib.*

See DESCENT AND DISTRIBUTION, 42. 44.

91. *Use necessary.* The probate judge is by statute the proper obligee in an administrator's bond; and suit may be instituted thereon in his own name, for a breach of its conditions; but he is a mere nominal party, and the declaration must show who the use is, and what his interest is in the suit; *Probate Judge v. Johnson*, 4 H. 680.

92. *As to action on the bond of an administrator of an administrator*, see *ante*, 41.

92a. *When decree of Probate Court necessary for suit on bond.* An action cannot be maintained on an executor's bond, by a residuary legatee, to recover the residuum, until that residuum has been fixed by a decree of the Probate Court; and the same rule applies to

an action by a distributee for his share in the general balance of the estate; *Jones v. Irvine's Executor*, 1 C. 361; S. P., *Stien v. Stien*, 3 C. 513; S. P., *Green v. Tunstall*, 5 H. 638.

But the rule is different as to the right of a creditor, to sue on the bond. He may sue without any previous accounting by the administrator in the Probate Court; *Thornton v. Glover*, 3 C. 132; S. P., *Randolph v. Singleton*, 12 S. & M. 439; *Burrus v. Thomas*, 13 id. 459.

4. Where New Bond Required.

93. *Effect of giving it.* Under the statute (H. & H. 398, § 46), where the sureties of an administrator or executor have petitioned for counter surety, and the executor or administrator has given a new bond in the form prescribed by the statute, this new bond is an absolute discharge of the sureties on the old bond, and they are no longer liable for a default which may have occurred before their release; *Russell v. McDougall*, 3 S. & M. 238.

This is changed under the Rev. Code of 1857, the former sureties remaining liable for all acts up to the date of the new bond.

94. *Where husband shall give new bond.* Where administration has been granted to a woman, and she afterwards marry, and then her sureties petition for counter security, it is proper that the husband should join with her in the new bond. And if on executing such bond the record recite that letters were granted to the husband and wife, it will not be intended that a new grant was made, but that it was but a continuation of the old grant to the wife; *Id.*

95. *The right of sureties to demand counter security.* Under the Act of 1821 (H. C. 658, § 65), which provides "that where sureties of executors and administrators" (extended in 1830, H. C. p. 676, art. 11, to guardians,) "conceive themselves in danger of suffering thereby, and petition the court for relief, the court shall summon the executor," &c., "and shall have full power to order either that the said executor," &c., "shall give counter security, or that he shall execute a new bond, with good security," &c.; it was held that upon the surety of a guardian filing his petition, alleging "that he conceived himself in danger of suffering as such," and praying for counter security or a new bond, he was entitled to the relief he asked; and that the fact that he was indemnified already, made no difference in this respect; *Foster v. Bisland*, 1 C. 296.

But under the Rev. Code of 1857, art. 145, p. 461, which provides that "if the securities of any guardian should apprehend danger, and desire to be discharged, they may petition the court for that purpose, and the guardian shall be summoned; and if on the hearing the court shall be of opinion that the complaint is well founded, the guardian may be required to give new securities," &c., it was held that the mere apprehension of the security that he was in danger would not do; it must appear by the proof that he was in

such danger, or the court would not be authorized to grant the relief; *Coleman v. Lamar*, 40 M. 775.

The statute in the Code of 1857, relating to the sureties of administrators, p. 439, art. 66, differs from the above quoted provision in relation to sureties of guardians. It provides if the sureties "apprehend danger, they may petition the court to require the executor, &c., to give a new bond, and that they may be discharged from further liability, and the court shall grant such petition, and require new sureties," &c.

See PROBATE COURT, 156.

XI. Commissions.

96. *Fund in which commissions are allowed.* Commissions should be allowed to an administrator on the whole estate administered, as evidenced by the inventories, appraisements, and accounts returned by him, and not alone on that part of the estate which has been appraised; *Merrill v. Moore*, 7 H. 271. He is entitled to commissions on the whole estate administered, including the amount of the sale of land made by him under an order of the court; *Shurtliff v. Wither- spoon*, 1 S. & M. 613.

97. *Commissions should be paid out of a fund, so as to make the burden equal.* If one of two executors upon his own petition be ordered to distribute a certain amount of funds in his hands generally among several residuary legatees, and he distribute to all but one, he should not, on a final settlement made by him, showing a balance in his hands not sufficient to pay his commissions, and the distributive share of the unpaid legatee, be allowed to credit his commissions on this balance, so as to diminish the amount due such legatee. His commissions in that case should be made chargeable on the assets in the hands of his co-executor, in which all the legatees are interested; *Brandon v. Hoggatt*, 3 G. 335.

98. *Allowance a matter of discretion.* The allowance of commissions within the limits prescribed by statute, is a matter of discretion in the Probate Court, and cannot be assigned as error unless the discretion be manifestly abused; *Spratt v. Baldwin*, 4 G. 581; *Satterwhite v. Littlefield*, 13 S. & M. 302; *Powell v. Burrus*, 6 G. 605; *Cherry v. Jarratt*, 3 C. 221.

99. *Reason and purpose of the allowance: Attorney's fees.* The provision made by law for the allowance of commissions, is not alone for the purpose of furnishing compensation for the trouble and labor expended in administering the estates, but also to reward administrators, executors, &c., for the responsibility incurred and for their fidelity in the discharge of the trust imposed on them; *Powell v. Burrus*, 6 G. 605. And it is wrong to impose onerous duties on men, and deny them compensation for their discharge. Such denial tends strongly to make them negligent in the discharge of the trust, or to make them seek indemnity in some other way; *Merrill v. Moore*, 7 H. 271.

The allowance of commissions is intended as a compensation for his whole expense, labor, and responsibility of administering the estate, and he is not, therefore, allowed to charge the estate with his expenses in employing lawyers to assist him in the administration of the estate, except that when he is compelled to bring suits for the estate, or defend claims brought against the estate, he is entitled to the lawyer's fee so expended; *Satterwhite v. Littlefield*, 13 S. & M. 302.

He will not be allowed expenditures for counsel fees, unless he shows that the services were rendered for the benefit of the estate; *Brandon v. Hoggatt*, 3 G. 333. See *post*, 215, 216.

• 100. *Allowance where an administrator has resigned before full administration.* Where an executor resigns before there is a complete administration, the court may allow him commissions on the whole estate which was in his hands to be administered; see *post*, 101. This allowance should never be liberal, and should be so adjusted that there will be a fair proportion of the sum which the law allows for administering the whole estate, left for his successor. In doing this, the court should see how much has been done towards administering the estate, and how much remains to be done, as the maximum of seven per cent. on the estate cannot be exceeded in the whole amount allowed to all the administrators. This is a matter, however, in the discretion of the court, with the exercise of which the High Court will not interfere, except in a case of flagrant abuse; *Cherry v. Jarrett*, 3 O. 221.

101. *Time of allowance.* Formerly, the allowance of commissions could only be made on final settlement; *Merrill v. Moore*, 7 H. 271; but now commissions may be allowed on partial and annual settlements; *Powell v. Burrus*, 6 G. 605. And so the court may allow the administrator commissions on making a decree for distribution; *Crowder v. Shackelford*, 6 G. 321.

When there is a partial administration, the administrator making a final settlement on his resignation, is not entitled to have allowed him any commissions on that part of the estate which has not been fully administered; but on that part which must go to the administrator *de bonis non*, he will be entitled to receive such commissions as shall appear reasonable and just for his services in relation thereto, when the estate shall be finally settled by his successor; *Spratt v. Baldwin*, 5 G. 327.

102. *Commissions where letters have been revoked after full administration.* Where the first administrator has fully administered the estate, the Probate Court may allow him full commissions, notwithstanding his letters have been revoked on account of his failure to answer a citation issued against him, and an administrator *de bonis non* has been appointed; *Spratt v. Baldwin*, 4 G. 581.

103. *Commissions where there are two administrators.* Where administration is granted to two, and one dies, the court may,

on final settlement of his accounts by his representative, allow commissions to the deceased administrator, without making an allowance to the survivor; *Effinger v. Richards*, 6 G. 540.

And where there are two executors, one has a right to sue out a writ of error to revise the action of the Probate Court, in allowing commissions to the other; *Overstreet v. Trainer*, 2 C. 484.

104. *Executor's commissions: Right to, as a disqualification to him as a witness.* The right of an executor to commissions does not accrue till the performance of the duties for which they are allowable; and if in point of fact he does not administer the estate, he is entitled to no commissions. Hence, the executor nominated in a will, is not by reason of the commissions which may be allowed him, disqualified as an attesting witness to the will; *Rucker v. Lambdin*, 12 S. & M. 230.

105. *Testimony of resigning executor on the point of commissions.* When a resigning executor made a settlement of his partial administration, and was allowed to testify on the point of the allowance of his commissions, stating the trouble and labor he had undergone in administering the estate, it was held that there was no error, as the testimony was immaterial, as the law presumed, in the absence of countervailing evidence, that he had discharged his duty; *Cherry v. Jarratt*, 3 C. 221.

106. *Duty of administrator de bonis non as to commissions allowed his predecessor.* An administrator *de bonis non* is not bound to pay the commissions allowed the administrator in chief, without notice of the allowance and demand of payment; and if he make a final settlement without such notice and demand, he is discharged; *Patton v. Patton*, 3 G. 331.

107. *Promise to pay fair compensation as commissions.* A promise by a distributee or ward to pay to the guardian or executor a fair compensation for his services, is a mere promise to pay what may be allowed by the appropriate tribunal, according to law; and hence, when such promise was made, and there was no final settlement of the accounts between the parties, the Probate Court alone can determine what commissions shall be allowed; *Ratliff v. Davis*, 9 G. 107.

108. *Executor's right to commissions on money improperly paid out.* An executor paying out money improperly, but in pursuance of the will, which was set aside, is entitled to commissions thereon, inasmuch as he is chargeable with the improper disbursements as assets; *Kelly v. Davis*, 8 G. 76.

XII. Devastavit.

1. What is a Devastavit.

109. *As to devastavit by the administrator paying claims in full when the estate is insolvent,* see PROBATE COURT, 109, 74, 75, 77a, 33.

110. *Same.* It is a *devastavit* for an administrator of an insolvent estate to pay a

debt in full, it having no lien or priority to the exclusion of others; *Gay v. Lemle*, 3 G. 309.

111. *Final settlement without paying debt.* If an administrator make a final settlement of the estate, leaving unpaid debts duly probated, of which he had notice, he will be guilty of a *devastavit*; *Allison v. Abrams*, 40 M. 747.

112. *Judgment against administrator no evidence of a devastavit.* A judgment against an administrator in his representative capacity is no evidence of a *devastavit*; the judgment only establishes the liability of the estate and the duty of the administrator to pay it out of the assets; *Vick v. House*, 2 H. 617.

2. The Remedy for a Devastavit.

113. *Judgment against administrator necessary before action brought.* No suit can be maintained by a creditor against an administrator on his bond for a *devastavit*, until he has first obtained a judgment on his debt against the administrator; and if a surety pay a judgment against an administrator, he cannot sue for a *devastavit*, until he has recovered judgment against the administrator for the sum so paid. The fact that he is a surety and that he has paid the debt, must be judicially ascertained before action brought. His payment of the judgment only made him a simple contract creditor of the estate, whatever rights he may have in equity to be substituted to all the rights of the judgment creditor; *Dinkins v. Bailey*, 1 C. 284; *sed vide* Rev. Code of 1857, p. 362. art. 2. And a judgment against the administrator in chief is not sufficient for an action against the administrator *de bonis non* for a *devastavit* in not paying the debt; *Ruff v. Smith*, 2 G. 59.

114. *As to form of the declaration, and the sufficiency of averments in an action for devastavit.* see PLEADINGS, 147, 148.

115. *Verdict in such action.* When the declaration against an administrator for a *devastavit* in not paying a judgment rendered against him, shows assets and a *devastavit* to a greater amount than the plaintiff's debt, and the evidence shows the same, it will not be error if the verdict do not find the amount of assets wasted, but is simply for the plaintiff for the amount of his debt; *Lee v. Gardiner*, 4 C. 521 (citing *Hoggatt v. Montgomery*, 6 H. 93), for which see PLEADINGS, 147.

116. *Judgment by default on overruling demurrer to the declaration.* If the declaration aver the sufficiency of assets, the *devastavit*, the recovery of the judgment at law against the administrator, on plaintiff's demand against the intestate, and that it is unsatisfied, and a demurrer be interposed to it, and overruled, and judgment by default entered, the judgment may be final without writ of inquiry,—the *devastavit*, and the amount of it, being admitted by the demurrer; *Hoggatt v. Montgomery*, 6 H. 93.

117. *Informal judgment in such case good.* And if in such action it appear that the

judgment at law of the creditor, be entered against the administrator individually, it is a mere clerical error, which the court, on the trial of the action for the *devastavit* (being the same court in which the judgment was rendered), may correct; *Ib.*

118. *Scire facias is a proper remedy.* A *scire facias* may issue in favor of a judgment creditor against an administrator, suggesting a *devastavit*, and this is a proper remedy in such case, to get a judgment *de bonis proprias*. But judgment by default on the *sci. fa.* will not justify an award of execution *de bonis proprias*; the *devastavit* must be proven. And the executor may make his defence to the *scire facias* by plea, it being in the nature of an original action against him; *Sims v. Nash*, 1 H. 271; S. P., *Black v. Barton*, 6 S. & M. 239.

119. *Proceedings on the scire facias.* The *sci. fa.* ought to state the amount of assets in the hands of the executor.

A judgment against an administrator as such, will not preclude him from showing afterwards, in answer to a *scire facias* for a *devastavit*, a full and proper administration of the estate; he may plead *plene administravit*, but that plea cannot be sufficient if there has been a mis-application of the assets; *Black v. Barton*, 6 S. & M. 239.

120. *Presumption of assets arising from sales on a credit.* An administrator who has sold property on a credit under an order of the Probate Court, is presumed to have collected the money, after the lapse of the proper time to enable him to do so; and in an action for a *devastavit*, if he has failed to collect the money, he should show it; *Gordon v. Gibbs*, 3 S. & M. 473. See also, *ante*, 84.

121. *Settlement in Probate Court no bar to action for devastavit.* To an action on an administrator's bond by a judgment creditor, alleging a *devastavit* in not paying his debt, the defendant pleaded, that his account as administrator, exhibiting a large indebtedness to him, had been allowed by the Probate Court, though it had been contested by the plaintiff, and that the balance thus shown was still due him, over and above all assets which had ever come to his hands: *Held*, that the plea was bad, as the Probate Court by its judgment, cannot control the creditor's right to his action for mal-administration, nor in any way create a bar to it. What weight this judgment of the Probate Court would be entitled to as evidence in a trial for a *devastavit*, was not determined; *Randolph v. Singleton*, 12 S. & M. 439.

122. *Duty of administrator to distribute assets equally.* To such an action it is not a good defence, that at the time of the rendition of the plaintiff's judgment against the administrator, the latter had no assets. The plea should allege either that there never were assets, or that they were consumed in paying claims having a priority over the plaintiff's; *Cogan v. Duncan*, 1 C. 274. And so if his accounts show he has sufficient assets to pay the debt sought to be collected, it is *prima facie* sufficient to make him liable

unless he show by proof that he has made a legal disposition of the assets; *Stewart v. Richardson*, 3 G. 314.

123. *Plea of nul tiel record in such action.* And if, to such action, the administrator plead that the plaintiff has no such judgment as mentioned in the declaration, this cannot be treated as a plea of *nul tiel* record, as the bond and not the judgment is the foundation of the action. It presents no matter going to the merits of the action, and only matter in abatement. And hence upon the courts deciding the plea against the defendant, judgment final cannot be entered against the defendant for the amount of the judgment mentioned in the declaration; but only judgment by default, with a writ of inquiry, that a jury may be called to ascertain the amount of the assets wasted; *Cogan v. Duncan*, *supra*.

124. *Right of assignee of a judgment to sue for a devastavit.* A judgment is not assignable at the common law, or by statute; the purchaser thereof is merely an equitable holder, and it is doubtful whether a court of law would so far recognize the title of an assignee of a judgment rendered against an administrator, as to allow him to make it the basis of an action against the administrator and his surety for a *devastavit*; *Ruff v. Smith*, 2 G. 59.

125. *Duty of administrator to apply assets to pay debts.* It is no answer to a *scire facias*, suggesting a *devastavit*, in neglecting to pay the judgment of the plaintiff, that there are personal assets subject to execution, sufficient to pay the judgment, within the State, on which plaintiff's judgment could be levied, because if there be such, it was the duty of the administrator to apply them to the payment of the debt; *Stewart v. Richardson*, 3 G. 314.

XIII. Duties, Powers, Rights, Liabilities and Remedies.

1. Duties and Liabilities as to Collections of Debts.

126. *Promptness required: Liability from neglect.* If by negligence or maladministration, an administrator has failed to collect a debt, he is chargeable not only with the debt, but with interest on it; *Banks v. Machen*, 40 M. 256.

And it is his duty to collect promptly for distribution and the payment of debts; and if he has sold property on a credit, he will be presumed in an action for a *devastavit*, to have collected it, after a lapse of time sufficient to enable him to do so, and if he has failed he must show it; *Gordon v. Gibbs*, 3 S. & M. 473. And he will be properly chargeable, on petition for distribution, as money, for all notes taken by him on sales of property, two years after they are due, unless he show that after using proper diligence he has failed to collect them; *Cole v. Leake*, 5 C. 777. But in the exercise of his power to compound a debt, he may, when the debt is doubtful, extend the time of payment, and get new securities, and in such case he will not be liable to

pay the money on it until after the expiration of the indulgence given; *Berry v. Parkes*, 3 S. & M. 625. He will not be chargeable with a note in final settlement unless he has been guilty of gross negligence in not collecting it; *Smith v. Hurd*, 8 S. & M. 682.

127. *The funds he must collect.* In the exercise of a proper discretion he may, when this is the best that can be done, collect debts in bank paper, not strictly at par, when the best interests of the estate require it. But in such a case it will be his duty to convert such funds into property less liable to depreciation, with as little delay as possible. And when he collects such currency, he should report his action to the court for such allowance as the circumstances may warrant, and the court may render a decree accordingly. But if he omit to make such report, and allow a decree to be rendered against him for so much money, without designating any particular kind of currency, constitutional currency will be intended, and he cannot afterwards, when sued on his bond, show that the collection was in other funds, and ought to be paid in that alone. The decree will be conclusive; *Bailey v. Dilworth*, 10 S. & M. 404.

See *ante*, 66; and PROBATE COURT, 175.

128. *Collections in Confederate treasury notes.* An administrator is entitled to a credit for Confederate treasury notes, which he has collected in good faith for the estate, and has not used; and also for such money invested by him, under the statute of this State, in Confederate States bonds; *Trotter v. Trotter*, 40 M. 704. Under the statute of 1865, Sessions Laws, p. 142, an administrator having collected Confederate money, and being unable to use the same for the estate, is only liable for the actual value of what he did not use; *Williams v. Williams*, 43 M. 430.

129. *Power to compound debts.* Executors and administrators are bound to the exercise of such prudence and caution, in the administration of the estates committed to their care, as a judicious man looking to his own interest would exercise in regard to his own affairs. They may compound debts or enter into arbitration, and these acts will be upheld if they are fair, beneficial to the estate and free from fraud, negligence and misconduct; *Bailey v. Dilworth*, 10 S. & M. 404; S. P., *Gulledge v. Berry*, 2 G. 346. But where the debtor is solvent, the administrator cannot receive from him, as payment, a slave or other property; and a payment so made will not discharge the debtor; *Gulledge v. Berry*, *supra*. He can take property in payment of the debt, if he act in good faith, and such course be necessary to save the debt; *Grayson v. Wilson*, 5 C. 553. He can, acting in good faith, compromise debts due intestate, renew securities for debts and postpone their payment, without previous sanction of the court; *Martin v. Tarver*, 43 M. 517.

129a. *Same: Case in judgment.* Two bills of exchange belonged to intestate, the drawer and drawee being both non-residents; and they did not come into the hands of ad-

ministrator till after their maturity, and no demand had been made for payment. The drawer and drawee, upon application by him, both declined payment; and the administrator being in doubt as to their liability, and fearing that the debt might be lost to the estate, negotiated them in exchange for promissory notes; some of these he collected: *Held*, that his conduct was judicious, and would be sustained; *Anderson v. Gregg*, 44 M. 170. See *ante*, 16b.

2. The Diligence required of an Administrator.

130. *Bound for reasonable diligence.* An administrator is liable for negligence, and he is bound to exercise the same diligence and attention to the business he has voluntarily assumed, which discreet men bestow on their own business; *Berry v. Parks*, 3 S. & M. 625; *Baily v. Dilworth*, 10 S. & M. 404; *Smith v. Hurd*, 8 S. & M. 682.

3. Administrator is a Trustee.

131. *He is bound to sell property for the interest of creditors.* An administrator is a trustee for creditors and distributees, and the assets are a trust fund, and it is his duty to dispose of them for the highest price for the benefit of creditors, whose claims are superior to those of the distributees; and if by the fraudulent machinations of the administrator the sale be made for an inadequate price, and bought in for the distributees, to the injury of creditors, it will be set aside; *Planters' Bank v. Neely*, 7 H. 80. See *post*, 341, 341a.; 207, 208.

132. *Trustee for distributees.* Where the distributees are parties to a petition for distribution, their answer denying the heirship of the petitioner will not be affected by a *pro confesso* against the administrator, for he is a mere trustee, having no interest in the question, and his admission cannot prejudice the heirs; *Porter's Heirs v. Porter*, 7 H. 106.

133. *He cannot make a profit out of the estate.* An administrator is not permitted to trade in the property of the estate, so as to become the owner of it. His transactions will be for the benefit of the estate. Where, therefore, an intestate had bought a town lot and paid one-half the purchase money and gave his note, with security, for \$500, for the balance, and took a title bond which he desposited with the surety as indemnity, and the administrator, believing that the surety could sell the lot if the money was not paid at maturity, made a private sale of the lot, by which he received enough money in cash to pay the balance due by the intestate on the purchase money, and with it paid the balance, and directed the vendor to make title to the purchaser, which was done, and the administrator afterwards surrendered the balance due by the last purchaser, and in consideration thereof took the title to himself; it was held that the sale made by him was void, and that the resale to him enured to the benefit of the estate; *Williams v. Stratton*, 10 S. & M. 418.

134. *Same.* And it was held further, that

the administrator was not entitled to an equitable lien on the lot for the amount of the debt secured by the deposit of the title bond and paid by him; and that it was doubtful, under the statute of frauds, whether the deposit of the title bond created an equitable mortgage on the land, and if it did, it was lost when the bond was surrendered to the vendor and he conveyed the title; *Ib.*

135. *Estate entitled to what is saved in paying a debt for less than its full amount.* If an administrator pay a *pro rata* dividend of an insolvent estate, to a bank, in its depreciated paper, the amount thus saved will belong to the estate; *Dahlgreen v. Peale*, 2 C. 142. And so, if he buy up a claim against the estate at a discount, with the funds of the estate, or fraudulently pay it at a great depreciation, for his own benefit, he will be entitled to a credit only for the amount he has actually paid; *Anderson v. Duke*, 6 C. 87.

136. *Purchase for estate without authority.* Where an administrator makes a purchase of slaves for the estate and with the funds of the estate, but without authority in law to do so, the property will belong to him and not to the estate, if the heirs make no objection; but objection made by strangers will not have the effect to give the property to the administrator; *Harper v. Archer*, 6 C. 212.

137. *Purchase of land where the title of decedent was void.* It is the duty of an administrator, executor or other trustee, to act in relation to the trust property, for the benefit of the *cestui que trust*, and he cannot avail himself of his position, or of information which he gets by it, to acquire adverse interests in the property. But this principle results from the rule that it is his duty to act in good faith for the benefit of the estate, and it necessarily presupposes in him a power so to do. Hence, it was held that where the testator had bought land, the title to which was wholly void, being public land, and was not merely a defective title, that the executor could purchase it for his own benefit when it was sold by the government. And that this was so, though the vendor of the testator (supposing, but without any contract or agreement with the executor, that the latter was acting for the estate) assisted in clearing away pre-emption rights, and otherwise facilitated the executor in getting the title. The rule would be otherwise if the title were merely defective; but in this case no title whatever was conveyed, and the executor, in getting it, made an entirely new contract, which, under the will, he was not authorized to do for the estate; *Glenn v. Thistle*, 1 C. 42.

138. *Same.* In this case the vendor surrendered to the executor, as soon as the land was discovered to be public land, all the notes for the purchase money which he could control, and this was held to be a rescission of the contract and a circumstance to bar an endorser of one of the notes for the purchase money from recovering, upon the ground that the title had been made good by the subsequent purchase of the executor; *Ib.*

4. The Title of an Administrator.

139. *Extent of his title.* The legal title to a decedent's property is vested in the administrator for certain special purposes, viz.: for collecting and preserving the assets, paying the debts, and for distribution. Subject to this the whole interest in the estate vests immediately on the death of the intestate, in the persons entitled under the statute to distribution; and where there are no debts to be collected or paid, and where it is unnecessary for the purpose of distribution that an administrator should be appointed, and none is in fact appointed, the legal title to the personal estate vests, without distribution, in the distributee, "in the same way and manner" as real estate descends to the heir; *Andrews v. Brumfield*, 3 G. 107.

And when there are no debts and no administrator, the distributees may sue for the property, and the statute of limitations will commence to run against them, and when they are barred, a subsequently appointed administrator will also be barred. In such a case the administrator will be a mere naked trustee for the distributees, and can assert no right which they could not assert; *Manly v. Kidd*, 4 G. 141.

His title exists only for special purposes, viz.: to enable him to administer the estate according to law, by paying the debts and making distribution; and when these acts are done his title ceases. And when distribution is made to a life tenant, it being also a distribution to the remainderman, the administrator, after the death of the life tenant, has no title to take the property and distribute it to the remainderman; *Hall v. Hall*, 5 C. 458; S. P., *Andrews v. Brumfield*, *supra*.

140. *Trust may exist after distribution.* But where the testator gave to his widow during widowhood, property, clothing it, however, with a trust to support his children, and the trust in case of her death was to be executed by the executor; if this property be levied on to satisfy a private debt of the widow, and she fail to assert the rights of her children, to prevent a sale, the administrator *c. t. a.* may do it; *Lucas v. Lockhart*, 10 S. & M. 466.

141. *Distribution: Title of distributee and administrator.* The object of distribution is to ascertain the share of each heir, so that he may enjoy it in severalty; it confers no new title. The title of an administrator is that of a mere trustee for those beneficially interested, and extends no further than is necessary to enable him to execute his trusts; and for distribution it is unnecessary that the legal title be vested in the administrator. The heirs may, therefore, when there are no debts, make by consent, a distribution of the personalty among themselves, and such distribution will be binding on them and the administrator, and will subject the share allotted to each heir to the payment of his own debts; *Henderson v. Clark*, 5 C. 436. See *post*, 267, 269.

141a. *His title to notes payable to him as*

administrator. Where a note is made payable to "A. as administrator of B.," suit may be brought on it in the name of A., and in his own right. The words "as administrator of B." are merely a *descriptio personee*. And if suit be brought on such a note in the name of A. "administrator of B.," these words may be treated as surplusage; and hence, to an action on such a note in the name of A. "as administrator of B.," it is no defence that A. was not administrator of B. when the suit was commenced; *Falls v. Wilson*, 2 C. 168 (citing *Carter v. Saunders*, 2 H. 851; *Laughman v. Thompson*, 6 S. & M. 259; *Trotter v. White*, 10 S. & M. 607).

And such a suit, if the plaintiff die, may be revived in the name of his administrator, although the note in fact belongs to the estate; *Laughman v. Thompson*, *supra*.

And so a foreign administrator may maintain a suit in his own name, in the courts of this State, to enforce collection of a note made payable to himself as administrator; and it makes no difference that he styles himself in the suit as administrator; *Trotter v. White*, *supra*.

See GUARDIAN AND WARD, 46, 47.

142. *Same: Where there are two administrators.* The legal title to a bill single payable to two joint executors, upon the final discharge of one, is vested in the other, who may sue on it in his own name. And this is so, though the executors gave separate bonds, and administered the estate separately, and the bill single was taken by the discharged executor in the course of his separate administration; *Grimstead v. Fonte*, 3 G. 120.

143. *Title to personalty unaffected by the relationship of testator.* It is no bar to an action by the administrator of a legatee to recover the legacy against a purchaser from the executor of the testator, that the heirs of the legatee and the testator are the same, and that if plaintiff recovered the property, it would go to the heirs of the original testator; *Magee v. Gregg*, 11 S. & M. 70.

5. Liability of Administrator for Wrongs, Trespass, Hire, &c.

144. *Liability to hire of property to adverse owner.* If a bill be filed for the recovery of slaves, to which the defendant claimed title, and pending the litigation the defendant die, and thereupon the suit is revived against his administrator, who keeps possession of the slaves, and defends the suit in his representative capacity, and by the final decree the complainant's right to the slaves is sustained, the defendant ought to be charged in his representative capacity, and not personally, for the hire accruing both before and after the death of the intestate; *Clark v. Hill*, 2 G. 520.

145. *Liability to adverse owner for property allowed by him to be sold.* A judgment against an administrator only binds assets in his hands; and hence, if he, in his character of administrator, holds property belonging to another, and with notice of the adverse

title allows it to be sold under an execution against him, he will still be liable to the real owner in an action of detinue for the slave; *Lovry v. Houston*, 3 H. 394.

146. *Liability to specific legatee for hire.* If an executor, by order of the Probate Court, hire a slave, specifically bequeathed, during the pendency of litigation respecting the validity of the will, and apply the proceeds to the general estate, he will, upon the establishing of the will, be personally liable to the legatee for the hire; the misapplication by the executor of the hire to the benefit of the estate will not constitute the legatee a creditor of the estate. And this is the rule, though the legatee refuse to accept the legacy during the litigation. In such case, the executor is not only liable for the hire actually received, but for what he might have received by the use of ordinary diligence; *Fonte v. Horton*, 7 G. 350.

147. *Same.* When a specific legatee of a slave has acquired possession of a note payable to the executor (and which was taken by the latter for the hire of the slave whilst in the executor's possession), and the executor afterwards recovered judgment against the legatee for the value of the note; it was held that in a proceeding by the legatee against the executor to recover the hire, the latter was only responsible for so much as he had collected on the judgment, and that the executor would not afterwards be entitled to collect any portion of the judgment; *Ib.*

148. *Executor entitled to hire of specific legacy for twelve months.* An executor is entitled to hire for twelve months from testator's death, from the legatee of a slave, although the legatee was in possession at the testator's death; *King v. Cooper*, W. 359.

149. *Liability for trespass.* An executor of a lessee is bound by the covenants in the lease, and if that contain a covenant that the landlord shall re-enter on failure of tenant to pay the rent, and the executor after default made, remove the buildings, he will be liable in trespass to the lessor for damages; *Winston v. Franklin Academy*, 6 C. 118.

150. *Liability for illegal loans.* A loan by an administrator, without authority of law, of notes or bonds belonging to the estate, will render him liable for the amount thereof, although the makers or obligors become insolvent; unless he show that by the use of the greatest diligence, the money could not have been collected or secured by any legal means; *Cason v. Cason*, 2 G. 578. And he is also liable for interest on such loans, at the rate established by law when they were made, though the rate were subsequently reduced; *Cason v. Cason*, *supra*.

151. *Liability for removing property from the State.* The 93d section of the Act of 1821 (H. C. 665), which enacts that no executor or administrator shall, on any pretence whatever, remove the property of his testator or intestate beyond the limits of the State, and that in case of any such removal that the judge of the Court of Probate, having jurisdiction of the estate, shall forthwith in-

stitute suit "for the use of the heirs" on the bond of such executor or administrator, and the jury trying the cause, on satisfactory evidence of the removal as aforesaid, shall render a verdict against the defendant or defendants for the full value thereof, and such other damages as the parties interested may have sustained, declares a rule of public policy for the purpose of securing to the courts of the estate to which the administration of estates has been committed, the full exercise of their jurisdiction for the benefit of those interested, and it gives the action as a specific right to the heirs, not by way of compensation for the actual damages sustained, but as a punishment on the offending administrator or executor for a gross violation of his duty and of law; and hence, in such a case the heirs are entitled to recover the full value of the property so removed; although the executor or administrator may have sold it, and applied the value to the payment of the debts of the testator or intestate. But the action is given to the "heirs" only, and it is unnecessary and improper that the widow should be joined as usee in the action; *Bridges v. Maxwell*, 5 G. 309.

6. Liability to Account for Lost Property and Illegal Disbursements.

152. *Liability for due care in preserving property.* An administrator is bound to account for all property of the intestate which he has received, and if any of it be lost, he must show he used due care and prudence to preserve it. A slave belonging to an intestate was run off by an insolvent son of the administrator, and carried to Benton, in this State; the administrator advertised for a recovery of the slave in a newspaper, which he did not show had any circulation at Benton, and he used no active steps to secure or obtain the slave: *Held*, he was liable for his value. Whether in such a case it is the proper mode to hold the administrator liable, for a distributee to object to the administrator's final account, because the slave is not accounted for, and for the court to hear evidence of the loss and value; *Quære?* *Boggan v. Walter*, 12 S. & M. 666.

153. *Same.* An administrator is liable as such for all property of the decedent, which has come to his hands after the intestate's death, whether before or after his appointment as administrator; *Hicks v. Harris*, 4 C. 420.

154. *Liability for improper disbursements.* Where an administrator in settling debts which he holds against the estate, charges too much interest, even with the consent of a part of the heirs, he is accountable for the excess as assets, so far as the rights of the non-assenting heirs are concerned; and the excess being assets improperly withheld from distribution, he is liable for interest on it; *Cole v. Leake*, 5 C. 767; *S. P., Cason v. Cason*, 2 G. 578; *Crowder v. Shackelford*, 6 G. 321.

7. Liability for Costs.

155. *Is personally liable for costs.* The

statute (H. C. p. 670, § 111), provides that executors and administrators may sue and be sued, "and that they shall be entitled to or answerable for costs, in the same manner that the decedent would have been, and they shall be allowed for the same in their accounts, provided the court awarding costs against them, shall certify there were probable grounds for instituting the proceedings, or defending the action, in which a judgment or decree shall be rendered." Under this statute, the judgment against them for costs should be *de bonis propriis*; *Williamson v. Childress*, 4 C. 328.

And a judgment in favor of an administrator, is not liable to sale for the payment of the costs, the administrator being personally liable therefor; *Ruff v. Cockerell*, 2 G. 57.

156. *Allowance to him for costs.* He is also entitled to an allowance for costs when he has been sued and judgment rendered against him upon an undefended cause of action, if he was not in default, owing to a deficiency of assets, or his inability to convert the assets into money, for the payment of debts; *Effinger v. Richards*, 6 G. 540.

8. Liabilities of Joint Administrators for the Acts of each other.

157. *Extent of liability for each other.* When there are two or more executors, each has a several right to the assets of the estate, and is solely responsible for what he receives. One is not liable for a *devastavit* committed by the other, unless he consented to the same, or negligently omitted to take any steps to prevent it; *Gaultney v. Nolan*, 4 G. 569.

He is liable for the acts of the other, which were done by agreement of the two, in the joint names of both, and on their joint account, and he is also liable for a misapplication of the trust funds, made by his co-executor, if by the exercise of reasonable diligence and care he could have prevented it. He is bound to take notice of accounts rendered by his co-executor, and he is chargeable with a knowledge of a misapplication of the trust funds therein disclosed; *Fonte v. Horton*, 7 G. 350.

And when it is shown that slaves, specifically bequeathed, were hired out by one of the executors, in the joint names of both, and with the consent and approbation of both, an account rendered by one, showing the amount of the hire, is evidence against the other; *Fonte v. Horton*, *supra*.

The rendition of a joint annual account, by two executors, is *prima facie* sufficient to charge both for the assets embraced in it; but either may be exonerated from liability, by showing that no assets came to his hands, and that the estate was solely administered by the other; *Gaultney v. Nolan*, 4 G. 569.

158. *Acknowledgment of liability to account.* When a positive and absolute acknowledgment of liability for the acts of his co-administrator is made by one cognizant of all the facts, and entirely competent to form an opinion as to the extent of his liability (as by a lawyer of eminence), the acknowledgment is conclusive, unless it be shown affirmatively

that it was founded on mistake; *Jeffries v. Lawson*, 10 G. 791.

159. *Liability when they execute a joint bond.* The execution of a joint administration bond by two administrators, renders each of them liable for the faithful performance of the duty of his associate as well as of himself; and hence, though one of the administrators may have received all of the assets, and conducted the entire administration of the estate, the other is liable to account; *Ib*.

160. *Liability to render an account.* How far one executor is liable for the acts of his co-executor, depends on circumstances, and these must be shown before the liability can attach; but it is proper, where, in answer to a petition against him for an account, the surviving executor states he never acted as executor, and that the deceased was sole acting executor; that no part of the estate ever came to respondent's hands; that the court should order that he render an account of his acts as such, and then the petitioner can contest his liability; *Nolan v. Calvit*, 12 S. & M. 273.

161. *Presumption as to which payment was made to.* When there are two executors who gave separate bonds, a note taken by one payable to himself alone, cannot be charged against the other, upon the mere proof that it has been paid, without a showing that it was paid to him. In the absence of proof, as to which of them the payment was made, it will be presumed that payment was made to the one who was payee in the note; *Smith v. Brown*, 3 C. 422.

162. *Service of process on one of several.* Whether service of a *scire facias* to revive a suit against several administrators is good as to all, if made only on one; *Querre*? It seems that it is, as they fill but one office, and as the act of one is the act of all. But whether a judgment rendered on such service would be erroneous or not, it is not void; and if not reversed on writ of error, the judgment will be admissible in evidence, as a judgment against all the administrators in an action against them on their bond, for a failure to pay it; *Woodward v. Fisher*, 11. S. & M. 303.

Such a service was held to be irregular in *Breckenridge v. Mellon's, Adm'r.* 1 H. 273.

All the administrators should be served with process. It will be error to discontinue as to those not served, and proceed to judgment against those served; *Barnes v. Jaregan*, 12 S. & M. 108.

Yet in *Hunt v. Anderson*, 4 G. 559, it was held, that if the summons be not served on one of two joint executors sued in an action at law, it will not be error to render judgment against the one served with process, without a formal dismissal as to the other; in such case the judgment is equivalent to a discontinuance as to the executor as to whom there was no service of process.

9. Right to bind the Estate by new Contracts, Waivers and Admissions, and his personal Liability on such Contracts.

(A.) HIS PERSONAL LIABILITY.

163. *He is liable on his own promise.* An

executor is individually liable when he promises in writing to pay an account stated—when it does not appear to be for money due by the testator—although he expressly promise to pay as executor. And so, he is liable for purchases made by him for the estate, though he expressly contract in his character as executor; *Sims v. Stilwell*, 3 H. 176. (S. P. as to guardians, see GUARDIAN AND WARD, 87.)

He is personally liable, though he expressly promise to pay as executor, where the nature of the engagement necessarily creates an individual liability, as if he make a promissory note or other written contract, and if it does not clearly appear that it was given or made for a debt or liability of the testator; or if it be made to pay a debt at a future day with interest, which necessarily makes it the personal debt of the executor; *Woods v. Ridley*, 5 C. 1195 (citing and confirming *Sims v. Stilwell*, *supra*); and declaring the case of *Steel v. McDowell*, 9 S. & M. 193, so far as it countenances the idea that a creditor having the promise of the executor, where that promise is based upon the liability of the testator, has an election to proceed against the executor as representative of the deceased, or against him personally, to be inconsistent with the authorities generally, and with *Sims v. Stilwell*. It seems if he give a promissory note bearing interest for the debt of testator, he will be personally liable; *Turner v. Brown*, 3 S. & M. 425.

163a. *Power to execute, and liability on, forthcoming bond.* See FORTHCOMING BOND, 3.

164. *Bound on injunction bond.* The court or chancellor may require of an administrator, as a condition precedent to the grant of an injunction applied for by him, that he execute an injunction bond, and if the administrator accept the injunction by executing the bond, it will be binding on him and his sureties personally; *Brown v. Speight*, 1 G. 45.

165. *Claimant's bond: Forthcoming bond: Refunding bond.* And so if he make claim, as administrator, to property levied on under execution against a third person, he is liable, individually, if the claim be not sustained; *Taylor v. Tatum*, 1 G. 701. He may give a forthcoming bond, on a judgment rendered against him as administrator, or against the decedent, but he will be bound on it personally; *Thompson v. Ross*, 4 C. 198. And he may execute a refunding bond, which is necessary to enable him to procure the distributive share of his intestate; and it seems such bond will bind him personally; *Maxwell v. Craft*, 3 G. 307.

166. *The consideration necessary to make him liable on his promise to pay debts of testator.* An executor or administrator will not be bound on his promise to pay the debt of his testator or intestate, unless there be a consideration for it. The considerations which will make such a promise binding are various—as having assets in his hands at the time—forbearance of suit for a definite period. And if he has charged the estate with

the debt so paid, and received a credit for it, it will be a strong circumstance to show his liability; *Turner v. Brown*, 3 S. & M. 425.

And a note executed by an administrator in his individual capacity, in satisfaction of a decree rendered against him in his representative capacity, is not binding on him beyond the amount of assets received by him to pay the decree with, unless it be based on a new and valuable consideration; *Byrd v. Holloway*, 6 S. & M. 199.

167. *Same: Case in judgment.* An executor is not liable to creditors beyond the amount of assets of the decedent; yet he may by his own act, if in writing, and based on a valuable consideration, become personally responsible for the testator's debts. Hence, if a creditor take from the executor in satisfaction of his debt against the estate, a note on a third party, which is guaranteed by the executor, the latter will be liable on the guaranty—the contract being in writing, and the surrender by the creditor of his claim against the estate being a sufficient consideration to support the guaranty. In this case, the guaranty was in these words, "For value received, I assign this note to L. (the creditor), and waive demand and notice, and warrant the consideration for which it was given; but as to the solvency or insolvency of the makers to be without recourse," and it was signed by the executor: *Held*, 1st. That it created a personal liability on the executor, according to its terms; 2d. That this liability was not at all dependent upon the solvency or insolvency of the testator's estate; 3d. But that the executor could show want of consideration for the promise, by showing that the claim against the testator, which had been settled by the note and guaranty, was invalid; *Robinson v. Lane*, 14 S. & M. 161.

B. HIS POWER TO BIND THE ESTATE.

168. *Power of executor to bind the estate by new contracts.* It is unquestionably true, as a general rule, that an administrator can make no contracts, nor create any new debt by which the estate would be chargeable at law; and that he is individually responsible, though he expressly promise to pay "as administrator." He takes the place of the intestate as to all existing contracts, but has no power to create new liabilities; nor can he waive any existing defence; he cannot even stipulate for the payment of interest where none is due. He cannot be sued at law in his representative capacity upon a promise to pay borrowed money, upon the ground that it was obtained for the benefit of the estate. In such case, if the lender has any remedy, it is in equity, upon the showing that the money so loaned was actually and legally applied to the benefit of the estate; *Woods v. Ridley*, 5 C. 114. See *post*, 170, 177; S. P., *Short v. Porter*, 44 M. 533.

169. *Rights of administrator paying debt: Substitution of creditor.* But when an administrator pays a debt, or discharges a contract which constituted a just charge against the estate of his intestate, out of his private

funds, or by the use of his credit, he will be entitled to an allowance for it in his administration account; and if the estate has passed into the hands of the distributees, he is entitled to enforce payment of the demand against them. And it seems to be settled, also, that where an administrator has given his own note in payment of a debt of the intestate, the estate will not thereby be released unless such were the agreement of the parties, and this is so though the administrator has in his settlements given himself credit for the amount. In such case the executor may proceed against the estate in equity, or against the executor individually; *Ib.* See *post*, 194. S. P., *Short v. Porter*, 44 M. 533.

170. *Suit against executor on his promise: Power to bind estate.* An administrator may be sued as such, on a promise made by him in that capacity, and a count against him on such a promise may be joined with a count against him on a promise made by the intestate. The test being that, wherever the subject matter of an action would, when recovered, be assets, the executor may sue in that capacity; the converse also being true, that whenever the assets in his hands would be liable for the debt, he may be sued as administrator; *Steele v. McDowall*, 9 S. & M. 193; overruled, however, in *Woods v. Ridley*, *ante*, 163.

171. *Same.* An action against an administrator, upon a promise made by him as such after the intestate's death, can be maintained where the contract is one which by law he was authorized to make, and where it appears that the contract was for the benefit of the estate; but a contract made by him in that capacity is not binding on the estate, if the fruits of it were not received by the estate, but by him individually; and it seems it is incumbent on the party contracting with him to see to such application; *Steel v. McDowell*, *supra*. See *ante*, 163, 168, 169.

171a. *Same.* If he give his note for a debt of the estate, it is not a satisfaction unless such were the agreement. In that case the creditor may sue the administrator individually on the note, and proceed by bill in equity against the estate; *Short v. Porter*, 44 M. 533.

C. HIS POWER TO MAKE CONTRACTS FOR CARRYING ON FARM.

172. *Same.* The statute provides for an administrator completing a crop planted at the intestate's death, and declares that the "surplus, after paying expenses, shall be assets." This statute authorizes the administrator to contract debts for necessities, which are entitled to priority of payment out of the crop. Whether in case of a deficiency in the crop to pay the expenses, the creditor can resort to other assets; *Quære?* It seems he takes the risk that the crop will be sufficient. (See *post*, 173.) But if the crops have been used as assets, then the creditor will have the right to be substituted, so far as to get from the general assets so much as the crop amounted to. And in case of a re-

moval of the administrator making the debts, his successor will be directed to make the application.

Medicine furnished slaves, though not among the articles specifically enumerated in the statute as necessities, are yet included by necessary implication; *Emanuel v. Norcum*, 7 H. 150.

And the hire of labor to work the farm is also among the necessary expenses; *Byrd v. Wells*, 40 M. 711.

173. *The expenses only bind the income.* Where a plantation is carried on by an executor under a will, which simply empowers him to do so, the executor has no power to incumber the *corpus* of the estate by contracting debts for plantation supplies beyond the income. And such debts, if created, cannot be levied of the *corpus* of the estate; *Ward v. Harrington*, 7 C. 238.

And the rule is the same where the will directs the executor to carry on the farm till the youngest child arrives at full age. He has no power to make a debt a charge on the estate, unless his power to do so clearly appears by the will; *Hogan v. Barksdale*, 44 M. 186.

D. HIS POWER TO MAKE ADMISSIONS.

174. *Can make certain admissions: Rule.* An administrator may make admissions which will bind the estate, if he acts with good faith, and with a due regard to the best interests of the estate; and hence his admission, that he has received notice of protest of a note falling due after his appointment, is competent evidence against the estate; *Duncan v. Watson*, 6 C. 187. (That these admissions are admissible against the administrator *de bonis non*, see *ante*, 38.)

And so the simple promise to pay, or the acknowledgment of a debt by an administrator, is sufficient *prima facie* evidence of the original validity of the demand, and sufficient to justify a verdict for it, in the absence of any other proof, when the claim is not barred by the statute of limitations; *Waul v. Kirkman*, 3 C. 609.

175. *He cannot waive a defence.* An executor has no power to waive a defence to a contract made by his testator. He cannot bind his testator by any promise or acknowledgment, in a case where by law the testator was released. Hence, a statement made by him to one who is about to trade for a note of the testator, that there was no set-off to it, and that it would be paid, and on the faith of which the party so informed traded for it, will not estop the executor from setting up failure of consideration to an action on the note by the assignee; *Glenn v. Thistle*, 1 C. 42 (citing *Henderson v. Illsey*, 11 S. & M. 9, for which see *post*, 177).

176. *Estate not prejudiced by administrator's silence.* An estate cannot be prejudiced or estopped by the mere silence of the administrator, or his omission to assert title for the estate, or to do an act for its interest; and hence, in a controversy between the administrator and a third person, involving the ques-

tion of the title of the decedent to property, it is incompetent to show that the administrator acquiesced in the claim of the adverse party, by introducing in evidence of his inventory of the estate, in which the property in controversy is not embraced as a part of the assets of the estate; *Lewis v. Lusk*, 6 G. 696 (citing *Magee v. Gregg*, 11 S. & M. 70. See post, this section, and *Woods v. Ridley*, 5 C. 119. See ante, 163).

And if an administrator stand by and allow personal property of the estate to be sold without objection, it will not prejudice the estate. His assent can estop his individual, but not his fiduciary rights; *Magee v. Gregg*, supra.

And, if he allow a *pro confesso* against him, on a petition for distribution by an alleged heir, this will not conclude the distributees, who are parties to the petition, and have denied by their answer the heirship of the petitioner; *Porter's Heirs v. Porter*, 7 H. 106.

E. HIS POWER TO WAIVE STATUTE OF LIMITATIONS.

177. *Same*. A claim barred by the statute of limitations at the time of the death of the intestate is not revived by the promise of the administrator (or executor where no such power is specially granted by the will). And it seems the same rule prevails when the claim was not barred when the intestate died; *Henderson v. Illsley*, 11 S. & M. 9; *Sanders v. Robinson*, 1 C. 389. In this case this principle was applied so as to defeat a recovery on such claim, the bar not being complete when the promise of administration was made. Whether an administrator is not bound to plead the statute, *Quære?* *Henderson v. Illsley*, 11 S. & M. 9. It seems, though not bound to plead it specially, he is bound to rely on it as a defence, which he may do under the general issue; *Waul v. Kirkman*, 13 S. & M. 599. Whether if he fail to rely on the statute the court is not bound to apply it as if it were pleaded and relied on; *Quære?* *Pinson v. Williams*, 1 C. 64.

178. *Power, when debt not yet barred*. Whilst it is true that an executor or administrator has no power to make a promise, which will give a cause of action upon a debt or demand against the decedent then completely barred by the statute of limitations, yet it has not been decided, nor is the court prepared to decide, that he may not make such a promise with reference to a valid debt or demand against the estate, which might then be enforced; *Bingaman v. Robertson*, 3 C. 501.

179. *Is an administrator bound to plead the statute*. An administrator is bound to plead the statute of limitations only when the defence, if set up, would be successful. Hence, if the claim be apparently barred by the statute, but is saved from the bar by an exception in the statute, as absence from the State by the intestate, he may nevertheless make voluntary payment, without being sued and interposing the statute. But in such case it

seems, he would be compelled in a contest with the heirs to show, that the claim was valid, by proving the facts which took the claim out of the statutory bar; *Roberts v. Rogers*, 6 C. 152; see ante, 177.

180. *Same*. Exceptions were filed to vouchers of an administrator, upon the ground that they appeared to be debts barred by the statute at the time of their payment. The court reviewed all the foregoing cases, and laid down the following as the true rule on this subject. That an administrator could not by his promise or acknowledgment revive a debt barred by the statute of limitations. And that where the debt was barred at the time of the qualification of the administrator he could not lawfully pay it. But in regard to debts not barred at the time of the administrator's appointment a less stringent rule would be adopted. That in the collection and payment of debts, he had necessarily a large discretion. That the policy of the law favored the payment of debts by profits made during the administration, rather than by a sale of the estate, and if a sale were made, that it should be on a long credit so as to enhance the price. That to deprive the administrator of the power to pay such debts, becoming barred during his administration, would deprive the estate of the benefit of indulgence and force all creditors to sue. And therefore, that as to such, he should have a discretion to pay them or not. And in accordance with this, the vouchers excepted to (the bar attaching during the administration) were allowed, though they were paid after the bar attached, and there was no proof, that the administrator had made a new promise to save the bar; *Byrd v. Wells*, 40 M. 711. He is not entitled to credit for the payment of a debt which was actually barred at the time of his appointment; *Trotter v. Trotter*, 40 M. 704.

180a. *Same*: And when the claim against the estate was made out as an open account, and probated as such, and then paid, and in that shape was barred by the statute, the administrator will not be permitted to show that it was in fact due by a written instrument, which took it out of the statute; *Trotter v. Trotter*, supra.

10. Liabilities for carrying on Farm without Authority.

181. *Liable for rent and hire, or profits*. If an executor carry on the plantation of the testator without an order of court, or authority in the will, he will be liable for rent and hire, or for the net profits, at the election of the heirs; but they are entitled to an account before making the election, and they ought to make their election in the petition for distribution; *Billingslea v. Young*, 4 G. 95. The election once made is irrevocable; and if they fail in their petition for distribution to elect expressly to take hire and rent, they being aware that the plantation has been carried on by the administrator, it will be held an election to take the profits; *French v. Davis*, 9 G. 167.

182. *Heirs may consent.* But the adult heirs may consent to the executor's carrying on the plantation, and this consent may be by implication. When this is done, they can only recover profits; *French v. Davis, supra.*

183. *How liability for rent enforced.* But when he carries on the farm illegally, he is not liable to account for rents in his administration account; that belongs to the heirs, and is not assets; *Trotter v. Trotter*, 40 M. 704.

11. Application of Assets and Conversion of them to his own use.

184. *Administrator may convey legal title.* It is well settled that an administrator of a person to whose order a promissory note is payable, may transfer it, so as to vest the legal title in the transferee; *Owen v. Moody*, 7 C. 79. He may assign a note belonging to the estate for a lawful purpose, and the assignee will get a good title; *Miller v. Helm*, 2 S. & M. 687; *Scott v. Searles*, 7 S. & M. 498; S. C., 14 S. & M. 94.

185. *The transfer must be for a lawful purpose.* But an administrator has no power to dispose of a note or other property of the estate in payment of his private debts; and if he do so to one having notice of the title of the estate, the assignee will get no interest or title in the note. The transfer is void as to the parties interested in the note, and the maker, if sued, may defeat a recovery by the administrator for the use of the assignee, by showing the illegal transfer; *Prosser v. Leatherman*, 4 H. 237; *Miller v. Helm*, 2 S. & M. 687; *Scott v. Searles*, 7 S. & M. 498; S. C., 14 id. 94. And if the note on its face be payable to the administrator in his trustee capacity, this is notice to the assignee of the title of estate; *Miller v. Helm, supra.*

See TRUST AND TRUSTEES, 103.

188. *Right of administrator to retain a note for balance due him.* An administrator has a right to retain for a balance due him on final settlement, a note of the estate; *Prestidge v. Pendleton*, 6 C. 379; but he has no right to retain a note for a larger amount than the balance due him, and if he do so, and transfer it to another with the understanding that the assignee will pay out of the proceeds the surplus due to the estate after paying balance due the administrator, the transfer will be void, because the estate has an interest in the note and the cause of action cannot be split. And a court of chancery will, at the instance of the administrator *de bonis non* enjoin the transferee from collecting the note and direct a delivery of the note to him, making, however, an order protecting the interests of the transferee, to the extent of the balance due to the administrator; *Scott v. Searles*, 7 S. & M. 498; see *post*, 192.

189. *Illegal assignment good if the note be accounted for on final settlement.* When an administrator has transferred a note belonging to the estate, and has subsequently made a final settlement, in which he accounts for the note as money, the heir cannot recover

the note from the assignee until the final settlement has been set aside; *Grayson v. Wilson*, 5 C. 553; *Searles v. Scott*, 14 S. & M. 94; and if the administrator has a partial interest in the estate as distributee, he has the right to use such assets as would belong to him in that capacity; and if after a final settlement, in which he has accounted for a note so used, he continues to plant with the property of the estate, the transferee of the note will be entitled to hold it until the settlement of these subsequent accounts and showing that the administrator is indebted; *Grayson v. Wilson*, 5 C. 553. That a note illegally transferred is unadministered assets, see *ante*, 32.

190. *Liability of administrator for conversion.* Where an administrator has converted personally to his own use, he is chargeable with its value, and he may be charged with the appraised value, unless he show that such valuation is excessive; *Cole v. Leake*, 5 C. 767.

12. Administrator not liable beyond Assets and his rights where he exceeds Assets.

191. *Not liable for mispleading.* By statute an administrator or executor is not liable beyond assets for any omission in pleading, or for mispleading, or false pleading, nor is he bound to plead specially, but may give in evidence any defence under the general issue; and it seems under our law nothing will create a presumption of assets; *Vick v. House*, 2 H. 617; S. P., *Bozman v. Brown*, 6 H. 349.

192. *Right to retain assets for over payments.* An administrator who has expended more money for the estate than he had received has the right to retain it out of the funds of the estate, but if on vacating the office he fail to do so, he then occupies the position of a simple creditor of the estate; *Fort v. Battle*, 13 S. & M. 133. See *ante*, 188.

193. *Right to make distributees refund.* An administrator who pays out of his private funds a debt, or discharges a contract which constituted a just charge against the estate, will be entitled to an allowance for it in his administration account, and if the estate has passed into the hands of the heirs or distributees, he still is entitled to enforce payment of the demand; *Woods v. Ridley*, 5 C. 119.

194. *Right of surety of administrator to be substituted.* If an administrator give his own note, with security, in satisfaction of a debt of the estate, and then become insolvent, and the surety pay the debt the surety is entitled to be substituted to the right of the administrator to have the assets of the estate applied to the payment of his debt. Where an administrator pays beyond the available assets then in his hands, he is a creditor of the estate, and entitled to be reimbursed out of the equitable or other assets, which may afterwards become available; *Gowing v. Bland*, 2 H. 813. See *ante*, 169.

See PRINCIPAL AND SURETY, 65, *et seq.*

13. Rights and Powers over Realty.

195. *Has no right to rent or power till in-*

solvency. An administrator, unless the estate be declared insolvent, has nothing to do with the realty of his intestate, upon whose death it goes directly to his heirs, who are entitled to the rent accruing from that time. Hence, an administrator cannot set off against a judgment in favor of a creditor, rent due by the creditor, and accruing since the intestate's death; *Bullock v. Sneed*, 13 S. & M. 293. The administrator has no power over the realty, it goes to the heirs, and he cannot divest their title by surrendering the title papers of his intestate and procuring a deed to be made to another; *Glen v. Thistle*, 1 C. 42; *S. P., Rucker v. Dyer*, 44 M. 591.

196. *His liability and duty in respect to taxes on realty.* A tax assessed on the realty of a decedent in his lifetime, is his personal debt, which his administrator is bound to discharge. And as the realty is assets for the payment of debts whenever there is a deficiency of personalty, the administrator may keep it clear of incumbrance, by paying the taxes due thereon, and redeeming it from a purchaser at a tax sale, when he shall have reasonable ground to believe that it will be needed for paying debts; and in any event, the disbursement being for the benefit of the heir, he cannot object to an allowance to the administrator in his account, for money so paid out in redeeming and paying the taxes due on the land; *Bowers v. Williams*, 5 G. 324.

197. *His liability to account for rent.* An administrator is not chargeable in his administration account for rent of land, which he used in carrying on a farm with the intestate's property, without an order of the Probate Court; his liability is to the heirs; *Trotter v. Trotter*, 40 M. 704. Yet after an administrator has received the rent of real estate, and accounted for it in his annual accounts to the Probate Court as assets, he is estopped to deny that he had authority to receive it; and he will be accountable, therefore, as for assets rightfully received; and especially will this be the case where he has paid debts of the estate to an amount equal to the rents received; *Crowder v. Shackelford*, 6 G. 321 (citing *Satterwhite v. Littlefield*, 13 S. & M. 302, for which see PROBATE COURT, 16h).

198. *Administrator's power over realty by waiver and consent of heir.* As a general rule an administrator has no power or control over the freehold estate of his intestate; yet it is subject to the payment of debts before actual appropriation of it for that purpose; and the heir may waive his right in it, and a compliance with the conditions prescribed by law for the regular exercise of the power of the administrator over it, and may consent to acts appropriating it to the payment of the ancestor's debts; *Crowder v. Shackelford*, 6 G. 321 (citing *Lee v. Gardiner*, 4 C. 521; *Kempe v. Pintard*, 3 G. 324, for which see *post*, sub-division Sales of Realty).

199. *Power over realty under Act of 1865: Session laws*, p. 140. This act does not authorize an administrator to lease lands of the intestate, except only where it consists of

a plantation, furnished with mules, horses, farming utensils, &c. The act does not apply, so as to give the administrator the power to lease the plantation, where there is nothing but the plantation, and no appliances of personal property for carrying it on; *Murphy v. Thomas*, 41 M. 429.

200. *His right to sue for trespass to realty.* The right to recover damages for a trespass committed to realty in the lifetime of the intestate, survives to his administrator; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374.

201. *His right to foreclose mortgage on realty.* A mortgage on realty is only a security for the debt, which is assets, and belongs to the administrator of the mortgagee, who may therefore bring a bill to redeem without making the heirs of the mortgagee parties. And under art. 14, p. 308, of the Rev. Code of 1857, payment of the mortgage debt to the administrator of the mortgagee of itself revests the title in the mortgagor; *Griffin v. Lovell*, 42 M. 402.

202. *His right to fixtures.* See *FIXTURES*.

203. *His right to emblements.* See *EMBLEMENTS*, 2.

203a. *His right to create mechanic's lien on the estate.* An administrator has no right or power to create a lien on the real estate by erecting buildings thereon; but if he makes such erection the mechanic has a lien on the building, and may sell and remove it; *Weathersby v. Sinclair*, 43 M. 189.

14. His Duty as to Sales.

See *post*, sub-divisions Sales of Personalty; Sales of Realty.

204. *Duty as to the security.* An administrator selling property on a credit must take good security; but if the security be good at the time, he will not be liable if the debt be lost by unavoidable casualty; *Gordon v. Gibbs*, 3 S. & M. 473; *S. P., Bodley v. McKinney*, 9 S. & M. 339.

205. *His duty and trust in respect to getting highest price.* The creditors of an estate have the first claim upon the property, at the hands of the administrator, and it is his paramount duty to protect their interests by using every effort to make it sell for the best possible price. He cannot purchase at his own sale, either directly or indirectly, nor can he sell under a secret trust that he is to have an interest in the property, or is to derive a benefit from it. Nor can he so arrange a sale, that the property shall be purchased, by his friends, at a reduced price. The property is devoted by law to particular purposes, and it is a breach of trust in the administrator, to permit counteracting interests to divert it from its legitimate designation, or diminish its value; *Pearson v. Moreland*, 7 S. & M. 609.

206. *Duty as to confirmation of sale made at a low price.* Where property has been sold by an administrator at a reduced price, and creditors are objecting to the confirmation of the sale, the desire and exertion of the administrator to have the sale confirmed—the purchaser being a near relative and a member of his family—is of itself well calculated

to create doubts as to the fairness of the administrator in conducting the sale, as a strict regard for the rights of creditors would induce him to desire the sale set aside; *Ib. S. P., Planters' Bk v. Neely*, 7 H. 80, for which see *ante*, 131.

207. *Sale held fraudulent on part of administrator: Instance.* The sale of all the personality of an estate appraised at \$25,000, was advertised by the administrator. An agent of a large creditor was under a mistake as to the place of the sale, supposing it would be made at the house of the administrator, and he accordingly went there for the purpose of bidding. A witness was asked by the administrator to detain the agent there till the sale, which was made at another place, was over. The agent remained at the administrator's house, and took dinner, and when he applied to the administrator's wife to know when the sale would take place, was answered; "Not before twelve o'clock, and that she would take no advantage of him." Whilst the agent was at the house still supposing that the sale would be made there, the administrator came in, and on being asked about the time of the sale, informed the company that it was over. The property brought one-fifth of its appraised value, and was bought in for the benefit of the heirs: *Held*, that the sale was fraudulent, and should be set aside; *Planters' Bk v. Neely*, 7 H. 80.

208. *Same: Another instance.* A sale made under the following circumstances, was held fraudulent on the part of the administrator and of the purchaser, and set aside. The administrator had expressed a desire that another should buy the property for him, and he had also expressed the opinion that the property would sell low, as no person would bid against him and the intestate's children. Very few persons attended the sale, and when the legal hour for the sale arrived, the administrator was informed that several persons desiring to bid were on their way to the sale and would soon be there, yet he directed the auctioneer to proceed at once with the sale. The administrator stated to a person wishing to bid, that his sister-in-law wished to bid. She was the sole bidder at the sale, except one creditor, whose bid seemed to create surprise, and as soon as he made a bid, a friend of the administrator took him aside and secured his debt in full, and he bid no more. The sister-in-law was in tears during the bidding. The property brought a little over one-fifth of its value, and the sale was conducted very rapidly, before the arrival of persons who were expected as bidders. After the sale was reported for confirmation, a creditor, who objected, was bought off by having his claim secured in full; *Pearson v. Moreland*, 7 S. & M. 609.

15. Miscellaneous Duties, Powers, &c.

209. *Attorney to collect, cannot contract to become an administrator of debtor.* It is the duty of an attorney intrusted with the collection of a debt, to enforce its collection, if it can be done by legal means; on the other

hand, it is the duty of an administrator to scrutinize rigidly every claim presented against the estate, and to resist its collection by interposing every legal defence which may exist against it; and hence, the two characters impose inconsistent obligations, which ought not to be united in the same person; a contract, therefore, by which an attorney takes a claim against an estate for collection, and to that end agrees to administer on the estate, is void as against public policy; and no action can be maintained on it for a failure to collect the debt; *Spinks v. Davis*, 3 G. 152.

210. *Suit in chancery by one as executor, and individually.* Where D. obtained an injunction restraining all proceedings in execution of a judgment rendered against him as an individual, and also as executor, it will be intended that he did so in both capacities. So if a bill in equity be afterwards filed against D. by the plaintiff on the judgment which had been enjoined, seeking to enforce the collection of that judgment upon the ground that during the pendency of the injunction and before its dissolution, his remedy at law had been barred by the statute of limitations, it will be construed as a proceeding against him individually and as executor; *Davis v. Hooper*, 4 G. 173.

211. *Not liable on his official bond, for improperly suing out injunction.* An administrator is not liable on his official bond for damages, for improperly suing out an injunction, even where the injunction was granted without his being required to give an injunction bond; *Ib.*

212. *Usury may be pleaded against an administrator.* A person who borrows the money of the estate from an administrator at a usurious rate of interest, is entitled to make the same defence in all respects, as if the money had belonged to the administrator in his individual capacity; *Norcum v. Lum*, 4 G. 299.

212a. *Powers of husband of executrix and administratrix.* The husband of an executrix may, and indeed is bound, without qualifying as executor, to exercise all the powers of executor, vested in the wife; but the right does not survive to him, after the death of the wife; *Edmundson v. Roberts*, 1 H. 322. The rule is the same with reference to the husband of an administratrix; *Wren v. Gayden*, 1 H. 365.

213. *Power to furnish board, &c., to minor distributees.* An administrator has no power as such, to furnish board and maintenance to minor distributees; and if he do so, he will not be entitled to a credit for the sum so advanced, on his accounts; and an order of the Probate Court allowing it will be void to that extent; *Washburn v. Philips*, 5 S. & M. 600; *Jones v. Coon*, 5 S. & M. 751; *Green v. Green*, 3 S. & M. 256; *Standley v. Langley*, 3 C. 252.

See PROBATE COURT, 25.

214. *Power to employ counsel.* See *ante*, 99.

215. *Power to give counsel a large contingent fee: Case in judgment.* A suit had

been instituted by the testator in his lifetime—the amount in litigation being about \$48,000. At his death, the counsel he had employed had removed from the State, and the case was unprepared for trial. The executors being ignorant of the facts of the case, employed an attorney at \$5,000, contingent, however, upon success. The suit was gained, and the legatees objected to the fee as exorbitant: *Held*, that the executors are only bound to act in good faith in such cases, and to exercise such care and prudence as a prudent and cautious man would exercise for himself; and that the employment and fee were proper; *Noel v. Harvey*, 7 C. 72.

216. *Where the employment was unnecessary.* An administrator will not be allowed credit for money paid to counsel, whose employment was entirely unnecessary, owing to a sufficient number of counsel having been already previously engaged; *Crowder v. Shackelford*, 6 G. 321.

217. *Effect of pendency of issue devisavit vel non, on powers of executors.* The pendency of an issue *devisavit vel non* suspends the right of the executor to proceed with the execution of the will, so far as its provisions are inconsistent with the law regulating the administration and distribution of intestates' estates, but no farther; and hence, an executor may, during the pendency of such issue, collect and pay debts due to and by the estate, and do all other acts beneficial to the parties interested; but he cannot, except at his own risk, pay legacies or otherwise dispose of the assets in pursuance of the will, and, contrary to the law regulating the administration of intestates' estates; *Kelley v. Davis*, 8 G. 76.

218. *Duty of executor to defend will.* It is not the imperative duty of the executor to defend the validity of the will, when contested by the heirs; he may give notice of the pendency of the suit to the legatees, if adults, and to their guardians, if they be minors; and decline to incur any risk or expense on that account; or he may defend, taking the risk of establishing the validity of the will, as the condition of being indemnified out of the assets in his hands; *Ib.*

219. *Same.* Where an executor employed counsel, and otherwise expended money in defending the validity of a will, which in the end was set aside, and during the pendency of the litigation he paid legacies to persons who were also distributees; it was held on final settlement he was entitled to charge the expenses of defending the will on the shares of the distributees who did not contest it, nor disclaim the benefits given by it; and that his payments of legacies were advances on the distributive shares of the persons to whom the payments were made; *Ib.*

220. *Power of executor before qualification.* Contracts made by an executor to preserve the estate before his qualification as such, are binding on the estate, as he derives his power to act from the will; *Emanuel v. Norcum*, 7 H. 150.

As to power of foreign executor over

realty without probate of the will here, see *post*, 235, 236.

221. *Execution of trust by executor.* Where an executor voluntarily executes a trust which the court would compel him to execute, his act will be sustained; *Bodley v. McKinney*, 9 S. & M. 339. For the example see *post*, 239.

221a. *Power and right as to funeral expenses.* It is the duty of an executor or administrator to bury the deceased in a manner suitable to his station and estate. Funeral expenses comprehend more than a mere shroud, coffin and grave; and where no injustice is done to creditors, a compliance with the last wishes of the decedent, as to the style and character of the funeral, if not extravagant or unreasonable, violates no principle of law. Hence, where the deceased expressed a desire that a tombstone should be erected over his grave, to be paid out of his effects, and exacted a promise from his step-son (who was afterwards appointed administrator) that it should be done, the assets of the estate being sufficient for that purpose, and the administrator accordingly erected a tombstone at an expense of \$230, it was held he was entitled to a credit for it; *Donald v. McWhorter*, 44 M. 124.

XIV. Executor de son tort.

222. *Definition of.* An executor *de son tort* is one who unlawfully intermeddles with the goods of a decedent, such as living in his house, carrying on his trade, paying off mortgages or other debts with the decedent's effects, suing for, recovering, or releasing his debts, disposing of his chattels, &c.; *O'Reilly v. Hendricks*, 2 S. & M. 388.

223. *Lawful sale does not constitute.* But to constitute this relation from a sale of goods, they must belong to the decedent, and the sale must also be without authority; and hence, a mortgagee of personalty to whom possession was delivered in the deceased mortgagor's lifetime, may, after condition broken, lawfully sell the goods to pay his debt, without filing a bill to foreclose, and such sale will not make him an executor *de son tort* of the deceased mortgagor; and if there be a surplus in his hands after paying the debt, and he retain it, there being no lawful executor to whom payment could be made, this will not make him executor *de son tort*. And so if such surplus be granted in the mortgage to another, or if there be a valid incumbrance on the property junior to the mortgage, he may pay the surplus to the person to whom it belongs; *Ib.*

224. *Same: Case in judgment.* Jones mortgaged certain slaves to indemnify his sureties on a supersedeas bond, and delivered possession to the mortgagees. The condition to indemnify was broken in the lifetime of the mortgagor, and after his death the sureties sold the slaves and paid off the mortgage, and held a surplus of \$1500. Jones had also executed a deed in trust on the same slaves to another, for a sum larger than the surplus: *Held*, that the mortgagees were not made

executors de son tort, either by the sale or the retention of the surplus; and as to the surplus, they were liable to the junior incumbents as trustees; *Ib.*

225. *Fraudulent grantee: An executor de son tort.* The grantee in a conveyance, fraudulent as to the creditors of the grantor, and who, after the death of the grantor, retains possession of the property thus conveyed, is liable to the creditors of the decedent, as his *executor de son tort*, and may be proceeded against as such both in law and in equity. And a bill may be filed by the creditors against the *executor de son tort* to set aside the conveyance, without there being any lawful executor who can be made a party to it; *Garner v. Lyles*, 6 G. 176.

See FRAUDULENT ASSIGNMENT, 78.

226. *Administration of the assets by executor de son tort: Rule on this subject.* At the common law, an *executor de son tort*, when sued by the rightful executor, might show, under the general issue, in mitigation of damages, that he had sold the decedent's goods and applied the proceeds to the payment of his debts; and if he showed that he had thus paid out the full value, he would non suit the plaintiff; but he could not in this way defeat the recovery for goods still undisposed of and in his possession. But the court disapprove of this rule because, under our system the rightful executor even cannot lawfully make a private sale of his testator's goods, and because under that rule an *executor de son tort* could convert the whole estate to the payment of a single debt, to the exclusion of others, if the estate were insolvent. And the court favored the rule that gave the right to the lawful executor to recover in full, and left the *executor de son tort*, for his remedy for paying debts, the privilege of proving them against the estate and recovering payment ratably with the other creditors; *Hardy v. Thomas*, 1 C. 544.

227. *Same.* If an *executor de son tort*, when sued by a creditor, attempt to justify his unlawful intermeddling with the assets of the deceased, by showing that he has applied them to the payment of his debts, he must show that he has applied them in the same manner that they would have been lawfully applied by the rightful executor; and if it appear that he has expended the assets in the payment of one particular debt, not being a lien on them, leaving others unpaid, he will be liable to the other creditors; *Gay v. Lemle*, 3 G. 309.

228. *Remedy: Judgment.* The statute which provides that an executor or administrator shall not be chargeable, beyond the assets of the testator or intestate, in his hands, by reason of any omission or mistake in pleading, applies as well to executors *de son tort*, as to rightful executors. Hence, in an action against an *executor de son tort*, who has omitted to plead *plene administravit*, it is error to take judgment against him, to be levied of the goods and chattels of the testator, in his hands and unadministered, and if there be none, then to be levied of his

own goods and chattels. The judgment should be in the ordinary form against rightful executors; *Hill v. Henderson*, 13 S. & M. 688.

228a. *Intermeddler with partnership property, after death of one partner, is no executor de son tort*, see PARTNERSHIP, 72.

XV. Exempt Property.

See EXEMPT PROPERTY.

229. *How affected by judgment for the purchase money.* The statute (Rev. Code of 1857, art. 284, p. 530) provides that "no property is exempt when the purchase money forms in whole, or in part, the debt on which the judgment is founded." But such judgment must be against the purchaser; and if it be against his administrator only, and be real estate, it cannot be enforced under the statute by a sale of the property; *Buckingham v. Nelson*, 42 M. 417.

230. *Exempt property not subject to administration.* Exempt property, on the death of the husband intestate, goes directly to the widow, and is not subject to administration in the Probate Court; *Whitley v. Stephenson*, 9 G. 113. But if the commissioners to appraise the estate, fail to set aside the exempt property, the widow may have their report rejected, and sent back for correction; if, however, it is confirmed, omitting the allowance, it is conclusive until reversed or set aside according to law; and if not set aside, the administrator may sell the property embraced in the appraisal, without becoming individually responsible to the widow; *Holliday v. Holland*, 41 M. 528.

XVI. Foreign Executors and Administrators.

231. *Cannot be sued here.* A foreign administrator cannot be sued here, even on a judgment rendered against him in the State in which he was appointed; *Winter v. Winter*, W. 211. See *ante*, 15.

232. *Right of foreign administrator to sue here*, see *ante*, 13, 14, 15.

233. *Same.* A foreign administrator may maintain suits in this State to enforce the collection of notes made payable to him as such administrator; for in such case he may maintain a suit in his own name as an individual, and it makes no difference that he styles himself in the suit as administrator; *Trotter v. White*, 10 S. & M. 607. See *ante*, 141a.

234. *May assent to legacy, &c.* A foreign executor may assent to a legacy so as to authorize the legatee to sue in this State for the property bequeathed to him; *Hamilton v. Cooper*, W. 542. And he may also assign a note payable to the testator, so as to authorize the assignee to bring suit on it in his own name in this State; *Andrews v. Carr*, 4 C. 577.

235. *Power before probate of will: Foreign executor: Special power to sell land.* By the common law of England "the probate of a will is merely operative, as the authenticated evidence, and not as the founda-

tion of the executor's title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death, and the probate when produced relates back to that time." This rule, though probably inapplicable under our laws to a disposition of property, which is strictly assets, made by an executor before probate, does apply to a sale of realty, made by an executor under a special power conferred by the will, and not appertaining to the office and duties of an executor in the ordinary administration of the estate; and hence, when an executor in execution of a power conferred by a foreign will which was duly probated in the State where it was made, sold and conveyed land situated in this State before its probate here, it was held that a valid title vested in the grantee, which would be protected upon the subsequent probate and record of the will in this State; *Crusoe v. Butler*, 7 G. 150. See *ante*, 220, and *post*, 241.

236. *Same*. It is not necessary that an executor who has qualified under a will made and duly probated in a sister State, should take out letters testamentary in this State, to enable him to exercise a special power conferred by the will, to sell land situated here; it is sufficient if the will be admitted to probate and record here; for as the grant of letters testamentary as authority for him to act, has reference only to the personality and the ordinary offices of administration, the only necessity for the grant of letters in the case of the special power to sell land, was to fix the person who was to execute the power conferred, and that was done by the grant of letters in the State where the will was made and probated; *Ib*.

XVII. Some Powers. Special to Executors.

1. Power to Sell and make Investments.

237. *Power and duty to invest*. This clause in a will, viz., "In the faith, trust and confidence that my executors will invest all the residue of the proceeds of my estate in good securities, in the most profitable manner," authorizes such investment in bank stock; and if at the time the investment was made, the stock was being taken by prudent and cautious men, and the investment considered safe, the executor will be protected, though it subsequently become worthless; *Smythe v. Burns*, 3 U. 422.

238. *Power to sell under will*. It is essential to the validity of a sale of either real or personal property, made by an administrator or executor, that it should be made pursuant to a valid order or decree of the Probate Court, unless where by statute it is otherwise provided or otherwise directed by the will of the testator. And in this case the will provided, that the testator's slaves should be sold by his executor, at public auction, to the highest bidder; and the court assume in the opinion, that an order of the Probate Court was necessary to the sale; *Gelstrop v. Moore*, 4 C. 206.

239. *Making investment without order of*

court; Joint power exercised by one. The testator gave to the three daughters of T. \$4,000 each, to be secured to them in the best possible manner, and the interest thereon to be paid to T. for their support and education. Moreover, he provided, that till this donation be secured, \$300 should be paid to T., and that the \$4,000 should be paid to each of the daughters of T. on her arriving at full age, or marrying, and he appointed "B. and H. jointly his executors to carry into effect the objects of the will." H. renounced, and refused to qualify. B. qualified, and made the investment of the legacies to the daughters of T. in real estate mortgages: *Held*, that the action of B. was legal and binding on the legatees; and that, if the security failed, the loss must fall on the legatees and not on the estate, and that B. was not personally liable for the failure of the securities, if he acted with that degree of caution which men of ordinary prudence exercise in the management of their affairs; and that it was no objection that the investment was voluntary, since a trustee may do that voluntarily, which a court would compel him to do; *Bodley v. McKinney*, 9 S. & M. 339.

2. Joint Powers of Executors.

240. *Common law rule: Statute*. At common law, where a power was given by will to several executors to sell land, and one of them refused the trust, the other could not exercise the power; but in England this rule was changed by the statute, 21 Hen. VIII., ch. 4, and in this State it is also changed by the statute H. & H., p. 413, § 90. By force of these statutes such of the executors as shall undertake to execute the will, may execute the powers conferred by the will. *Bodley v. McKinney*, 9 S. & M. 339; for the example see *ante*, 239. See also *post*, 245.

241. *Same: Explanation of the rule*. At common law, real estate, without express direction of the will, did not go into the course of administration, and as to that the executor was without authority, so that one empowered by the will as executor to sell land, might exercise the power of sale though he renounced probate of the will (see *ante*, 235, 236). But in regard to personalty, the rule was different. As to it, in the ordinary course of administration, co-executors are regarded in law as one person, and by consequence the acts of every one of them are deemed the acts of all, for they all have a joint and entire authority over the whole estate; *Ib*.

242. *Same*. When powers outside of the ordinary duties of an executor, such as the power to carry on the mercantile business of the testator, to borrow money, execute mortgages, &c., are conferred by the will on two or more executors, to be exercised jointly, they cannot be exercised by one alone, and all the acts of one alone, in the execution of the power, are invalid; *Bank of Port Gibson v. Baugh*, 9 S. & M. 290.

243. *Joint powers coupled with an interest*. By the common law where a naked power is

given by will to two or more persons as executors, to sell land, or to do any other act, it must be executed by all jointly in order to be valid. But if the power to sell land be coupled with an interest in the executors or agents so appointed to execute the trust, on the death of one or more of the executors, the survivor or survivors may execute the power; *Bartlett v. Sunderland*, 2 C. 395.

244. *Same: Rule further illustrated.* Where the terms creating the power to sell detached from the other parts of the will, confer merely a naked power to sell land, and yet the other provisions of the will evince a design in the testator, that the land shall be sold at all events, in order to satisfy the whole intent of the will, there also the power survives; for in that case, it is not a naked power to sell, but the power is coupled with other interests and duties which require its execution; *Ib.*

245. *Statutes on this subject.* By the English statute, 21 Hen. VIII., ch. 4, it was provided that the executor or executors qualifying, and the survivors of them should have power to sell land devised to be sold; and our statute, H. C. 671, §113, is similar to this. The statutes, however, do not authorize one of several executors to execute the power of sale, where there is no express direction to sell at all events, and where the will looks to a joint execution of the power, and gives a direction to execute it or not, at the discretion of the executors; for where a power to act is conferred on two or more, and it is dependent on their judgment whether the act shall be done or not, the power then is a special trust or confidence reposed in the judgment of all; and without the concurrence of all the power cannot be executed; *Ib.*

246. *Same: Case in judgment.* In this case, the testator directed his farm to be carried on till his youngest child should arrive at full age, and then the property should be divided; and that his debts should be paid out of the income of the farm, and his other property not necessary to carry it on; and he then added this clause, "I further will and desire, that my executors, hereinafter named, shall be at liberty at any and all times, to sell or dispose of any part of my estate at private sale, if in their judgment it will promote the interest of the estate." He appointed three executors, one of whom only qualified, and he sold a part of the land at private sale; *Held*, that the sale was void; that the power was one to be executed or not, according to the joint judgment of all; *Ib.* See *Ante*, 44, 45, for power of administrator, c. t. a., in such cases.

XVIII. Inventory.

See PROBATE COURT, 11 to 14.

247. *Duty to return.* The failure of an administrator to return an inventory of the estate, is a breach of his bond; *Edmondson v. Roberts*, 2 H. 822. It is cause for revocation of his letter; *Dowdy v. Graham*, 42 M. 451. See *post*, 251, 321, 326.

248. *Duty to return his own debt: Effect of failure.* By our statute an executor or administrator indebted to the decedent, is required to return his debt in the inventory; and in case of failure, the parties interested may petition and have an issue tried as to the indebtedness; and if the issue be found against the executor or administrator, then the debt is assets; but the debt is not assets until so returned, or the issue is tried. The failure to return the debt may be a breach of the bond, but this does not render the unreturned debt assets; and if it be not returned before final settlement, it is unadministered assets, and goes to the administrator *de bonis non*; *Kelsey v. Smith*, 1 H. 68.

248a. *What is a return of his own debt: Case in judgment.* There was a suit pending in favor of the intestate when he died, against the administrator and others; and also a judgment in favor of intestate against the same parties. The administrator caused the suit to abate, and gave to the attorneys of record a receipt for the cause of action, stating in it, "And I hereby charge myself with the amount thereof," and signed the same as administrator; at the same time he receipted to the attorneys for the amount of the judgment; *Held*, that this action of the administrator made him liable therefor, as assets of the estate; *Anderson v. Gregg*, 44 M. 170.

249. *Not bound to return invalid debt.* An administrator is not liable in his final account for money received by him in his intestate's lifetime, on account of a fraudulent sale made by him of the intestate's land. In such a case, the sale is not injurious to the heirs or the intestate, as no title was conferred; and the heirs will not be permitted to receive the fruits of it, unless they will confirm the title; *Franks v. Wanzer*, 3 C. 121.

250. *After returning the debt, administrator may show failure of consideration.* An administrator who returns his own note in his inventory, (as a valid claim), is not thereby estopped to show that the consideration thereof has, subsequently to the return, failed; and if he make such showing he will be exonerated; *Frank v. Wanzer*, 3 C. 121.

251. *Debt may be returned by co-executor.* The failure of an executor to return in his inventory of debts, a note due from himself to the estate, and which is in possession of his co-executors, and returned in their inventory, is no ground for his removal; *Dowdy v. Graham*, 42 M. 451.

252. *Duty to join in inventory, where there are several executors.* Art. 78, p. 442, of the Rev. Code of 1857, which provides that if there be more than one executor, administrator or collector, they shall all join in returning the inventory, and upon the refusal of one or more, his or their power shall cease, unless within two months they shall assign a reasonable excuse, which the court may deem satisfactory, applies not to the inventory of debts, as required by art. 73, p. 441, but to the inventory of personal property, as required by art. 69, p. 440; *Ib.*

XIX. Interest payable by Administrator, &c.

See GUARDIAN AND WARD, 58, *et seq.*

253. *Liability for interest on illegal disbursements.* If an administrator loan the bonds and notes of the estate, he will be liable for interest on the same, at the legal rate which they bore, notwithstanding the rate of interest was afterwards and before final settlement reduced; *Cason v. Cason*, 2 G. 578.

He is liable for interest on all sums illegally disbursed by him; *Crowder v. Shackelford*, 6 G. 321. And the rule is the same if the illegal disbursement be made to himself; *Cole v. Leake*, 5 C. 767.

254. *Liability for interest on uncollected note.* An administrator is not chargeable with a note in his hands as assets, nor with interest on such a note, until it is actually collected, unless he make himself so chargeable by some act of gross negligence or fraud; *Smith v. Hurd*, 8 S. & M. 682. But if by negligence he fail to collect the note, he is liable for it, and also for interest; *Banks v. Machen*, 40 M. 256.

255. *Liability for not accounting, and for improper retention.* If an administrator render no account of the money received by him, as a part of the assets of the estate, and there is no necessity for his retaining it, he will be liable for interest on the money so received and retained; *Cason v. Cason*, 2 G. 579; S. P., *Cole v. Leake*, 5 C. 767; *Anderson v. Gregg*, 44 M. 170.

256. *Liability for unnecessary retention.* Whilst it is true, as a general rule, that an administrator will not be liable for interest before the expiration of twelve months from the date of his appointment, yet if it be clearly shown that there was no necessity for his retaining the fund, he ought to pay interest; and his petition to the Probate Court, in which he alleges that all the debts are paid, and asks permission to make distribution of a certain amount in his hands, which is granted, is sufficient proof to charge him with interest on the sum so ordered to be distributed, in case he fail to make distribution as ordered; *Brandon v. Hoggatt*, 3 G. 335; S. P., *Bunks v. Machen*, 40 M. 256. And so if after the expiration of twelve months, he allow the money to remain in his hands, without just excuse, which he must show, or if he use the money, he is liable for interest; *Satterwhite v. Littlefield*, 13 S. & M. 302; S. P., *Anderson v. Gregg*, 44 M. 170. See *post*, 258.

257. *Interest on annual balance.* And he may be charged with interest on a balance shown by his annual account, where its retention is unnecessary; *Smith v. Hurd*, 8 S. & M. 682.

258. *Chargeable for interest when he uses the fund.* An executor using, for his private purposes, money of the estate, is chargeable with interest thereon at the highest legal rate, notwithstanding the judicious management of the estate by him; and in this case he was charged interest at ten per cent. per annum; *Powell v. Cooper*, 42 M. 221.

And it is well settled, that if any trustee mingle the trust fund with his own he is liable for interest. His mere readiness to pay over the fund when called on, will not exempt him from liability for interest when he has mingled it with his own money; and in such case no demand is necessary to make him liable for interest; *Kerr v. Laird*, 5 C. 544. And though ordinarily he is not chargeable with interest for twelve months after his appointment, yet if he use the money for his own purposes during that time, he is liable for interest; *Anderson v. Gregg*, 44 M. 170.

259. *Liability for compound interest on profits.* An administrator, or other trustee, is not permitted to speculate and make a profit with the trust funds in his hands. And if he do so, the *cestui que trust* is entitled to the profits, or to compound interest, at his election; *Shackelford v. Crowder*, 6 G. 321; S. P., *Anderson v. Gregg*, 44 M. 170.

260. *Same: Case in judgment.* The proof showed that the administrator, from 1844 to 1855, had cash balances in his hands varying from \$1,300 to \$12,000; that in 1849 he refused the application of one of the distributees for a settlement and distribution, and demanded of him money to assist him in carrying on a law suit for the estate, saying he greatly needed the money for that purpose; that in 1852 he drew two bills of exchange for \$250 each, to pay attorneys' fees, which were chargeable to the estate, which bills were payable four months after date, and stated as a reason therefor that he had no money; that he complained frequently that he was much troubled to pay the expenses of the said law suit, and that he was hard pressed to get the money to pay said expenses; that he paid other attorney's fees chargeable to the estate, in small sums of \$10, \$20 and \$40, stating as a reason, that times were hard and money scarce; that since his appointment he had grown rich, and that he had been all the time an unsuccessful planter, and an active trader: *Held*, that the above facts warranted the conclusion that he had used the money of the estate in speculating and trading, and that he was liable for compound interest; *Ib.*

261. *How the interest should be calculated.* Where an administrator is by law chargeable with interest, and he has made disbursements on account of the estate, the interest should be calculated in the same way as on contracts for the payment of money, and the disbursements should be first credited on the interest due by the administrator at the time they were made, and the surplus, if any, on the principal; *Cason v. Cason*, 2 G. 578.

It is not proper to charge him with interest on all he has received, and credit him with interest on all he has paid out; but where he actually pays interest, he is entitled to a credit for it; *Trotter v. Trotter*, 40 M. 704.

XX. Insolvent Estates.

261a. See PROBATE COURT, sub-division Insolvent Estates, 72, *et seq.*

XXI. Distribution.

261b. See DESCENT AND DISTRIBUTION. PROBATE COURT, 116, *et seq.*

262. *As to who are distributees*; see DESCENT AND DISTRIBUTION, 11, *et seq.*

263. *As to the legal title of distributees*, see *ante*, 139; PROBATE COURT, 61.

263a. *Claim of distributee not barred by limitation.* The statute of limitations does not run before final settlement in favor of an administrator against the claim of a distributee for his share in the estate—the trust being direct and subsisting till that time. Nor will it run in favor of the husband, who, the wife being administratrix, acts as administrator in right of his wife; *Wren v. Gayden*, 1 H. 365.

See LIMITATION OF ACTIONS, 48 to 52.

264. *Distribution according to the law of the domicile of deceased.* See CONFLICT OF LAWS, 29, *et seq.*, 60.

265. *Necessity for an administrator, in order to have distribution.* To enable distributees to obtain and receive their distributive shares, it is necessary that administration should be taken out on the intestate's estate, through the medium of which the property may be distributed according to law; and hence, in this case a petition by distributees against their guardian in possession of slaves, which they claimed by descent, to compel him to inventory them, was dismissed, because an administrator had not been appointed to recover the slaves; *Marshall v. King*, 2 C. 85 (citing *Browning v. Watkins*, 10 S. & M. 482).

267. *Right of distributees to sue for rights of intestate.* The distributees of an intestate cannot—being defendants to a bill of interpleader in equity—recover a debt due to the intestate. The administrator alone can do this. This case distinguished from *Farve's Heirs v. Graves*, 4 S. & M. 707; for which see next section; *Browning v. Watkins*, 10 S. & M. 485. See *post*, 269.

268. *Distributees may sue in chancery.* The Chancery Court has jurisdiction to entertain a bill by the heirs or distributees against persons who have wrongfully assumed to administer the estate, to compel a settlement and an account, and to recover their share of the estate, including choses in action, where no administrator has been granted; *Farve's Heirs v. Graves*, 4 S. & M. 707.

269. *Distributees of mortgagor may foreclose.* When there has been no administration in this State, or when the administration has been closed, and there are no debts, the distributees may sue in their own names in a court of equity, to collect a debt due the estate, by foreclosing a mortgage. And this is so though there be a foreign administrator, but who is not accountable for the debt, and never had possession of the note secured by the mortgage; *Hill v. Boyland*, 40 M. 618 (citing *Moody v. Harper*, 9 G. 599; *Manly v. Kidd*, 4 G. 146; *Wood v. Ford*, 7 C. 57; *Robb v. Griffin*, 4 C. 579; *Archer v. Jones*, 1b. 583;

Farve's Heirs v. Graves, 4 S. & M. 707; *McRea v. Walker*, 4 H. 455).

270. *Widow's right to distribution: Case in judgment.* The testator declared it to be his desire that his widow should have his entire estate, "to have and to hold, and to sell any part thereof she might think best for her interest and the interest of his children during her natural life or widowhood," and for that period that the estate was to be kept together; and that if his widow should live until his two youngest children should arrive at full age or marry, that she should give them such property as she deemed proper; and that they should be educated out of the estate; and upon the death of the widow, he directed a division of the property among the children, and finally he directed "that D. and N. should take the entire business in hand, and act as executors of his will." Held, that the widow took a legal freehold in the property during her life or widowhood, and that his executors were not entitled to retain possession of the estate after the payment of all debts, and after the lapse of twelve months from the date of their qualification; *Dean v. Nunnally*, 7 G. 358.

XXII. Limitations of actions against.

See LIMITATION OF ACTIONS, 87 to 100, for the cases in this subject.

271. *As to the bar of four years in selling land to pay debts*, see *ante*, 81.

271a. *Bar of distributees and legatees.* See *ante*, 265. LIMITATION OF ACTIONS, 48 to 52.

272. *Same.* After the lapse of twenty years from the rendition of a decree against an administrator, a court of chancery will permit him to take no steps in relation to it, which would prejudice the heir, or those claiming under him; *McCoy v. Nichols*, 4 H. 31.

273. *Breach of bond in not paying a debt barred.* It is a breach of an administrator's bond that he does not pay a debt against his intestate, when it is presented, if he has assets, whether the claim be probated or not; and in an action to recover for such breach, it is no defence to show the claim against his intestate were barred by the statute of limitations, when the action on the bond was commenced; to constitute the defence, the bar should have been complete when it was presented; *Probate Judge v. Hairston*, 4 H. 242.

274. *Defence may be relied on under the general issue.* An executor or administrator may rely upon the defence of the statute of limitations under the plea of the general issue, for he is not bound to plead specially it any case; *Sanders v. Robertson*, 1 C. 389; *S. P., Herrington v. Herrington*, W. 305; *Bozman v. Brown*, 6 H. 349; *Gray v. Thomas*, 12 S. & M. 111. See *post*, 314.

275. *As to power of administrator to waive the bar of the statute, and to make a new proviso to save the bar*, see *ante*, 177 to 183.

275a. *How claims of administrator affected by.* The debt of an administrator

against his intestate, if not barred by the statute of limitations at the time of his appointment or qualification as such, will not afterwards become barred before final settlement, although the period limited for suit on it may elapse; and it is not necessary in such case for him to pay his debt, or claim allowance for it till final settlement, if he has procured it to be legally probated and registered in proper time; *Sims v. Sims*, 1 G. 333.

XXIII. Presentation of Claims.

1. What is a good Presentation.

276. *Probate of claim not necessary to a valid presentation.* It is unnecessary that the claim be probated when presented to the administrator; the presentation is valid without it. The probate is for the reciprocal benefit of the administrator and heir, &c., and it has no effect whatever on the validity of the claim, or the creditor's right of action on it; *Wren v. Spann*, 1 H. 115.

The probate of the claim is designed only to protect the administrator from a wrongful payment of it. Its presentation within the time limited is valid without probate; and the creditors' right to sue exists whether it be probated or not; *Campbell v. Young*, 3 H. 301; *S. P., Probate Judge v. Harriston*, 4 H. 242, for which see *ante*, 273; *Branch Bank of Alabama v. Rhew*, 8 G. 110; *Smith v. Smith*, 3 H. 216; *Rawlings v. Poindexter* 4 C. 654.

277. *Actual knowledge and notice of the claim instantaneous to presentation.* Knowledge of a claim, on the part of the administrator, within the time limited, is a sufficient presentation; and that he spoke of the claim within that time, is evidence of the knowledge; but the declaration must be shown to have been made within the time limited for the presentation; *Pickett v. Ford*, 4 H. 246. Actual notice of the claim within the time limited, is good without probate or registration; *Branch Bank of Ala. v. Rhew*, 8 G. 110; *Miller v. Jefferson College*, 5 S. & M. 651; *Helm v. Smith*, 2 S. & M. 453; *Miller v. Helm*, *Id.* 687; *Gordon v. Gibbs*, 3 *id.* 473; *Elles v. Carlisle*, 8 *id.* 552; *Brown v. Hill*, 4 C. 643; *Perry v. West*, 40 M. 233.

Any legal evidence, which would establish the knowledge of the administrator within the time limited, that a claim existed against the estate, will establish a sufficient presentation of it, under the estate; *Miller v. Jefferson College*, 5 S. & M. 651.

And it makes no difference, that this knowledge of the administrator originated before his appointment; and hence, notice of a claim given to a person who has a void appointment as administrator, is good, if he afterwards be validly appointed; *Brown v. Hill*, 4 C. 643.

The presentation need not be in any particular form; it is sufficient if it give such notice to the administrator, of the existence of the claim, its character and amount, as will enable him to provide with reasonable

certainty for its payment; *Henderson v. Hsley*, 11 S. & M. 9.

278. *Constructive notice and presentation: Liens and Mortgages.* Liens of record and mortgages duly registered, are considered always as in a state of presentation to the administrator of the mortgagor; and the statutory mortgage given to an administrator to secure sales of property made by him, though never registered, is notice to the administrator; *Miller v. Helm*, 2 S. & M. 687. And so if the mortgage be regular and formal and actually recorded; *Miller v. Jefferson College*, 5 S. & M. 651.

But the lien must be operative, and in that condition necessary to its enforcement; and, hence, a judgment against the intestate, not revived against the administrator, being in that condition not capable of enforcement, is dormant; is not *per se* notice to the administrator, and it must be presented; *Robertson v. Demoss*, 1 C. 298.

279. *Same: Administrator's bond.* The grant of letters of administration, and the execution of the bond, are matters of public record; and the administrator's bond is notice *per se* to the administrators of the obligors of a claim under it, and need not, for that reason, be presented to him within the time prescribed by the statute; *Gordon v. Gibbs*, 3 S. & M. 473. See *post* 283.

280. *Constructive notice by suit against administrator.* A motion made against an administrator in the Circuit Court, to compel him to pay money paid by the surety of his intestate, if he appear and resist it, is a sufficient presentation of the claim to the administrator; *Smith v. Smith*, 3 H. 216.

281. *Constructive notice by protest.* Notice of the dishonor of a note endorsed by the intestate, and protested after his death, deposited in the post-office, and directed to intestate, if actually received by the administrator within the time limited, for the presentation of claims, is a good presentation of it; *Helm v. Smith*, 2 S. & M. 403.

2. Presentation as affected by the nature of the Claim.

282. *Warranty of title.* If a warranty of title to personally be broken by the rendition of a judgment against the vendee, in the lifetime of the vendor, then the claim of the vendee for damages is subject to the operation of the statute requiring the presentation of claims within a limited time; *Probate Judge v. Harriston*, 4 H. 242.

283. *Administrator's bond.* The statute requiring a presentation of claims against a decedent's estate within a limited period, and on failure that the claim should be barred, was only intended to apply to claims arising out of private contracts of the deceased, between him and other individuals, and hence does not embrace a claim arising on an administrator's bond, executed by the deceased as principal or surety; it being a contract made in court under a judicial determination; *Gordon v. Gibbs*, 3 S. & M. 473. See *ante*, 279.

3. Publication of the Notice: and the time limited.

284. *The publication is notice of what.* The publication of the notice to creditors to present their claims within the time prescribed by law, is not notice to all the world of the death of the decedent. It is notice to creditors only, and for the particular purpose for which it is made, viz., to present their claims within the time limited. It is not notice to the creditor of the death of the testator, so as make it illegal, to send notice of protest directed to the decedent at his post office, instead of to the executor at his post office, the creditor being actually ignorant of his death at the time of protest; *Helm v. Smith*, 2 S. & M. 403. And in such a case when a presumption would arise that the creditor had notice of the debtor's death from the publication of such notice in the creditor's neighborhood, it may be rebutted by positive proof that he had no such knowledge; *Helm v. Smith*, *supra*.

285. *How the publication must be made.* The statute (H. & H. 413, § 92, makes it the duty of administrators and executors to cause publication to be made for the presentation of claims against the estates they respectively represent, and provides that the publication shall be commenced within two months after the grant of letters. And the same statute provides that all claims not presented to the executor within eighteen months after such publication, shall be barred. The notice thus provided for is purely constructive, and must be given in strict pursuance of the terms of the statute; hence, if the publication be not commenced within the two months from the grant of letters, it will be void, and creditors are not bound by it; *Pearl v. Conly*, 7 S. & M. 356; *Branch Bk of Ala. v. Windham*, 2 G. 317; *Dowell v. Webber*, 2 S. & M. 452.

286. *When the time limited commences to run.* The time limited for the presentation of claims does not commence to run till the expiration of the two months during which the publication is required to be made; *Helm v. Smith*, 2 S. & M. 403; *Henderson v. Ilsley*, 11 S. & M. 9.

4. Miscellaneous.

287. *Is a mere statute of limitations.* The statute requiring the presentation of claims to an administrator within a limited time after the publication of notice to creditors, is a mere statute of limitations; *Miller v. Jefferson College*, 5 S. & M. 651; *Cohea v. Commis'srs of Sinking Fund*, 7 id. 437. This was made a query in *Johnson v. Planters' Bank*, 4 S. & M. 165.

288. *Same.* It is a statute of limitations only as to the administrator; and if a mortgage of realty be barred for non-presentation to the administrator, it is a bar only of the remedy against the administrator; it would not extinguish the remedy of the creditor to proceed against the heirs for a sale of the lands; *Miller v. Jefferson College*, 5 S. & M. 651.

289. *Effect of a new statute prescribing a different period for the bar.* The statute of 1846, which prescribes a different period for the presentation of claims against a decedent, does not apply to cases where publication was made and letters granted before its passage; *Robertson v. Demoss*, 1 C. 298; S. P., *Wilkinson v. Barringer*, 1b. 319.

XXIV. Probate of Claims.

290. *Effect and office of: Probate of claims in favor of the administrator.* The probate of a claim by the Probate Court is not a conclusive adjudication of its justice and legality; but it is only a justification to the administrator in paying it, if he sees proper. The probate of a claim in favor of one of several administrators, will justify a co-administrator in paying it, just as if the claim were in favor of a third person; but if an administrator have a claim in favor of himself, and seeks a credit for it in his final settlement, the probate is only *prima facie* evidence of its correctness; and the heirs can object and cause its rejection if it appear illegal; *Sumrall v. Sumrall*, 2 C. 258.

291. *Payment of probated and of unprobated claims.* If an administrator pay a claim against his decedent, which is duly probated and allowed, *prima facie* he is entitled to an allowance for it, on his final account; but if he pay a claim not so probated, *prima facie* he acts on his own money, and he will not be entitled to an allowance for it, unless he establish by competent evidence before the court, that the claim was originally just and valid, and that it remained unpaid at the time it was paid by him; *Sims v. Sims*, 1 G. 333; S. P., *Harrison v. White*, 9 G. 178.

If the claim on its face appear to be a legal debt against the estate, and be properly proven and probated, the administrator will be protected in its payment, unless the objector furnish sufficient evidence to overthrow the *prima facie* case in favor of the administrator. But the rule is contrary, if the probated claim on its face do not show a liability of the estate; *Gray v. Harris*, 43 M. 421.

292. *Duty of creditor probating claim to allow set-off.* It is the duty of a creditor probating a claim against a decedent, to place on it all proper and legal credits, including both payments and set-offs; and if he omit to do so, and receive payment in full, when there is a valid credit, he will be liable to an action by the administrator, for the recovery back of so much of the money as ought to have been credited, although at the time this action is commenced, the set-off omitted to be credited is barred by the statute of limitations; for in such case the action is not on the set-off, but for the wrong committed in omitting to give the credit, as it was the defendant's duty to do; *Gamble v. Hickey*, 5 C. 781.

293. *Probate not necessary to enable creditor to bring suit.* It is unnecessary that a

claim against a decedent should be probated, in order to maintain an action on it against the administrator or executor. Such was the rule under the Act of 1822. (See *Smith v. Smith*, 3 H. 216; *Campbell v. Young*, 3 H. 303; *Probate Judge v. Hariston*, 4 H. 242.) And the rule is not changed by the act of 1846, which provides "that to authorize the collection of any claim and payment thereof, by the executor or administrator, the same shall be first probated." This statute, like the other, was intended merely to have the claims authenticated, so as to justify a voluntary payment by the executor or administrator; *Rawlings v. Poindexter*, 4 C. 654; *Branch Bank of Alabama v. Rhew*, 8 G. 110.

294. *Agent cannot make the affidavit for probate.* It is essential to the validity of the probate of a claim against the decedent, that the creditor himself should make the affidavit required by law; an affidavit by the agent of the creditor will not do; nor will an affidavit by the husband of the creditor; *McWhorter v. Donald*, 10 G. 779.

295. *The affidavit must be in legal form.* The probate of a claim against a decedent, if not made in the form required by law, is void, and is not, therefore, a sufficient voucher for its payment by the administrator; the affidavit must not only state that the claim is just and true, but also that it is unpaid, and that no security or satisfaction has been received therefor; *Id.*

296. *Probate of claim paid in lifetime of the creditor.* A party paying a debt due by a decedent in his lifetime, cannot, without showing by independent proof that such payment was made at the request of the decedent, probate the amount so paid in an account in his own favor, by his own affidavit merely. He ought to have the affidavit of the original creditor that the claim is just and unpaid; *Id.*

297. *As to the office and effect of a probate claim,* see *ante*, 276.

XXVI. Remedies of Executors and Administrators.

298. *What can be recovered by.* In an action brought by an administrator, the plaintiff can recover only what belongs to him in his representative capacity; *Hoover v. Wells*, 6 G. 159.

299. *Action on a note payable to him as administrator.* An administrator may bring an action in his individual capacity on a note made payable to him as administrator, although it belong to the estate; and if in such an action the plaintiff dies, the revivor must be in the name of the administrator of the plaintiff, and not in the name of the administrator *de bonis non* of the estate to which the note belongs; *Laughman v. Thompson*, 6 S. & M. 259. See *ante*, 141a.; S. P., *Eckford v. Hogan*, 44 M. 398.

And so a foreign administrator may bring an action in this State on a note made payable to him in his representative capacity; *Trotter v. White*, 10 S. & M. 607.

299a. *Same.* A note was made payable to

A., as guardian of B., and after A.'s death suit was brought on it in the name of A.'s administrators; *Held*, that the action could be maintained; the court citing the cases in 141a., 299, and declaring that *Cocke v. Rucks*, 5 G. 106, was not contrary to this; *Eckford v. Hogan*, 44 M. 398.

300. *Appeals by: Not required to give appeal bond.* The statute which exempts executors and administrators from all liability beyond the assets of the estate, create an exception in their favor from the operation of the statute requiring appellants to give appeal bonds; *Scott v. Searles*, 1 S. & M. 590.

301. *Supersedeas bond.* It seems that an administrator is not bound to give a supersedeas bond; that his official bond covers his duties in that respect; *Williams v. Stewart*, 12 S. & M. 533.

302. *That he may be required to give an injunction bond,* see *ante*, 164.

303. *As to his right to give claimant's bond, forthcoming bond, and refunding bond,* see *ante*, 165.

303a. *Probate of letters in suits by.* In all actions by executors, administrators and guardians, proof of the letters giving the plaintiff his official character, should be made in the declaration, and a failure to do so will be fatal on demurrer; but an amendment is allowable to cure the defect; *Ligon v. Bishop*, 43 M. 527.

XXVI. Remedies against Executors and Administrators, and their Defences and Pleadings.

See *ante*, sub-divisions *Devastavit*; *Bonds*; *Accounts*; and *post*, sub-divisions *Revivor*; *Revocation of Letters*.

1. Generally.

304. *Venue of suits against.* The statute, art. 32, p. 483, of the Rev. Code of 1857, which provides that defendants in actions not local, shall be sued in the county of their residence, applies as well to actions against executors and administrators, as to parties sued in their individual capacity. If an executor or administrator do not reside in the county in which he is appointed, he is, nevertheless, entitled to the benefit of the statute, and cannot be sued in the county of his appointment; *McLeod v. Shelton*, 42 M. 517.

Whether an administrator of a deceased defendant, upon *scire facias* being served on him to revive the suit, has the right to have the venue changed to the county of his residence; *Quære?* *Neeley v. Planters' Bk.*, 4 S. & M. 113.

305. *No action against, till after nine months from their appointment.* The statute which provides that no suit or action shall be brought against any executor or administrator in such capacity, till after the expiration of nine months from the date of proving the will, or the granting of letters of administration, applies to all suits and actions against an executor or administrator, in which he is a necessary party. The administrators of

a deceased vendee of real estate, is a necessary party defendant, to a bill to enforce the vendor's lien for the purchase money, and such suit is within the operation of the above quoted statute; *Reedy v. Armistead*, 2 G. 353.

306. *Remedy in chancery of distributee against an administrator.* When an administrator who has an interest as distributee has sold a slave, the distributees may proceed in chancery against the administrator and the purchaser, to recover the slave. The rule would be different if the administrator alone were a party, for as to him the Probate Court would have exclusive jurisdiction; *Barnes v. McGee*, 1 S. & M. 208.

306a. *Distress against.* By the statute, the remedy by distress is given against the administrator of a tenant or lessee; *Smith v. Robb*, 12 S. & M. 322.

307. *Right of creditor to compel administrator to account.* It seems that a petitioner claiming to be a creditor of the estate, cannot call the administrator to account in the Probate Court, without showing that his claim is legally authenticated, and that there is danger of his losing his debt, by insufficiency of assets, or insolvency of the estate. And it seems, also, that a general creditor of the estate, where there is no apparent impediment to the recovery of his claim at law, cannot coerce the administrator to account generally; *Freeman v. Rhodes*, 3 S. & M. 329.

2. Action for Legacy, and Executor's assent to Legacy.

308. *Action at law for legacy.* A general or special legatee, after the lapse of twelve months from the grant of letters testamentary, if there be no debts existing against the testator, may, without the executor's assent, maintain an action at law to recover his legacy; *Dean v. Nunnally*, 7 G 353 (citing *Worten v. Howard*, 2 S. & M. 530; *Magee v. Gregg*, 11 id. 70).

309. *Executor's assent to legacy.* The statute (H. & H. 412), which enacts that any person having a legacy bequeathed in any will, may sue for and recover the same at common law, changes the common law rule, which required the assent of the executor before suit at law could be brought for it; *Worten v. Howard*, 2 S. & M. 530; *Magee v. Gregg*, 11 id. 70.

310. *What acts amount to an assent: Life tenant: Remuinderman.* Where a specific legacy is given to one for life, remainder over, a delivery by the executor of the legacy to the life tenant is an assent to the legacy, and enures to the remainderman; and such delivery is also a full administration of the legacy, and it no longer remains unadministered assets; *Magee v. Gregg*, 11 S. & M. 70.

See DESCENT AND DISTRIBUTION, 45, 46.

311. *Assent by one executor binds the others.* Where the assent of one of the executors has been given to a legacy, it binds his co-executors; *Ib.*

312. *Possession by legatee proof of assent.* Possession by a legatee of his legacy for a

considerable length of time, without objection by the executor, is proof of the latter's assent to it; *Hall v. Hall*, 5 C. 458.

3. Set-off against Administrator.

313. *Same.* A claim on an intestate purchased by a debtor after the intestate's death, is not a good set-off against the debt of such purchaser to the estate; *Whitehead v. Cade*, 1 H. 95. And a debt due by an intestate in his lifetime is not a proper set-off against a debt due the administrator for a sale of the intestate's property, especially where the estate is insolvent; *Mellen v. Boorman*, 13 S. & M. 100.

4. Pleading by Administrator.

314. *Administrator not bound to plead specially.* An executor or administrator is not bound to plead specially in any case; *Herrington v. Herrington*, W. 305; *Bozman v. Brown*, 6 H. 349; *Gray v. Thomas*, 12 S. & M. 111. See also *ante*, 274.

But if he wish to deny the execution, by the intestate, of the note sued on, or the character given the deceased in the declaration, he must deny the same under oath, according to his belief; *Thornton v. Alliston*, 12 S. & M. 124; *Ellis v. Planters' Bank*, 7 H. 235. And so a person sued as administrator, if he wish to deny that he is such, must do so under oath; *Stewart v. Richardson*, 3 G. 313.

And an administrator having the right to make all legal defences under the general issue, if a demurrer be sustained to a special plea filed by him, it is unnecessary to award *respondent ouster*, if the general issue be on file; *Hawkins v. Miss. & Tenn. R. R.*, 6 G. 688; *Effinger v. Richards*, 6 G. 540.

See PLEADING, 166.

314a. *Plea of plene administravit.* The plea of *plene administravit* to an action on the bond of an administrator, alleging a breach in the non-payment of a judgment against the administrator, is a good plea; but there are but few cases to which it will be applicable; the distinction between different grades of debts being abolished in this State, the plea could only be sustained by proof that all the assets had been consumed in the payment of preferred debts, or those which were liens on the property in the intestate's lifetime; *Randolph v. Singleton*, 12 S. & M. 439.

For plea by executor *de son tort*, see *ante*, 228.

For misleading, see *ante*, 84, 191.

5. Service of Process on.

315. *As to service of process on one of several executions, see ante*, 162.

6. Execution and Judgment against Administrator.

316. *Execution against administrator: What it binds.* An execution against an administrator cannot be levied on the individual property of the administrator; *Jones v. Miles*, 1 H. 50.

Such execution can be levied only on per-

sonality. Nor can it be issued, on a judgment to which the administrator alone is a party, against the heirs without revivor as to them; *Treadwell v. Henderson*, 41 M. 38; *Mason v. O'Brien*, 42 M. 420; *Langston v. Abney*, 43 M. 161. Only judgments, however, which were rendered against the ancestor in his lifetime, can be revived against the heirs; a judgment rendered against the administrator after the ancestor's death, is incapable of such revivor; *Foster v. Sumner*, 3 S. & M. 606. A term for years, in land, is personality, and can be levied on under execution against an administrator; *Dillingham v. Jenkins*, 7 S. & M. 479; *Smith v. Estell*, 5 G. 527; *Webster v. Parker*, 42 M. 465.

See DESCENT AND DISTRIBUTION, 34c.

317. *Form of judgments against.* In an action against an administrator, it will be error to enter judgment against him *de bonis propriis*; *Hill v. Robeson*, 2 S. & M. 541; *S. P., Breckenridge v. Mellon*, 1 H. 273; *Neely v. Planters' Bank*, 4 S. & M. 113.

If he be sued, in his representative capacity, verdict and judgment against "the defendant" generally, means the defendant as administrator; *Bozman v. Brown*, 6 H. 349; *Hoggatt v. Montgomery*, 1b. 93. And so if the action be against an administrator in his representative capacity, and the verdict be that "the deceased, in his lifetime, assumed." &c., and the judgment be "that the plaintiffs recover of the defendant administrator of said deceased, as aforesaid," the judgment will be considered as against the administrator as such, and therefore good; *Howcott v. Collins*, 1 C. 398; *Mason v. O'Brien*, 42 M. 420; *Neely v. Planters' Bank*, 4 S. & M. 113. But it was said in this last case *arguendo*, that if the judgment had been against the "defendant," without adding the word "administrator," it would have been bad. And so if in such action the judgment be against "A. L., administrator of C. L." it will be a judgment against A. L. in his representative capacity, and therefore good; *Lea v. Gardner*, 4 C. 521; *Guice v. Sellers*, 43 M. 52. If A. be sued individually, and as executor of B., on a joint note made by A. and B., if judgment be entered simply against the "defendant," it will be a judgment against A. individually, and a discontinuance against him as executor; *Davis v. Mahorner*, 41 M. 552.

If the defendant be administrator *c. t. a.*, it is immaterial that the judgment be against him as administrator generally; *Woodward v. Fisher*, 11 S. & M. 303.

318. *Judgment against administrator after resignation.* A judgment against an administrator after his resignation, is not binding on the estate, and is no evidence against the administrator *de bonis non* in a proceeding to hold him liable for a *devastavit*. It is a mere nullity; *Buckingham v. Owen*, 6 S. & M. 502. See *ante*, 51, 64.

7. Writ of Error against Administrators, &c.

319. *Same.* When the plaintiff in the court

below dies after the rendition of a judgment in his favor, a writ of error will lie against his administrator to revise the judgment, without its having been first revived in his name; *N. O. J. & G. N. R. Co. v. Rollins*, 7 G. 384. And so when the judgment is in favor of an administrator, and he dies, and there be an administrator *de bonis non* appointed, a writ of error may issue without revivor, and a *scire facias ad audiendum errores* will issue from this court to notify the administrator *de bonis non* of the pending of the writ of error; *Mayer v. McLure*, 7 G. 389.

320. *Writ of error by one executor against another.* Where there are two executors, one has the right to sue out a writ of error to revise the action of the Probate Court, in allowing commissions to the other; *Overstreet v. Trainer*, 2 C. 4 4.

As to mispleading by administrators, see *ante*, 84, 191.

XXVII. Revocation of Letters and Resignation.

1. For what causes Letters are revoked.

321. *General rule.* As a general rule, where the Probate Court has conferred letters of administration, it cannot revoke them except for some defined statutory cause; but this rule does not apply where the letters were prematurely granted; *Muirheid v. Muirheid*, 6 S. & M. 451; or improperly granted; *Gasque v. Moody*, 12 S. & M. 153; for which see PROBATE COURT, 219. 40.

322. *For maladministration.* The Probate Court may remove an administrator for past acts of mal-administration, notwithstanding his liability on his bond; *Lehr v. Tarball*, 2 H. 905.

323. *For incapacity.* Where the administrator possessed the same capacity at the trial of an application for removing him for incapacity, as he did when he was appointed, the court refused to remove him, although his appointment was injudicious, it not being shown that there was any change in his habits, or any alienation in his mind, and there being also a failure to show that the estate had suffered by his acts; *Ib.*

324. *For failure to give bond.* The court may revoke the letters of an executor who has failed to give bond in pursuance of a regular decree of the court, although the will exempted him from giving such bond; *Clark v. Niles*, 42 M. 460. See *post*, 325.

2. Proceedings for Removal.

325. *He is entitled to notice.* Letters of administration cannot be revoked for insufficiency of the surety on the bond, without notice to the administrator, and giving him an opportunity of giving new security; *Wingate v. Woolen*, 5 S. & M. 245. And even when the letters were improperly granted, the administrator is entitled to notice of an application to revoke them, and the notice must be given to him; notice to his attorney will not do; *Gasque v. Moody*, 12 S. & M. 153. But it is an implied agreement, on the part of

an administrator, that he will remain within the State, and in the jurisdiction of the court by which he was appointed, and if he violate this the court may remove him on the petition of his sureties, without giving him any notice of the proceeding; notice is required to be given by the statute only by summons, and to a resident (see H. C. 658, § 65); *Hardanay v. Parham*, 5 C. 103.

326. *The application.* Where the letters were illegally granted, the court may revoke, at his own instance, or at the suggestion of an *amicus curiæ*, without any formal application by a party interested; *Gasque v. Moody*, 12 S. & M. 153. But where the application is made upon the ground that the appointee is not next of kin, the application must be made by a person entitled to letters in preference to the administrator; *Edmundson v. Roberts*, 1 H. 322. And an application to remove for failure to return an inventory, must be made by a party interested; an application by a co-executor will not do; *Dowdy v. Graham*, 42 M. 451. See *ante*, 247.

327. *Appeal from order of removal.* An appeal from an order revoking letters of administration, suspends its force, and the administrator can continue to act, pending the appeal, if no person (under the statute H. & H. 385, § 1) be appointed to act as administrator *pendente lite*; *Muirhead v. Muirhead*, 8 S. & M. 211.

328. *As to his liability to account after revocation*, see PROBATE COURT, 219, and *ante*, 71.

329. *As to his right to money obtained before removal*, see *ante*, 36a.

329a. *Revocation of letters granted to sheriff: Case in judgment.* The sheriff of Kemper county was, under the Act of 1846 (H. C. 680), appointed in virtue of his office administrator of an intestate. In 1852, that act was repealed so far as that county was concerned, and thereupon the next of kin applied for letters on the estate: *Held*, that the repeal did not *ipso facto* revoke the sheriff's letters, but it gave power to the court to do so at any time, and to appoint another person on such revocation being made; *Hull v. Neal*, 5 C. 424. See *ante*, 72, *et seq.*

3. Resignation.

330. *Effect of on pending suit.* If an administrator make a final settlement *pendente lite*, this will not prevent a recovery at law; a new administrator may be necessary, but the recovery against the first administrator will bind the estate of the decedent, which was unadministered when the suit was commenced; and hence, threats by an administrator that he will resign and make a final settlement, is no ground for going into equity; *Ogden v. Walder*, 2 C. 190. See *ante*, 64, 65.

331. *Cost of resignation charged on administrator.* In case of resignation, which is an act for the benefit of the administrator, the costs attending the resignation and the appointment of a new administrator, should be taxed on the resigning administrator; *Cherry v. Jarratt*, 3 C. 221.

XXVIII. Revivor of Suits by and Against Administrator.

SEC SCIRE FACIAS. REVIVOR.

332. *Scire facias may issue within nine months.* A *scire facias* to revive a suit against an administrator is not an action, and may be issued within nine months after the grant of letters; *Breckinridge v. Mellon*, 1 H. 273.

333. *When sci. fa. served only on one of several administrators.* If the *scire facias* be served only on one of two administrators, judgment cannot be rendered against both; *Ib.* See *ante*, 162; as to venue of *sci. fa.*, see *ante*, 304. See also, 141a, 299.

334. *Defence to scire facias to revive.* If a judgment has been rendered against an executor upon a promise made by him in settlement of a demand against the estate, he cannot to a proceeding by *scire facias* to revive, or bill in equity to collect the debt, insist that the judgment was on a promise made by him, and not binding on the estate. He can make no defence to such a proceeding, which he might have made to the rendition of the judgment; *Bingaman v. Robertson*, 3 C. 501.

334a. *Waiver as to form of revivor.* A judgment in favor of an administrator in a suit commenced by his intestate, will not be reversed by the Supreme Court upon objections to the form of the order of revivor unless objections were made to it in the court below; *De Ford v. Furniss*, 43 M. 132.

XXIX. Sales of Personalty by Executors and Administrators.

See PROBATE COURT, 43 to 46a.

1. The Power of an Administrator to sell Personalty.

335. *Is a common law power.* An administrator does not derive his power to sell personalty from the statute, but from the common law. The statute requiring him to procure an order from the court to make a sale, and to give notice of the sale, is a restriction upon his common law powers, and is to be strictly construed; *Bland v. Muncaster*, 2 C. 62.

336. *Sales not made in pursuance of law are void: Private sales.* A sale made by an administrator not in pursuance of law, is void and passes no title. Sale of a slave at private sale is void; *Worten v. Howard*, 2 S. & M. 527. Private sales of the trust property are forbidden and pass no title; *Cable v. Martin*, 1 H. 558; *Baines v. McGee*, 1 S. & M. 208. But if the administrator be a distributee, and as such have an interest in the property sold, a private sale is good to convey his interest; *Cable v. Martin*, *supra*. But in ascertaining his share, the receipts of assets by the other distributees and the administrator in the whole estate, is to be looked to, and not their *pro rata* interest in the single article of personalty sold; and hence, if it appear that the administrator has wasted the assets, so that the whole property sold would not exceed the distributee's share

then the purchaser will get nothing; *Baines v. McGee*, *supra*; *S. P., Hull v. Clark*, 14 S. & M. 187; *Ware v. Houghton*, 41 M. 370; and if the report of sale do not show affirmatively that the sale was made at public auction, it may be shown in a suit by the distributees to recover the property, that the sale was private; *Worten v. Howard*, *supra*. See *ante*, 33.

337. *Order of court necessary to validity of sale.* It is essential to the validity of a sale of either real or personal property, made by an administrator or executor, that it should be made in pursuance of a valid order of court, unless when by statute, it is otherwise provided, or where the will directs differently; *Gelstrop v. Moore*, 4 C. 206. See *ante*, 238; *S. P., Edmundson v. Roberts*, H. 822.

2. Consequences of illegal Sale; Rights and Duty of Purchaser.

338. *Purchaser's liability to pay.* A purchaser at an illegal sale of a chattel, made by an administrator, is not bound to pay the purchase money; *Joslin v. Caughlin*, 4 C. 134. But he cannot avoid payment of the purchase money, without an offer to return the property; *Bohannon v. Fulton*, 2 G. 348; *Martin v. Tarver*, 43 M. 517; and this must be done upon discovery of the illegality in the sale; *Joslin v. Caughlin*, 1 G. 502. And the death of the chattel so purchased, is no excuse for the failure to return, if the purchaser had reasonable time after the discovery of the illegality in the sale, to make the return; *Joslin v. Caughlin*, 1 G. 502. And so, if the death is occasioned by the ill-treatment of the purchaser, it is no excuse for a failure to make an offer to return; *Joslin v. Caughlin*, 3 G. 104. But if the order be void, the sale will be good, if made by the assent of the heirs given *in pais*; *Ib.*

339. *Same: The rule about returning the chattel further explained.* But though a sale of personalty by an administrator be void as to the distributees, it does not follow that the purchaser can resist the payment of the purchase money, so long as he retains possession under the void sale. In a sale by an administrator, there is no implied warranty of title, and the maxim *caveat emptor* applies both in regard to the title and soundness of the thing sold (see *post*, 341b). And if there were a warranty of title, as there is perhaps to the extent that the administrator has power to convey, and does convey, all the title of the intestate, still, by the general rules of law regulating sales of personalty, the purchaser cannot defeat a recovery of the purchase money, on the ground of a defect of title, when he has been put in possession, unless there has been an eviction, or except in cases of fraud. In cases of void sales, the vendee in possession cannot keep and exercise the dominion of an owner over the property, and yet refuse to pay the price; he must pay the price or return, or offer to return, the property in a reasonable time, and thus put the vendor in *statu quo* by a surrender of the property, and of every-

thing that he obtained under the contract. So if a purchaser of personalty at a void sale from an administrator, desires to resist payment, he must offer to return the property in a reasonable time after the discovery of the defect in the sale, and thus rescind the contract *in toto*. And in such case the defect, if any is in a record, and he ought to be held to greater strictness in discovering it than in other cases. But if for any cause he be unable to return the property when he discovers the defect, he being by such inability incompetent to put the vendor in *statu quo*, cannot rescind the contract, nor resist the payment of the purchase money, but is left to his remedy on his covenant, if he has protected himself by them. Hence, it was held that a purchaser of slaves from an administrator, under a void order of sale made in 1860, could not, when sued in 1866 for the price, resist payment, it appearing that he had never offered to return them, but had kept and used them till they were emancipated in 1865; *Ware v. Houghton*, 41 M. 370; *S. P., Jagers v. Griffin*, 43 M. 134. Nor is it any excuse for a failure to make an offer to return a slave so bought, that he ran away and was emancipated, and then could not be returned; *Jagers v. Griffin*, 43 M. 134; *McMillan v. Causey*, *Ib.* 227.

See GUARDIAN AND WARD, 53.

340. *Right of purchaser to have his money refunded.* A purchaser of a chattel from an administrator, in regular course of administration, cannot be compelled to surrender the property for an irregularity in the appointment of the administrator, when he has paid the purchase money, and it has gone to the payment of the debts of the estate, and to exonerate the other property, without the purchase money being first refunded; *Rayland v. Green*, 14 S. & M. 194.

3. Fraudulent Sales.

A. FRAUDULENT AS TO DISTRIBUTEES AND CREDITORS.

341. *For instance of a sale held fraudulent as to creditors.* see *ante*, 207; and for administrator's duty on that subject, see *ante*, 131. See also, 205, 206, and 208. Fraudulent sale may be set aside before confirmation by the Probate Court without notice to the purchasers; *Pearson v. Moreland*, 7 S. & M. 609.

341a. *Lien of fraudulent purchaser.* When an administrator's sale is set aside for fraud, the fraudulent purchaser will be entitled to a lien on the land for what he has paid and interest, and will be liable for rent, and will be allowed for valuable improvements not exceeding the rent; *Grant v. Lloyd*, 12 S. & M. 191.

B. FRAUDULENT AS TO THE PURCHASER.

341b. *Fraud of administrator no defence to the purchaser.* The maxim *caveat emptor* applies in its fullest extent to all sales made by executors and administrators, they being not bound, nor even authorized, by law to make any statement in their official capacity in relation to the quality of the property

sold by them; and a fraudulent misrepresentation of the administrator as to the quality of the thing sold, is no defence to an action against the purchaser for the price. The administrator may bind himself personally by such statements, but not the estate; *Hutchins v. Brooks*, 2 G. 430; S. P., *George v. Bean*, 1 G. 147.

See WARRANTY, 29.

4. Purchase by Administrator at his own Sale.

342. *Is not void: Who may avoid it.* A purchase by an administrator at his own sale, is not void, but only voidable at the instance of the heirs; it is good as against strangers and creditors even, unless the complaining creditors show that they are in danger of being injured thereby by an insufficiency of assets; *Bland v. Muncaster*, 2 C. 62; S. P., *Baines v. McGee*, 1 S. & M. 208; neither the administrator nor those jointly interested with him can complain or avoid the purchase; *McAnulty v. Hodges*, 4 G. 579.

343. *He has no power to purchase.* An administrator cannot purchase at his own sale, either directly or indirectly; nor can he sell under a secret trust that he is to have an interest in the property, or is to derive any benefit from it; nor can he so arrange the sale that his friends can purchase the property at a reduced price; *Pearson v. Moreland*, 7 S. & M. 609.

343a. *Purchase by administrator: Resale: Liability of parties for rent.* If an administrator buy land at his own sale, and procure a bidder to take the deed in his own name, but really for the benefit of the administrator, and the bidder make another sale and make a deed to a party cognizant of the illegality of the first sale, the administrator and the bidder will be liable jointly with the sub-purchaser for the rent accruing during the occupancy of the latter; *Howcott v. Collins*, 1 C. 398.

344. *Joint executor has no power to purchase.* When a joint power of sale is given by the will to several executors, none of the executors can be purchasers; and in such case they will be bound for the value of the property (slaves) so sold at the time of settling the final account, or their value when they are sued for them at the election of the distributees; and the executors will be entitled to interest on the price on showing that the money was used for the benefit of the estate; *Noel v. Harvey*, 7 C. 72.

345. *Lien exists on such purchase.* If a purchase by an administrator at his own sale be regarded as valid, then the statutory lien existing as against purchases would exist as to him; and the lien would exist in favor of the distributees, since the administrator has abandoned his trust, and it would only be discharged by actual payment to them. "A payment to the administrator by his sub-vendee would not discharge the lien, because in such a transaction the administrator must be treated in the payment as he acted in the sale, viz., as acting individually and not as a

trustee for the estate;" *Baines v. McGee*, 1 S. & M. 208.

5. Warranty: Caveat Emptor.

346. *An implied warranty of title.* If an administrator expressly sell only the title and interest of his intestate in personality, the purchaser will not be discharged from the purchase money, if it afterwards appear that the intestate's title was not good; *Cabaniss v. Clark*, 2 G. 423. As a general rule, an administrator and other trustees warrant neither the title nor soundness of property sold by them; *George v. Bean*, 1 G. 147; *Storm v. Smith*, 43 M. 497. He sells only such title as was in his intestate, and the purchaser takes it at his own risk, and will not be discharged from the purchase money if the title prove defective; *Cogan v. Frisby*, 7 G. 178.

But if an administrator, at the time he sells personality, agree, if it should be taken from the purchaser under executions against the estate, which are a lien on it, the sale shall be rescinded, and the note of the purchaser given up, the agreement will be binding and valid; *Buckels v. Cunningham*, 6 S. & M. 358.

347. *As to warranty of soundness.* There is no implied warranty of soundness by an administrator, or other trustee, in a sale of a chattel made by him; *George v. Bean*, 1 G. 147.

347a. *The purchaser buys at his own peril.* The rule is *caveat emptor*, unless there be an express warranty, or one implied from the circumstances of the sale, or the nature of the commodity, or unless the seller be guilty of a fraudulent concealment or representation in relation to a material inducement to the sale. And this rule of *caveat emptor* is applied with great strictness against purchasers at administrator's sales; *Joslin v. Caughlin*, 4 C. 134; *Storm v. Smith*, 43 M. 497. See *ante*, 341b.

6. Purchaser Refusing to Complete the Purchase.

348. *Re-sale at purchaser's risk: Action against him.* If the vendee, at an administrator's sale, refuse to complete the purchase by giving bond and security as required by the terms of the sale, the administrator may re-sell and hold the purchaser responsible for the loss sustained by the diminution in the price brought by the property on the second sale; and this is the general rule, applicable to all sales at auction. And in such case, the administrator may sue the purchaser immediately for the loss; he is not bound to wait for the expiration of the credit given at the sale; for the action is not on the contract of sale, but for damages resulting from the purchaser's refusal to complete it; *Mount v. Brown*, 4 G. 566.

7. Lien on Sales.

349. *Same.* When property, real or personal of a decedent or minor, is sold by order of the Probate Court, it is under the statute liable for the purchase money, in the hands

of the purchaser and his assignees, just the same as if a mortgage had been taken from the purchaser on the property, and duly rendered; *Miller v. Helm*, 2 S. & M. 687; *Lambeth v. Elder*, 44 M. 80; *Walker v. Fuqua*, for which see *post*, 379.

And it is doubtful whether the administrator can do anything to release the lien, short of an actual reception of the purchase money; *Elliott v. Connell*, 5 S. & M. 91.

If he take a new note from the purchaser, and new security for a balance due him on a sale of land, made by him as administrator, and express on its face that it was for loaned money, and it be made payable to him as guardian of the heir, it will not be a release of the lien; *Elliott v. Connell*, *supra*. See *post*, 377.

350. *As to lien when the administrator is purchaser*, see *ante*, 345.

8. Miscellaneous.

351. *Sale of slaves: Notice*. Notice to the heir is not necessary, if the application be to sell slaves for the payment of debts; *Smith v. Chew*, 6 G. 153; *Hutchins v. Brooks*, 2 G. 430. It is necessary when the sale is for distribution, and when the proceeding does not show for what purpose the sale was made, and there was no notice, it will be presumed in favor of the action of the court, that the sale was ordered to pay debts; *Hutchins v. Brooks*, 2 G. 430. It was said in *Baines v. McGee*, 1 S. & M. 208, that slaves could be sold for no other purpose than for the payment of debts.

352. *Sale of slave without proper advertisement of notice*. A sale of a slave made by an administrator, under a valid order of the Probate Court, is not void because the legal notice of the sale was not given. Whether it is voidable, *Quære?* If it is voidable it will not be set aside at the instance of a creditor of the estate, unless he show it was not fairly made, and that he is in danger of being injured thereby; *Bland v. Muncaster*, 2 C. 62 (citing *Minor v. City of Natchez*, 4 S. & M. 602, which holds that a sheriff's sale of land is not void because proper notice was not given).

352a. *Notice of sale of personalty*. An administrator, in making a sale of personalty under a valid power, must make the sale according to law, or it will be invalid, but as his acts, in execution of the power, are matters *in pais*, it would seem that unless proof of the fact be made and entered of record, a statement in the report that the sale was regularly made, will not be more than *prima facie* evidence of its legality: and if the record of confirmation do not show affirmatively that the requisite notice was given, or that the sale was made in accordance with law, the sale will not, for that omission, be invalid. When the record is thus silent, parol proof is admissible to show both a compliance with the law in making it and the contrary; *Gelstrop v. Moore*, 4 C. 206 (citing *Worten v. Howard*, for which see *ante*, 337); *Smith v.*

Denson, 2 S. & M. 336, for which see *post*, 361a.

As to defective notice of sales of realty, see *post*, 381.

See SHERIFF AND SHERIFF'S SALES, 95, 96. GUARDIAN AND WARD, 58e.

353. *No sale to pay debt barred by statute of limitations*. See *ante*, 81, 272.

354. *The security required on sales*. See *ante*, 204.

355. *Administrator's assent to sale of the trust property by another*. The assent of the administrator to a sale by another, of his intestate's property, may bind him individually, but it is no bar to his subsequent assertion of his fiduciary rights; *Magee v. Gregg*, 11 S. & M. 70.

356. *Voidable sale*. A voidable sale made by an administrator and regularly confirmed, cannot be set aside in a collateral proceeding in the Circuit Court, except for fraud in procuring the order of confirmation; *Bland v. Muncaster*, 2 C. 62.

For ratification of illegal sale, see *post*, 371, 372, and PROBATE COURT, 234.

XXXI. Sales of Realty.

See *ante*, as to fraudulent sales, 341, *et seq.*
See PROBATE COURT, 46a, *et seq.*

1. Generally.

357. *That the record must show the jurisdictional facts*, see PROBATE COURT, 46a to 47.

358. *As to this notice to the heirs*, see PROBATE COURT, 50.

359. *As to the necessity for the bond to apply proceeds*, see PROBATE COURT, 51.

360. *As to the recital of jurisdictional facts, notice, &c.*, see PROBATE COURT, 47.

361. *Decree without notice, void*. A sale of land made at the instance of the administrator, without notice to the heirs, is absolutely void, and a sale under it is void and confers no title, and the purchaser is not bound to pay the purchase money; *Campbell v. Brown*, 6 H. 106; S. C., 1b. 230; *Matlock v. Livingston*, 9 S. & M. 489; *Hamilton v. Lockhart*, 41 M. 460; and see PROBATE COURT, 46a to 47.

361a. *Sale not according to law invalid*. A sale of land by an administrator will not be valid unless made in strict accordance with law; *Smith v. Denson*, 2 S. & M. 326.

2. Sale of Realty to Pay Debts.

362a. For proceedings on this subject, see PROBATE COURT, 58 to 65, and *ante*, 82.

3. Sale for other Purposes than to Pay Debts.

363. *No power to sell for division*. An administrator can be empowered by the Court of Probates to sell the realty of his intestate, in those cases only where the power is expressly or by necessary implication given by statute. The Act of 1821 (H. C. 667, § 102), which authorizes a sale of the realty of a decedent to insure a more equal division among the heirs, clearly means that the application shall be made by one of the heirs;

the administrator, therefore, is not authorized to make such application, and if he do, a sale made in pursuance thereof will be void; *Washington v. McCaughan*, 5 G. 304.

363a. *Sale for partition.* See *GUARDIAN AND WARD*, 58b, *et seq.*

4. Illegal Sales, and the Consequences.

364. *Purchaser may avoid the sale.* The purchaser at an invalid sale of realty made by an administrator, is not bound to offer to surrender the possession thus acquired, in order to entitle him to resist the collection of the purchase money. The sale being void, there is no consideration for the promise to pay the purchase money; *Washington v. McCaughan*, 5 G. 304; S. P., *Brown v. Campbell*, 6 H. 106; S. C., 1b. 230; *Puckett v. McDonald*, 6 H. 269; *Laughman v. Thompson*, 6 S. & M. 259. And this is so, though the administrator gave a deed with warranty of title; *Puckett v. McDonald*, *supra*.

365. *Same.* When the realty of a decedent, who had but a bond for title when the purchase money was paid, and a part of the purchase money was still unpaid, is illegally sold by the administrator, and the purchaser executes his note payable to the vendor of the decedent for the unpaid balance, and which note is in part payment of the price he bid at administrator's sale, he may, notwithstanding, avoid the note, as the sale is absolutely void; *Planters' Bk v. Johnson*, 2 S. & M. 449. And so a person who by agreement becomes substituted as a purchaser, and takes a deed directly from the administrator and gives his notes payable to the administrator, has the right to insist on the invalidity of the sale in an action against him for the purchase money; *Williams v. Childress*, 3 C. 78.

But when such void sale is made, and by agreement the administrator and his vendee sell by a joint deed with covenants of warranty of title to another, who gives his note for the purchase money to the administrator, the latter vendee when sued for the purchase money, cannot set up the invalidity of the title, if he be in possession under the deed; for in such a case the action is not on the original void contract of sale, and the invalidity of the sale is but a defect in the title; *Green v. McCarroll*, 2 C. 427; S. P., *Duncan v. Lane*, 8 S. & M. 744, for which see *VENDOR AND VENDEE*, 34.

366. *Duty of purchaser to impeach the sale.* A defendant seeking to impeach an administrator's sale of realty in order to avoid payment of the purchase money, must produce the record showing the defect. The sale will be presumed, in such a case, valid, until the contrary is shown; *Harris v. Ransom*, 2 C. 504.

367. *Title afterwards made by the heirs.* When the administrator's sale is void and there was no fraud, and there has been a judgment at law for the purchase money, equity will not relieve the vendee, if the heirs at the hearing will make him a good title; *McLaurin v. Parker*, 2 C. 509.

368. *Right of purchaser to recover purchase money from the estate.* Where the sale is void, the purchaser will be regarded as a trustee for the heirs; and so will a sub-purchaser from him. And upon setting aside the sale, at the instance of the heirs, the Chancery Court will decree an account for rent and for improvements, but will not charge complainants for improvements beyond the amount of the rents; and it will also allow to the purchaser whatever sum has been paid to the administrator as purchase money, and which the purchaser can show that the administrator has actually applied in payment of debts, or otherwise, according to law; *Williamson v. Williamson*, 3 S. & M. 715.

368a. *Same.* Whenever a void sale has been made of realty, and the purchase money has been applied to the payment of valid debts against the estate, the purchaser, being ignorant of the invalidity of the sale, has a right as against the heirs, to have his money refunded. His equity, however, grows out of the fact that his money has been applied to the exoneration of the estate by the payment of claims which are a legal charge on it; and he must show the application. If the estate be insolvent, then this equity exists against the creditors; and if the money paid has been applied to the discharge of debts which were a lien on the land, then on a re-sale of the land, the purchaser will be entitled as to its proceeds, to stand in the place of the creditors, whose debts and liens have been discharged, and to be first satisfied as such creditors would have been; *Short v. Porter*, 44 M. 533.

5. Sale under Private Act of the Legislature.

369. *Such a sale is valid.* A sale of the realty of an intestate made by an administrator in pursuance of a power granted him by a private act of the Legislature, is valid; *Williamson v. Williamson*, 3 S. & M. 715.

370. *Requisites of such a sale: The bond to apply proceeds.* But the terms of the act must be strictly complied with, or the sale will be void. Where the act required the administrator, before he made the sale, to execute a bond conditioned, among other things, "to invest the proceeds of the sale in other property," and the bond omitted this condition, it was held the sale was void, notwithstanding a condition in the bond "to account for the funds." The last condition was held not to be in legal effect the equivalent of the one omitted. But it was intimated that if it had been shown that the investment had been made, that this full compliance with the law might have been regarded as a substitute for the omitted condition in the bond, which was only intended to secure this performance of what had actually been done; *1b*.

See *PROBATE COURT*, 51.

6. Ratification of Illegal Sale.

371. *Ratification by reception of proceeds.* If the heir, though a *femme covert*, recover

from the administrator the proceeds of a void sale made by him of the realty of the ancestor, it will be an affirmation of the sale, and will estop her from denying its validity; but the reception of the proceeds by the husband, without her consent, will not have that effect; and especially is this so, where the husband is the purchaser, and merely gave a right to the administrator in satisfaction of the debt he owed for the land; *Kempe v. Pintard*, 3 G. 324 (citing *Lee v. Gardiner*, for which see next section).

372. *Same*. An administrator was sued by a creditor on his bond, for not applying the proceeds of the sale of land to the payment of his debt, and he attempted to defend by showing that the sale was void, but it appearing that he had paid the proceeds of the sale to the heirs, this was held an affirmation of the sale by them, and therefore the defence set up was bad; *Lee v. Gardiner*, 4 C. 521. This principle was applied to an illegal sale of slaves, where the guardian of the infant heirs had received the proceeds and applied them, under the order of the Probate Court, to their benefit; *McLeod v. Johnson*, 6 C. 374, for which see PROBATE COURT, 234.

7. The Warranty in such Sales.

373. *Administrator not bound to warrant the title*. An administrator selling land under an order of the Probate Court, is not bound to warrant the title; *Campbell v. Brown*, 6 H. 106; S. C., *Ib.* 230.

If he make representations in relation to the title, they may constitute a fraud, but not a covenant. And if there be neither fraud nor a covenant of warranty, the purchaser is bound to pay the purchase money if the sale be regular, though the title be bad. He sells the title of the decedent as it exists. If he were to make a warranty, it would probably bind himself only; *Miller v. Boorman*, 13 S. & M. 100. This is now settled as to personally upon reasoning which equally applies to realty; see *ante*. 346, 347.

374. *Same: Case in judgment*. An administrator sold a town lot of his intestate, and at the sale it was proclaimed by a surety of the intestate, that the latter had not paid for the lot, and that he as surety had paid a part of the purchase money, and that he claimed to be subrogated to the rights of the vendor; and the administrator stated that he did not think the claim could be sustained. The purchaser afterwards arranged with the surety, by giving him half the lot, and when sued for the purchase money set up a failure of consideration, and a set-off for the amount so arranged: *Held*, that he could do neither; *Mellen v. Boorman*, 13 S. & M. 100.

8. The Lien on such Sales.

375. *For the statute giving the lien*. See *ante*, 349.

376. *Taking security does not affect the lien: Release of lien*. It is the duty of an administrator who sells land, to take personal security for the purchase money, and his per-

formance of this duty does not affect the lien given by the statute on the land, for the payment of the purchase money. Each security is intended to be cumulative; and as the lien is for the benefit of the estate, it is doubtful whether the administrator can do anything short of actual reception of the purchase money, which would have the effect to release the lien. At all events, he will not be held to have released it by construction; *Hoggatt v. Wade*, 10 S. & M. 143 (citing *Elliott v. Connell*, for which see *ante*, 349, and *Baines v. McGee*, *ante*, 345).

377. *Same*. An administrator sold land to two, and made them a joint deed, but took from each his own separate note, with security for one-half of the purchase money: *Held*, that the lien on the whole land for all the purchase money was not thereby affected; *Hoggatt v. Wade*, *supra*.

378. *Renewal of the debt and taking new security does not release the lien*. See *ante*, 349.

379. *Lien exists against purchaser without notice*. The statute makes property sold by an administrator or executor on a credit, liable for the purchase money, in preference to all other liens or claims, whether it be in the hands of the purchaser or of an assignee from him, or of a purchaser at sheriff's sale. And it makes no difference whether such assignee or sub-purchaser has notice of the administrator's lien or not. No record or registration of the lien is necessary, besides the record of the proceedings ordering the sale, made in the court ordering it. And the liability of the property exists everywhere throughout the State, as well as in the county in which the sale was made; *Walker v. Fuqua*, 2 C. 640; S. P., *Miller v. Helm*, 2 S. & M. 687; for which see *ante*, 349; S. P., *Lambeth v. Elder*, 44 M. 80.

380. *The administrator's deed, when notice of the lien*. Where the deed of an administrator on its face shows that a part of the purchase money was to be paid at a future day, this will be notice to a sub-purchaser, buying before the day fixed for payment, that the land is subject to the statutory lien for the unpaid purchase money; *Hoggatt v. Wade*, 10 S. & M. 143.

9. Irregular Sale under Valid Order.

381. *Effect of irregularity in sale on its validity*. It has never been decided in this State that an administrator's vendee would be affected by any mere irregularity of the administrator in making the sale, as the failure to give proper notice, where he was acting under a valid order condemning the land for sale. Whether such irregularity would vitiate the sale: *Quære?* It seems it would not. But if this objection could be raised at all, it seems that the proper time to do it would be when the report of the sale comes up for confirmation in the Probate Court; *Natchez v. Minor*, 10 S. & M. 246.

It seems that where an administrator acts under a valid decree condemning realty for sale, subsequent irregularities committed by

him in making the sale will, in analogy to sheriff's sales, not affect a *bona fide* purchaser. The sale in such case would be under a valid power derived from a decree of the court, and if the power be deficiently executed, it will be favored in law; *Stevenson v. McReary's Heirs*, 12 S. & M. 9. The sale is good, notwithstanding irregularity in the notice; *Hanks v. Neal*, 44 M. 212. As to defective notice of sale of slaves and other personalty. see *ante*, 352, 352a.

See GUARDIAN AND WARD, 58a.

10. Miscellaneous.

382. *Sale not final till confirmed.* A sale of land under order of the Probate Court is not final till confirmed by the court; *Smith v. Denson*, 2 S. & M. 326.

See PROBATE COURT, 55.

383. *Decree in relation to notice of the sale.* Under a statute which requires an administrator's sale of land to be advertised for three successive weeks in a newspaper, and for forty days, by posting notices at three public places in the county, a decree for a sale of land, which directs that the administrator shall give notice by publication for three weeks in a newspaper, and says nothing about posting notices, but does not say that the administrator shall sell on the notice published in the newspaper, will not be void. It is the duty of the administrator to give the notice required by the statute, independent of any decree of the court; and the order in relation to the notice, though unnecessary, was consistent with and not contrary to the statute; *Harris v. Ranson*, 2 C. 504.

384. *Notice under the statute.* H. C. 577, art. 12, § 1. Under the statute, notice of an executor's application to sell land, is not required to be published in two newspapers, unless the heirs be non-residents and cannot be served personally with process; *Id.*

385. *As to effect of lapse of time in applying presumptions in favor of sale*, see PROBATE COURT, 48, 49.

XXXI. Miscellaneous.

386. *No privity between administrator and heir.* There is no privity between the administrator and heir; and hence, a judgment against the former is no evidence against the latter, if he were no party to the suit; *McCorry v. Nichols*, 4 H. 31.

387. *Limitation of actions as to claim of the administrator.* The statute, of limitations will not run against a claim of the administrator on the estate, if he has probated and registered it within proper time; *Sims v. Sims*, 1 G. 333.

388. *Meaning of "legal representatives"* The term "legal representatives," is generic, and includes several species (as heirs, executors, administrators in chief, and *de bonis non*, and with the will annexed); and a plaintiff claiming to be a legal representative of a deceased person, must set forth in his declaration, the exact character in which he sues. Hence, in an action on a bond payable to the

"curator of D., or his legal representatives," it will be improper for the plaintiffs to describe themselves "as legal representatives of E. D.," without showing whether they are heirs, administrators, &c.; *Cushing v. Gibson*, W. 78.

389. *Possession of husband as administrator.* Possession by the husband during coverture, of the wife's interest in an estate, though undivided, is a sufficient possession to entitle him to it by the common law; *Cable v. Martin*, 1 H. 558.

390. *Surety of insolvent administrator: His right to enjoin his principal.* The surety of an administrator is not entitled to enjoin his principal from collecting a judgment against him in favor of the administrator, upon the mere ground that the latter is insolvent, without any charge of fraud or misapplication of assets; *Marsh v. Bennett*, 6 H. 215.

391. *Action against individually.* An action against an administrator individually, does not authorize a judgment against him as administrator; and it will be error in such a case to charge the jury, by stating to them rules of law applicable alone to his liability as administrator; *Howard v. Cousins*, 7 H. 114.

392. *Forthcoming bond given to administrator.* When the plaintiff dies after the issuance of an execution, the forthcoming bond should be payable to the administrator, and it is his duty to see that the sheriff takes a proper bond; *Smith v. Montgomery*, 11 S. & M. 284.

393. *Waiver by heirs of illegal acts of administrator.* The distributees may waive illegal acts of the administrator, and ratify them. A submission by them of the accounts of the administrator to arbitration, is a waiver of all illegality in them, to the extent that they are sustained by the award; *Fort v. Buttle*, 13 S. & M. 133.

394. *Proof of loss of assets by fire: Case in judgment.* The Probate Court allowed an administrator "\$2000 for losses by fire, and off-sets to the debts reported good." The evidence in support of the allowance showed that the estate papers were burned; "that some money was burned, but not much." The claims reported as due the estate, in the inventory, amounted to \$6000. There was no proof of any set-off allowed: *Held*, that the evidence did not justify the allowance; *Banks v. Machen*, 40 M. 256.

395. *Removal of administrator to another county.* Under the statute (H. C. 677, § 2), if an administrator remove himself or the property of the estate to another county, he may get new letters in that county, and proceed to a final settlement in the court first granting the letters; *Watkins v. Adams*, 3 G. 333.

396. *Debts due in two States: Devise of property in each.* Where a testator owning property in two States, devised the property in one State to one, and that in the other to a different devisee, the debts due in each State, should be paid out of the property

situated in that State; *Brandon v. Hoggatt*, 3 G. 335.

397. *Estoppel to deny that one is administrator.* A person who submits himself to the jurisdiction of the courts, as administrator of a deceased person, of whose estate he is the beneficial owner, and in his character as administrator, conducts a protracted litigation, cannot, after the litigation has ended adversely to his interests, impeach the validity of the judgment against him, upon the ground that he was not in fact administrator, and that he was acting without authority; *Henderson v. Winchester*, 2 G. 290.

398. *Letters durante minoritate.* If the next of kin and widow be minors, the court may appoint a stranger (over a creditor), administrator *durante minoritate*; *Pitcher v. Armat*, 5 H. 288.

399. *Administrator may be sued at any time.* An administrator may be sued at any time at law, upon a claim against the estate, until after a declaration of insolvency; *Saunders v. Douglass*, 3 S. & M. 454.

400. *Liability of legatees to refund.* As between legatees, if one has been paid in full, and there is a deficiency of assets to pay the other, occasioned alone by the *devastavit* of the executor, the former will not be compelled to refund; but he would be compelled to refund, to pay an unpaid creditor; *Evans v. Fisher*, 40 M. 643.

For refunding bond, see DESCENT AND DISTRIBUTION, 42, *et seq.*

Exempt Property from Execution.

1. *What property is exempt: Plow-horse.* Under the statute which allows to each head of a family a plow-horse, it is sufficient, to bring a horse within this description, to show that he is the only horse owned by the debtor at the time of the levy and sale, and that the horse was adapted to the business of plowing, and that the debtor was engaged in raising a crop, which required the use of a plow-horse, though there be no positive evidence to show that the horse was used as such; *Matthews v. Redwine*, 3 C. 99.

2. *Same: Dental instruments.* Dentistry is not a "trade," nor is a dentist a mechanic; and hence, instruments used by a dentist, in the practice of his calling, are not exempt by law from execution, under the denomination of "tools of a mechanic necessary for carrying on his trade;" *Whitcomb v. Reid*, 2 G. 567. But under the Act of 1857, Rev. Code, 529, art. 280, the instruments of surgeons and dentists, to the value of \$250, are exempt from sale under execution.

3. *Same: Leasehold land.* The term "lands," as used in the statute, exempting the homestead of the debtor from sale under execution, embraces leasehold lands, as well as an estate for life, and any greater estate of freehold; *Johnson v. Richardson*, 4 G. 462.

4. *Who entitled to benefit of homestead exemption.* If a judgment debtor, being a free white citizen of the State, becomes a householder, and head of a family after

the rendition of a judgment against him, and before a sale, he will be entitled to hold exempt from sale, under a levy made to enforce the judgment, the quarter section of land exempted as a homestead by art. 281, p. 529, of Rev. Code of 1857; *Trotter v. Dobbs*, 9 G. 198. By the Act of 1870, if the lien of a judgment once attaches to property, no subsequent change in the character and condition of the debtor will exempt it.

5. *Nature and extent of the privilege of exemption: Realty: Jus disponendi of debtor.* The land exempted by art. 281, p. 529, of the Code of 1857, from sale under execution, is a personal privilege extended to the debtor on condition of occupation, and it becomes liable to sale under a judgment against him, as soon as he shall abandon the use and occupation of it, in pursuance of a sale of it made by him to a third party; *Whitworth v. Lyons*, 10 G. 467. But this is changed by the statute of 1870, which gives him the power to sell and invest the proceeds in another homestead.

6. *Same: Personality.* But the rule, under the statute of 1857, in reference to personality exempt from execution, is different. As to that, the exemption is not simply a mere privilege, but it is a right to hold, or dispose of it in any way, exempt from liability for his debts, that he may see proper; and hence, an insolvent debtor may give away his personality exempt from execution, and vest a good title in the donee, which will continue good, even after the debtor shall cease to be a citizen, whereby he loses the character which gives him the right to this exemption. And he may give it to his wife with the same rights; *Smith v. Allen*, 10 G. 469; *S. P., Moseley v. Anderson*, 40 M. 49.

7. *Against what debts.* The Exemption Act of 1841, by its express terms applies to no debt contracted before its passage; but where the original judgment was rendered before its passage, and a forthcoming bond, in satisfaction of it, was executed afterwards, the bond will not be considered as a new contract made after its passage, but as mere process to enforce the original judgment; and the exemption will not be allowed as to it; *Smith v. Brown*, 6 C. 810. Under the Act of 1852 (Session Laws, ch. 66), the widow of a deceased debtor is entitled to his exempt property, as well against debts created before the act passed as afterwards; *Morrison v. McDaniel*, 1 G. 213.

8. *Power of Legislature to exempt as to past debts.* That the Statute of 1865, making additional exemptions as to past debts, is constitutional; See CONSTITUTIONAL LAW, 81.

8a. *Policy of exemption laws: Fraud of debtor.* The statute allowing exemptions is founded upon a policy, that has no reference to the conduct or character of the debtor claiming the benefit of it; and this privilege is granted without reference to the merit or demerit of the debtor. It subverts a public interest in preventing a citizen from being deprived of the means of earning a subsistence for himself and family; and in saving

families from pauperism, and securing to them reasonable shelter and comforts, notwithstanding the follies, vices and crimes of their head. The statute allows as an exemption, one slave to be selected by the debtor; and he may, whether solvent or insolvent, claim this exemption, notwithstanding he may own other slaves placed beyond the reach of his creditors, or may have fraudulently disposed of them to defeat his creditors; *Moseley v. Anderson*, 40 M. 49.

9. *Remedy of debtor for illegal seizure of exempt property.* Where exempt personality is levied on, the debtor is not confined to the remedy of trespass, or case prescribed by the statute, but may bring replevin under the general statute allowing all parties illegally deprived of the possession of property, to bring replevin for its specific recovery; but in such action he cannot recover the *pretium affectionis*, but only the actual value. And the judgment against the debtor is competent evidence for the defendant, and the record will not be excluded, because it embraces unnecessary proceedings by garnishment to enforce the judgment; *Ib.*

10. *What becomes of the exemption after debtor's death: Widow's right.* Under the Act of 1852 (Session Laws, ch. 66), the interest and right of the widow in the property, real and personal, of her deceased husband, exempt by law from execution, cease and determine upon her second marriage; and if then there be no children of the deceased debtor, the property reverts to the estate, and becomes again liable to the payment of the deceased's debts; *Carpenter v. Brownlee*, 9 G. 200. But her right to it is not forfeited by her removal from the State; *Brown v. Brown*, 4 G. 39.

11. *Same: Children's right under Act of 1852.* If there be no widow, the children of the deceased debtor are entitled to his exempt property; *Whitcomb v. Reid*, 2 G. 567.

12. *Same: Widow's right.* Under the Acts of 1839 and 1846 (H. C. 680), the widow is entitled in all cases to the personal property of her deceased husband exempt by law from execution whether the estate be solvent or insolvent; and she is entitled to it, in addition to her distributive share, and not as a part of it; *Lowry v. Herbert*, 3 C. 101. The same is the rule under the Act of 1857; *Whitley v. Stephenson*, 9 G. 113; *Mason v. O'Brien*, 42 M. 420. But she is not entitled to the realty; *Williams v. Hale*, 12 S. & M. 562. Under the Act of 1852, it vested in the wife. See *ante*, 10.

And her right to it is not affected by the fact that she owns a separate estate equal to her distributive share in the husband's estate; *Coleman v. Brooke*, 8 G. 71. And so under the Acts of 1857 and 1860; *Wally v. Wally*, 41 M. 657; *Hardin v. Osborne*, 43 M. 532. And by Act of 1860, the children participated with her in it; *Ib.*

13. *Same: Leasehold property.* A leasehold interest, or a term for years in land, is personal property, and upon the death of the

tenant (it being his homestead, and not exceeding \$1500 in value) goes to the widow, like other personality exempt (see H. C. 680); *Smith v. Estell*, 527.

13a. *Right under Act of 1865.* By the Act of 1865 (Session Laws, p. 138, § 3), the widow is made tenant for life or widowhood of all her husband's exempt property; not, however, for her exclusive use and benefit, but "for the use and benefit of herself and children." Under this act the benefit and use are joint and common to the widow and children so long as she continues a widow; but on her death or marriage it goes to her husband's heirs. And where the property has been converted into money, the widow is entitled only to a child's part during life or widowhood, and is compellable to give security to have it forthcoming at the termination of her interest; *Hardin v. Osborne*, 43 M. 532.

14. *Same: Right of husband to dispose of exempt property by will.* Under the statutes, as they existed in 1856, the widow, on the death of her husband, took his exempt property by descent; and hence, this property was like his other estate, subject to be disposed of by the husband's will; and in such case she is not entitled to that property, unless she renounce the will, as in other cases; *Turner v. Turner*, 1 G. 428. And if she renounce the will, she will not be entitled to that specific property, if it be bequeathed or devised to others; *Nash v. Young*, 2 G. 134. Whether this is the rule under the Act of 1857; *Quære?* Since it is held under that act that the exempt personality, on the husband's death, goes directly to the widow, and is not subject to administration; *Whitley v. Stephenson*, 9 G. 115; *Holliday v. Holland*, 41 M. 528.

15. *Remedy of widow: Failure of appraisers to set apart exempt personality.* Notwithstanding the exempt personality goes to the widow upon the death of her husband, and is not liable to administration, yet it is her duty to see that the appraisers set it apart to her, and if they fail to do so and she allow the report to be confirmed, in which is appraised, as a part of the estate, the exempt personality, this is conclusive on all parties, until reversed or set aside according to law; and if it be not set aside, the administrator may sell the exempt property, without being liable individually to the widow for it; *Holliday v. Holland*, 41 M. 528.

16. *Same.* A proceeding in the Probate Court, by a widow, to procure her interest in the personality of her deceased husband, which is by law exempt from execution, if the administrator be dead, ought to be against the administrator *de bonis non*, and not against the representative of the deceased administrator, for the latter is not under any responsibility to her for having sold as assets of the estate the exempt property, when the appraisers had failed to set it aside to her, but had embraced it in the appraisement; *Ib.*

See EXECUTOR AND ADMINISTRATOR, 229.

Expatriation.

See DOMICILE, 6, 7.

Experts.

See EVIDENCE, 336 to 340.

Federal Courts.

See CONSTITUTIONAL LAW, 115, *et seq.*

1. *Jurisdiction of: Removal of causes to.* Under the Judiciary Act of 1789, the Circuit Courts of the United States have no jurisdiction of a cause, unless one of the parties reside in the district in which the court is held. Hence, a suit in such court must either be brought in the district in which the defendant resides, or if he be a citizen of another State, and be found in the district in which the plaintiff resides, he may be sued there. But if there be several necessary defendants, residing in different districts, suit can not be brought in the Federal Court at all. Under the Act of 1839, the plaintiff was authorized, in case of the residence of necessary defendants in different districts, to bring suit against all in a district in which one of the defendants resided, and if the non-resident defendants voluntarily appeared and submitted to the jurisdiction of the court, they thereby became properly parties, and if they would not, the plaintiff might elect to proceed to judgment against the resident parties.

Under the Judiciary Act of 1789, the defendants in a suit in a State court, who are non-residents of the district or aliens, may cause the suit to be transferred to the United States Circuit Court for the district in which the State court, in which the suit was instituted, is held. This, however, is a right secured to the defendants, and all of them must join in the petition for the removal, and the suit in the State court must be such that the United States Court, to which it is proposed to transfer it, would have jurisdiction over all the parties; for the Act of 1839, above quoted, refers only to cases originally instituted in the United States Court. Hence, a non-resident alien defendant, where there are several other defendants, has no right to cause a transfer of a case from a State court to the United States Court, if there be one or more defendants over whom the United States Court would not have jurisdiction unless by his or their voluntary appearance or consent. The plaintiff having elected a State court having jurisdiction of all the defendants, cannot be forced into a United States court by a part of the defendants, and thereby lose his right to proceed against the others; *Dennison v. Potts*, 11 S. & M. 36.

2. *Same.* But if the party in the State court over whom the United States Court would have no jurisdiction, be a mere nominal party, his refusal to join in the petition for a transfer, would be no objection to the removal of the suit. A married woman who has joined in a mortgage to release her dower, is not, however, a mere nominal party to a bill to foreclose, and her refusal to join in

the petition would prevent a removal of the cause; *Ib.*

3. *Right of non-resident to compel removal: Remedy.* A non-resident sued in a State court for a sum exceeding \$500, is entitled under the Act of Congress, upon compliance with the terms thereof, to have the cause transferred from the State court to the next term of the United States Circuit Court to be held for the district in which the State court is held; and if an application be made for such transfer, it will be error to refuse it, and the applicant need not apply for a mandamus to enforce it, but may have a writ of error to the High Court; *Hill v. Henderson*, 6 S. & M. 351. But if on remanding the cause to the court below, the applicant neglect to give the bond as required by the act of Congress, the State court will still have jurisdiction to go on and try the case; S. C., 13 S. & M. 688.

4. *Non-resident executor entitled to remove.* And a non-resident executor of a person who died domiciled in this State, is entitled upon being sued here, in a State court to have the cause removed; *Ib.*

5. *To what terms the transfer must be made.* If the term of the Circuit Court of the United States, and the term of the State court in which the application for a transfer is made, commence on the same day, the transfer must be made to the term of the United States court, next succeeding the term in session when the transfer is ordered; *Ib.*

6. *Judgments in Federal court have no extra-territorial effect.* Judgments in the Federal court have no more extra-territorial effect, beyond the limits of the State in which they are rendered, than judgments in the State courts, and they must therefore, when made the basis of an action in a State court outside of the State in which they were rendered, be authenticated in the same manner as judgments of State courts are required to be authenticated by the Act of Congress; *Dorsey v. Maury*, 10 S. & M. 298.

7. *Lien of judgments in Federal courts.* The lien of judgments rendered in the Federal courts is derived entirely from the law of the State in which they are rendered. This lien must therefore be regulated by any change in the State law upon the subject. Legislative acts of the States on the subject of liens of judgments are rules of property, and therefore binding on the Federal courts; *Tarpley v. Hamer*, 9 S. & M. 310.

8. *Same: Application.* The act of the Legislature of this State, passed in 1841, which took away the liens of judgment theretofore rendered, unless an abstract was filed in the circuit clerk's office of the county in which the defendant's property was situated, by 1st July of that year, is a rule of property and applies to judgments rendered in the Federal courts, held in the State. Hence, property sold under a judgment rendered in a Federal court prior to 1st July, 1841, an abstract of which had never been filed in the county, would still be liable to be sold under a junior judgment rendered in a court of this State, which by our law was a lien on it at

the time of the levy under the execution from the United States court. And it makes no difference in this respect, that the plaintiff in the judgment in the State court had notice at the time of the rendition of his judgment, of the fact that a prior judgment had been rendered in the Federal Court against the same defendant. For notice of a judgment which has no lien, amounts to nothing in creating one for it; *Ib.*

9. *Federal judgment as a foundation for a creditor's bill.* A court of equity of this State will entertain a bill to annul a fraudulent conveyance of property, where the creditor's debt has been reduced to judgment in a Federal court, held in this State; *Bullitt, Miller & Co. v. Taylor*, 5 G. 708.

10. *Liens of Federal judgments barred by State statute of limitations.* The liens of judgments rendered by the Federal courts in this State, are subject to the operations of the statute of limitations enacted by the Legislature of this State, and will be extinguished by the lapse of time therein prescribed; *Abbey v. Commercial Bank of New Orleans*, 5 G. 571.

Ferryman.

See COMMON CARRIER, 3, 16, 17, 18.

Fixtures.

1. *General rule and exceptions.* Whatever is fixed to the land is thereby made a part of the realty to which it adheres, and becomes a parcel of the freehold, and partakes of all its incidents and properties. To this general rule, there are many exceptions and qualifications. The greatest relaxation of it is in favor of the tenant, who has erected improvements on the land during his tenancy, and in favor of the tenant for life, as against the remainderman. And the rule is applied with its strictest rigor between the heir and executor, and between vendor and vendee; *Stillman v. Hamer*, 7 H. 421; *S. P., Terry v. Robins*, 5 S. & M. 291; *Richardson v. Borden*, 42 M. 71; *Weathersby v. Sleeper*, 42 M. 732. See post, 6, 7.

2. *Buildings erected by license and by intruder.* Buildings erected by an intruder become a part of the freehold; but buildings erected by the parol license of the owner may be removed. In this case a dwelling house was erected by one who purchased a lot from one who was only a half owner; on partition, the lot fell to the other tenant, who instituted proceedings for its recovery, pending which the builder removed the dwelling, and it was held that he was liable in trover for the house; *Stillman v. Hamer*, 7 H. 421.

4. *A still.* It seems that a still in a still-house and attached to it, is personal property, and that it is not necessary that the relation of landlord and tenant should exist to warrant its being so considered and treated, and to authorize its removal by the person placing it there; *Terry v. Robins*, 5 S. & M. 291.

5. *Dwelling house: Vendor and vendee.* A

dwelling house erected on land by a vendee who has only a bond for title, is annexed to the soil, and upon a rescission of the contract, occasioned by his failure to comply with it, goes to the vendor as part of the soil, being annexed to it. The general rule, that whatever is annexed to the soil becomes a part of it, is applied with all its rigor in such a case. And in this case, a bill filed by a mechanic to enforce his lien on a building erected by him for the vendee was dismissed. The court, holding on the above grounds that the vendor was entitled to it; *English v. Foote*, 8 S. & M. 444.

6. *Rule for determining what is a fixture.* In determining whether a chattel is so annexed to the freehold as to become a fixture, reference must be had to the nature of the chattel, the position of the party placing it there, the injury that would result from its removal, and the object of the party in placing it there with reference to trade, agriculture, or ornament; *Richardson v. Borden*, 4 S. & M. 71.

7. *Same.* Whether a chattel attached to the freehold is personal property or a fixture, in the absence of established usage or a special contract, must be determined by taking into consideration its nature, mode of attachment, purpose for which used, the relation of the party making the annexation, and other attending circumstances, indicating an intention to make it a temporary attachment or a permanent accession to the realty; this latter intention must affirmatively and plainly appear before the legal quality of the chattel will be changed. In some instances the intention to make the article a fixture, may clearly appear from the mode of the attachment alone, as where the property cannot be removed, without serious injury to the realty by the act of severance. But where the attachment is but slight, and does not enter into the physical structure of the realty, the intention to annex must be gathered from the nature of the article and other attending circumstances. An article may also be a fixture or not by established usage, and so by special agreement between the parties; *Weathersby v. Sleeper*, 42 M. 732.

8. *Gin-stands.* Vendor sold a cotton plantation on which there was only one gin-stand, which was attached to the gin-house in the manner that gin-stands, when ready for use, are usually attached; there was no other gin-stand on the place: *Held*, that the gin-stand went to the vendee as a part of the realty; *Richardson v. Borden*, 42 M. 71.

9. *Steam engine and mill.* The owner of a steam engine and boiler, and saw and grist mill, loaned it to W., who was to remove it and put it up on land of W. & S., who were to run it for an indefinite period, in payment for repairs they were to make. The removal was made, and the annexation to the land was as follows: The boilers were incased in brick, and there were two posts at each end of the boilers which were joined by cross-beams, through which run iron bolts, extending to the boilers, and aided in supporting

them. The engine was bolted down to heavy timbers, which were firmly inserted in the earth, and there were pipes leading from the engine to a pond, and also to a well. All parts were connected together, as usual in cases of steam mills. All the property could be removed without material injury to the freehold. The owner, after removal, sold the property to plaintiff. S. refused to deliver it up, claiming a lien on it for the money expended in repairs: *Held*, that the property was not a fixture, and that replevin would lie for its recovery; *Weathersby v. Sleeper*, 42 M. 732.

10. *Rule: Agricultural improvements.* At common law, the rule is, that whatever is annexed to the freehold becomes a part of it, and cannot be removed except by the owner of the inheritance. But there are exceptions to this rule, in favor of traders and manufacturers, and in favor of tenant against landlord. In England, there seems to be no relaxation of the rule in favor of erections for agricultural purposes, though such relaxation is recognized in the United States; *Perkins v. Swank*, 43 M. 349.

11. *Same: Case in judgment.* S. leased from H. a plantation, for the year 1866, and during that year a verbal sale of the land was made to S., on certain conditions. In December, 1866, this verbal contract was reduced to writing, and it was agreed that if a certain payment was not made by the first of January, 1867, H. should have the privilege of taking and selling any property of S., on the place when the contract was made, or which he might put on it afterwards. In 1866, and after the verbal contract of sale was made, but whether before or after it was reduced to writing does not appear, S. having bought a steam saw mill from P., erected the same on the land, with a view of sawing timber growing on the land, for market. After he had so erected the mill, and after default made in the payment for the land, due January 1st, 1867, S. mortgaged the mill to P., and the contest was between H. and P. as to priority of payment out of the mill: *Held*, that under these circumstances, the mill was a fixture, it having been erected by S. in his character as vendee and not as tenant, and that H.'s claim was the best; *Ib.*

Foreign Laws.

See CONFLICT OF LAWS.

Forcible Entry and Unlawful Detainer.

1. *Is only a possessory action.* The action is merely possessory, and does not involve the title, and the judgment is no evidence in ejectment or trespass; *Spears v. McKay*, W. 265; *Loring v. Willis*, 4 H. 383.

2. *When a proper remedy.* The action of unlawful detainer is not given in every case where defendant is wrongfully in possession, and keeps out the true owner. It extends to cases only, where the defendant entered under

a defeasible title, which has expired. It is a mere possessory action, in which the right to the possession is involved, and is dependent on certain relations existing between the parties, and not on the title. The action has heretofore been allowed in this State only where the relation of landlord and tenant existed, or of vendor and vendee, where the latter had entered into a contract of purchase, which he failed to comply with; *Cummins v. Kilpatrick*, 1 C. 106.

3. *Same.* The object of the proceeding is to effect restitution of the possession to one who, having had it, is kept out; but, nevertheless, a plaintiff who never had possession may maintain the action, if he be heir of the landlord, or assignee of the landlord's right, with attornment to him by the tenant. And the case of *Rabe v. Fyler*, 10 S. & M. 440, is not contrary to the above; for in that case the plaintiff was assignee of the landlord's right, and he was permitted to introduce his title to prove his ownership, but in connection with proof of the attornment of the defendant, to show that the relation of landlord and tenant existed between them; *Ib.*

4. *Same: Case in judgment.* The defendant was a tenant of a bank, which conveyed the premises to two trustees jointly, to collect the rent, sell the land, and pay the debts of the bank. The defendant refusing to deliver possession, the plaintiff, one of the trustees, brought the writ of unlawful detainer in his own name, and on the trial read the trust deed from the bank: *Held*, that the right of possession being one of the points in controversy, that the deed was admissible in evidence to enable the jury to determine that right; *Rabe v. Fyler*, 10 S. & M. 440.

5. *Same.* And in this case it was held that when there had been an assignment of the landlord's right, as stated in 4 *ante*, and the trustee gave notice to the tenant that he must pay rent to him, and the tenant did not object, this would be counted as an attornment by the tenant; *Ib.*

6. *Same: Vendor and vendee: Refusal of vendee to complete the purchase.* Where a party goes into possession, under an executory agreement to purchase, if he refuse to complete the purchase by a refusal to pay a balance due on the purchase money, from that time he becomes a trespasser, and may be turned out of possession by the vendor, by the action of unlawful detainer; *Loring v. Willis*, 4 H. 383; *S. P., Johnson v. Tuggle*, 5 C. 836.

7. *Purchaser at sheriff's sale not entitled to.* The action does not lie in favor of a purchaser at sheriff's sale to recover possession, of the land he bought, from a party not occupying the relation of tenant to the defendant in execution; *Cummings v. Kilpatrick*, 1 C. 106.

8. *Party entitled to profits of a mill.* A party who holds a contract in writing from the owner of land, and the mill situated on it, to the effect that if he would help build the mill, and attend to it afterwards, he

should have half the profits so long as he so attended it, is entitled to a joint possession with the owner so long as he complies with his contract, and cannot be turned out of possession by unlawful detainer; *McMullin v. Mayo*, 8 S. & M. 298.

9. *Forcible entry.* The owner of land, in the constructive possession of it, is entitled to the writ against one who enters on it without his consent, if the entry be made peaceably; *Wilson v. Pugh*, 3 G. 196.

10. *Unlawful detainer: Purchaser at trustee's sale.* To enable a party to maintain an action of unlawful detainer, the defendant must have entered into possession under the plaintiff, and must continue in possession in violation of the contract; hence, a purchaser of land sold at a trustee's sale, by virtue of a deed and power of sale executed by the owner, cannot maintain unlawful detainer against the owner if he refuses to surrender the premises; *Burford v. Nolan*, 1 G. 427.

11. *Joint tenants as plaintiffs.* Where joint tenants are entitled to this action, it may be brought in the name of one alone; *Rabe v. Fyler*, 10 S. & M. 440.

12. *Demand of possession before suit.* In the action of unlawful detainer, if the tenant has disclaimed that relation, it is unnecessary for the landlord to prove demand of possession, the disclaimer being equivalent to a demand and refusal. Nor is a demand necessary, if the tenant resists, in the action, the right of the plaintiff and litigates his claim; yet if no demand were made before action brought, and the defendant had, when demand was made by the bringing of the suit, offered to deliver up possession, he might be entitled to costs; *Id.*

13. *Landlord and tenant: Estoppel.* In unlawful detainer, where the tenancy of the defendant to the plaintiff is shown, the defendant cannot object to the plaintiff's title, nor deny his right to possession; *Newman v. Mackin*, 13 S. & M. 383.

14. *Change of possession.* A party in possession cannot defend the plaintiff's right of recovery by abandoning the possession to another, after suit brought. Such third party will occupy the same relations to the plaintiff that the defendant did; but if the defendant so abandon it, and a third party, after his abandonment, intrude on the land, claiming not from the defendant, but in his own right, the defendant cannot be made responsible for the rent which accrued after the abandonment. The party taking possession after suit brought, will be bound by the judgment, and if it be for the plaintiff, the sheriff, on executing the writ, will turn him out of possession; *Id.*

15. *Where plaintiff never had possession.* The plaintiff is entitled to maintain forcible entry, notwithstanding he may never have had actual possession of the land; if he be entitled to the possession, and one has entered, though in a peaceable manner, and withhold the possession, the plaintiff can maintain the action; *Spears v. McKay*, W. 265.

16. *Right of administrator to maintain the action.* An administrator as such, has no right to bring the action; but it seems he would be entitled to it, if he show that such proceedings have been had in the Probate Court, as to authorize him to dispose of the real estate; if he be in possession, and be dispossessed by an intruder, he may maintain the action as an individual; *Carmichael v. Davis*, W. 221. Whether an administrator can bring the action; *Quære? McMullen v. Mayo*, 8 S. & M. 298.

17. *Proceedings in: Affidavit.* In an action of unlawful detainer, the plaintiff introduced a witness and proposed to prove by him, that the defendant did unlawfully withhold a tract of land and tenements, as described in the affidavit on which the action was founded. The affidavit described the land as "a tract of land containing 140 acres, lying and being in the county of Holmes:" *Held.* that the proof offered was competent, and that the affidavit sufficiently described the land, as it was in the words of the statute; *Torrey v. Cook*, 3 S. & M. 68.

If in the affidavit to the complaint, the name of the affiant be omitted, it will be a clerical error, and may be corrected by the insertion of the proper name; *Johnson v. Tuggle*, 5 C. 836.

18. *Oath of jury.* The statute (Poindexter's Code, p. 239) requires the jury empanelled in an unlawful detainer case, to be sworn to try: "1st. Whether defendant holds possession against the plaintiff's consent. 2d. Whether he has so held for three years next before the exhibition of the complaint. 3d. Whether the plaintiff has the right of possession." Under this statute, where the record sets out the oath administered, it must show a compliance with the statute, and the omission of either one of the three issues in the oath, will be fatal to the verdict, though the verdict embrace all of them. Whether a general statement that the jury were sworn according to law will do; *Quære? Holt v. Mills*, 4 S. & M. 110. If the record show the jury were "duly sworn," it is sufficient; *Wilson v. Pugh*, 3 G. 196. But if the oath be set out, it must be as the law requires; hence, if the record show, that the jury were "sworn well and truly to try the matter in controversy between the parties," the verdict will be set aside; *Graham v. Busby*, 5 G. 272. The record must show affirmatively that the jury were properly sworn; *Holt v. Mills, supra*.

19. *Statute of limitations.* Three years' adverse possession by the defendant before the commencement of the suit is a bar to the action; *Loring v. Willis*, 4 H. 383; and when a tenancy has once been established, it is incumbent on the tenant to show when his possession assumed an adversary character, as the statute would commence running from that time; *Rabe v. Fyler*, 10 S. & M. 440.

20. *Remittitur of rent.* When too much rent has been assessed, the plaintiff may remit the excess, and thus prevent the setting

aside of the verdict; *Newman v. Mackin*, 13 S. & M. 383.

21. *When entitled to rent.* Under the Acts of 1827 (H. C. 813) and of 1846 (H. C. 821), the plaintiff in unlawful detainer will not be entitled to recover rent, unless he demands it in his complaint; *Johnson v. Tuggle*, 5 C. 836.

Forfeiture of Land for Non-payment of Taxes.

See CONSTITUTIONAL LAW, 44, 45.

Former Recovery.

See RES ADJUDICATA.

1. *Suit on an instalment.* A suit on, and recovery for, the first instalment of a contract is no bar to a suit on a second instalment not due when the first action was commenced. And the principle is here applied to an action on the first instalment of a contract for personal services rendered by plaintiff, who was wrongfully discharged from employment before the first instalment fell due; *Armfield v. Nash*, 2 G. 361.

See RES ADJUDICATA, 10.

Forthcoming Bond.

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I. Statutes.

1. *Statutes.* By the Act of 1827 (H. C. 910, art. 6), it was made the duty of a sheriff levying on personalty under execution, if the debtor would give sufficient security, to take a bond from the debtor and surety, payable to the plaintiff, "reciting the service of such execution, and the amount due thereon," in a penalty double the execution and costs, conditioned to have the property levied on forthcoming on the day of sale, at twelve o'clock, noon, of such day; to suffer the property to remain with the debtor until that time, and if the obligors should fail to deliver the property according to the condition of the bond, or pay the debt and costs, the sheriff "shall return the bond so forfeited, with the execution, to the court from which the same issued, on the return day thereof; and any bond which shall be forfeited, shall have the force and effect of a judgment, and thereupon it shall be lawful for the clerk immediately to issue execution thereon" against the obligors for the full amount of the plaintiff's debt and costs, &c. This act is constitutional; *Wanzer v. Barker*, 4 H. 363; *Jones v. Miss. & Alabama R. R. Co.*, 5 H. 407.

II. Form and Requisites of a Forthcoming Bond.

2. *Parties to: Obligees.* A forthcoming

bond is not void because it is made payable to the plaintiffs by their firm name; *Parkinson v. Waldron*, 189 (see post, 2, for partners as obligors). There must be an obligee, and if the plaintiff be dead, when the bond is taken, it will be void; where plaintiff dies after judgment or issuance of execution, the bond should be given to his administrator or obligee; *Smith v. Montgomery*, 11 S. & M. 284.

2a. *Same: Obligors: Partners.* A forthcoming bond executed by one of the partners in the name of the partnership, against whom the original judgment was rendered, is void as to the partners who did not execute it; and a sale of such partners' property under an execution, emanating on the bond, is also a nullity; *Doe v. Tupper*, 4 S. & M. 261.

3. *Same: Executors and administrators.* There is nothing in the terms or policy of the statute which would prevent an administrator from executing a forthcoming bond, where property of the estate has been levied on, under an execution against the intestate. But if he execute the bond, though, as administrator, it would be binding on him individually, and not in his representative capacity (citing *Glenn v. Thistle*, 1 C. 42; *Henderson v. Ilesley*, 11 S. & M. 9); *Thompson v. Ross*, 4 C. 198. And such bond will be good, though there has been no revivor against him, the intestate having died after the issuance of the execution (citing *Davis v. Helm*, 3 S. & M. 17); *Ib.*

In *Jones v. Stanton*, 7 H. 601, the opinion was expressed, that executors and administrators might execute forthcoming bonds; and it was intimated that they would be bound only in their representative capacity, but this last point is overruled by this case.

4. *Cannot be made by strangers to the judgment.* A forthcoming bond made exclusively by strangers to the original judgment, as principal and sureties, is not a valid statutory bond, and if forfeited cannot have the force and effect of a judgment, whatever force it may have as a common law obligation; *Nabours v. Cocke*, 2 C. 44.

5. *Without security.* A forthcoming bond taken without security, or with fictitious security, is a nullity, and does not, when forfeited, raise the lien of the original judgment upon which execution may be issued, without quashing the void bond; *Carlson v. Osgood*, 6 H. 285. It is not, however, an absolute nullity, but only voidable at the election of the plaintiff. If he elect to treat the bond and judgment thereon as valid, no one else can complain; *Walker v. McDowell*, 4 S. & M. 118.

6. *Without sealing.* An instrument in all respects a valid forthcoming bond, except that it is not sealed, is not an absolute nullity, it is valid as an unsealed instrument; and though the plaintiff might possibly have disregarded it by issuing a new execution on the original judgment, yet if he receive it as a bond, by issuing execution on it and collecting thereon a part of the money due, and the makers do not object, he cannot afterwards

treat it as a void instrument; *McComb v. Ellett*, 8 S. & M. 505.

7. *Printed seal good.* A printed scroll is a sufficient seal to a forthcoming bond; *Wanzer v. Barker*, 4 H. 363.

8. *The levy.* Where the return on the execution does not show that a levy was made, a recital in the execution that a levy was made, is sufficient to uphold the bond; *Pritchard v. Myers*, 11 S. & M. 169.

9. *Same: Case in judgment.* A surety sought to be relieved in equity from a forthcoming bond, on the ground that there had been no levy; and it was proven by the defendant in execution, who was examined as a witness, that the sheriff came to his store with the execution, and that he supposed it was considered by both parties that a levy was made on the goods: *Held*, that the proof was entirely too vague, even if equity had jurisdiction to grant relief; *Baine v. Williams*, 10 S. & M. 113.

9a. *No seizure necessary.* No actual seizure of the property by the sheriff is necessary to uphold a forthcoming bond, in a case where the principal and sureties voluntarily execute the bond reciting a levy, and in that condition delivered it to the sheriff; it is an admission of a levy which the parties are estopped to deny; and where there is no actual seizure, but only an execution of a bond acknowledging a levy, it seems it would be a fraud on the plaintiff to allow the obligors on the bond, after voluntarily inserting in the bond property not liable to seizure and sale, to object to the validity of the bond on that account; *Walker v. Shotwell*, 13 S. & M. 544.

10. *Recital of judgment in it.* A forthcoming bond need not refer to the judgment which is its foundation; it will be sufficient if the execution and the amount for which it issued be recited in the bond; *Head v. Beatty*, 5 H. 480.

11. *Omission of words in it.* A forthcoming bond, in all other respects perfectly regular, is not void for the omission to insert the words "said property" after the word "deliver," in the condition. The law will supply these words by intendment, so as to make a valid covenant to deliver the property; *Clow v. Tharpe*, 3 S. & M. 64; *Doe v. Parker*, *Id.* 114.

12. *Mistake in.* A mistake in a forthcoming bond as to its date, will not vitiate it after forfeiture; *Hyman v. Seaman*, 4 G. 185. Whether a mistake by which the bond is conditioned to have the property forthcoming at the court house of a different county from the one in which it is taken, is valid or not; *Quære? Buckingham v. Bailey*, 4 S. & M. 538.

12a. *Irregularity or misrecital in execution.* An irregularity or misrecital in an execution, which does not vitiate it so that a levy under it would be bad, will not affect the validity of a forthcoming bond given to secure the relieving of the property so levied on—the release of a valid levy being the consideration of the bond. Hence, if the

executor erroneously recite that the judgment is against S. and another, when it is against S. only, a forthcoming bond given by S. and his sureties to release the property of S. levied on under it, will be good. And it is no fraud on the sureties that the sheriff failed to notify them that the judgment was against S. alone; and if it were, the plaintiff, not being implicated in it, would not be affected by it; *Walker v. Shotwell*, 13 S. & M. 544. Nor in such case is it a ground for releasing the sureties on the bond, that S. was insolvent when the bond was made, and the other, who was erroneously recited as a defendant in the execution, was solvent, since the sureties are the sureties of S. alone, and not of the other; *Id.*

13. *Bond should show owner of property.* The bond should show to whom the property levied on belongs, and if it appear on the face of the bond that the property levied on, and for the forthcoming of which the bond is given, is not liable to the execution, the bond ought to be quashed; *Jones v. Miles*, 1 H. 58.

14. *Failure to give ten days between levy and sale day.* It does not vitiate a forthcoming bond that there are not ten days between the levy and day of sale, as stated in the bond, though the law requires ten days' notice of the sale of personality. If the defendant is damaged thereby, his remedy is against the sheriff; *Jones v. Miss. & Ala. R. Co.*, 5 H. 407.

15. *Penalty too small, or too large.* The obligors in a forthcoming bond cannot complain that the penalty is too small; *Jones v. Miss & Ala. R. R. Co., supra.* And if it be for too much, and a motion be made to quash on that ground, the error may be corrected by a *remititur*; *Ridgeway v. Marshall*, 5 H. 286.

16. *Taken by unau'horized person: Case in judgment.* A person who is not legally appointed a deputy sheriff cannot take a forthcoming bond; but if he be proven to have acted in that capacity, it will not be sufficient evidence that he was not legally appointed, that the probate clerk has searched his office for evidence of his appointment and has failed to find it, especially when it is proven that the probate clerk who held the office when the appointment should have been made and filed, kept his office loosely, and carelessly; *Pritchard v. Myers*, 11 S. & M. 169.

20. *Blank forthcoming bond.* A forthcoming bond delivered with the penalty and the amount of the execution in blank, is void. And the return of the sheriff that the bond was duly taken and forfeited, is not conclusive; the obligor may, nevertheless, attack it; *Williams v. Crutcher*, 5 H. 71. The court in this case incline to follow those authorities which hold that a bond signed, sealed and delivered in blank, but filled up by parol authority from the obligor, is void, without a re-delivery by him; *Id.* And so if a party, at the request of a judgment debtor, sign and seal a forthcoming bond in blank, and deliver

it to the principal, upon his express promise that he will procure two others to sign as co-sureties, and upon the condition that he does so, and the principal deliver it thus to the sheriff, without procuring those signatures, and the sheriff fill it up, the bond is void as to the surety, and a court of chancery will order it delivered up; *Sessions v. Jones*, 6 H. 123.

21. *Same: When objection made on that account.* But when sureties signed a forthcoming bond in blank, and delivered it to the principal, who perfected it and delivered it to the sheriff, who accepted it and returned it forfeited, and the sureties, four years after the forfeiture, applied in chancery for an injunction on this ground; it was held, that they were too late in applying for relief. That being informed when they signed it, as to the purposes for which the bond was intended, they were bound to make their objection at the earliest possible period, so as not to delay the plaintiff in pursuing his remedy on his judgment; *Finney v. Harris*, 1 G 36.

22. *Bond by one of several defendants.* Where there are several defendants, that one on whose property the execution is levied, may execute a forthcoming bond, without the concurrence of the others; *Head v. Beaty*, 5 H. 480. And in such a case, where another defendant, instead of the owner of the property levied on, executed the bond with surety—the owner not joining—and the plaintiff in execution allowed the bond to be forfeited, and did not move to quash it at the return term; it was held that the bond might be out of the usual course of things, and even irregular, yet the plaintiff had a right to accept it, which he virtually did, by failing to move to quash at the return term; *Coffee v. Planters' Bank*, 11 S. & M. 458.

22a. *Bond where the property levied on is under mortgage.* Nor is a forthcoming bond void, because the property levied on was under mortgage at the time, and therefore not liable to the execution; though it seems that the sureties would be released from liability, if they were prevented by legal proceedings under the mortgage, from delivering the property to the sheriff on the day of sale, in discharge of the bond; but the mere existence of the mortgage does not prevent such delivery of the property, and it is therefore no defence to the action. And it seems, also, that where there is no actual levy on the property, but a voluntary execution of the forthcoming bond, reciting a levy, it would be a fraud on the plaintiff to allow the obligors, after voluntarily inserting in the bond property not liable to sale, to object on that account to their liability on the bond; *Walker v. Shotwell*, 13 S. & M. 544.

III. Forfeiture and its Effects.

1. The Return.

23. *The return: Instances.* An endorsement by the sheriff on a *fi. fa.* "Received August 8th, 1836, bond taken and forfeited," is a sufficient return of the taking and forfeiture

of a forthcoming bond returned with the *fi. fa.*; the statute not requiring the return to be endorsed on the bond; *Wanzer v. Barker*, 4 H. 363; *Barker v. Planters' Bank*, 5 H. 566; *Shields v. Graves*, 6 H. 262; *Jones v. Miss. & Ala. R. R. Co.*, 5 H. 407. The return on the bond of the word "forfeited," is sufficient evidence of its forfeiture; *Pritchard v. Myers*, 11 S. & M. 169. And it is unnecessary to make any written return on the execution or on the bond, of its forfeiture. The actual return of the bond into court is itself evidence of its forfeiture, since, if it had been paid, or the property delivered, the sheriff should have delivered up the bond to the obligors; *Talbert v. Melton*, 9 S. & M. 9; *Hyman v. Seaman*, 4 G. 185.

24. *Same: Clerical error in.* If the return on the execution shows that the levy was made after the forfeiture of the bond, this will be held a clerical error, and the levy will be treated as made prior to the execution of the bond; *Talbert v. Melton*, 9 S. & M. 9.

2. The Judgment on the Forfeiture.

24a. *The judgment.* The forfeiture of a forthcoming bond has the force and effect of a judgment; *Weathersby v. Proby*, 1 H. 98. It is, however, only a judgment in law, and no formal or judicial judgment is entered on the minutes of the court; *Barker v. Planters' Bank*, 5 H. 566; *S. P., Hoy v. Couch*, 5 H. 188. Therefore, only such a judgment is considered as entered on the forfeiture as is legal and proper; and hence, if one of the obligors be dead at the time of the forfeiture, the judgment will be considered as entered only against the survivors; *Moody v. Harper*, 9 G. 599.

25. *The foundation of the judgment.* And the judgment on the forthcoming bond, being in fact never entered is but an incident to the original judgment, and is founded on it and supported by it; and if the original judgment be reversed on writ of error, the judgment on the forthcoming bond falls with it, without any order quashing it; *Hoy v. Couch*, 5 H. 188. Nor does a judgment on a forthcoming bond preclude an inquiry as to whether there is a judgment on which it must be founded; mere irregularities or informalities in the original are, however, waived by the forfeiture, and cannot be looked into after that event. Thus when the original judgment was entered in these words, "This day, by attorney in fact for the defendant, M. D. P. confessed judgment in favor of the United States Bank, for the sum of \$11,885, with interest thereon," &c., and a forthcoming bond was afterwards given by P.; it was held that P. was estopped from asserting that the judgment was in fact entered against G. and not against him; *Bank of United States v. Patton*, 5 H. 200. And so a judgment in these words, "plea withdrawn and judgment by default for \$1000, and costs," though informal, is a sufficient foundation for a judgment on a forthcoming bond, taken on an execution emanating from it; *Miller v. Patton*, 3 S. & M. 463. And if the original judgment be void,

the forthcoming bond and all subsequent proceedings are void; *Buckingham v. Baily*, 4 S. & M. 538; *Pender v. Felts*, 2 S. & M. 535.

26. *Variance between original judgment and forthcoming bond.* If the judgment be in favor of the Bank of United States, and the execution and forthcoming bond be in the name of the Branch of the Bank of United States at Natchez, the variance is immaterial; *Bank of United States v. Patton*, 5 H. 200.

27. *Revivor of the judgment.* If more than a year and a day elapse from the date of the forfeiture of the forthcoming bond, without the issuance of an execution thereon, there must be a revivor, as in case of other judgments; *Abbott v. Hackman*, 2 S. & M. 510.

28. *What is a forfeiture: And the judgment.* A forthcoming bond is forfeited by the non-delivery of the property on the day specified, and upon its forfeiture and before its return, it has the force and effect of a judgment, including the lien; *Wanzer v. Barker*, 4 H. 363.

29. *Is a waiver of defence to the original judgment.* The giving of a forthcoming bond by an adult, is a waiver of any defence he may have had against the original judgment, on the ground that it was based on a contract made by him whilst an infant; *Robb v. Halsey*, 11 S. & M. 140.

30. *Same: But no waiver of credit on the execution.* But the giving of a forthcoming bond is only intended to keep in existence the remedy which the plaintiff has to collect the original judgment, or so much thereof, with interest, as he was entitled to at the time the bond was given, and hence, is no waiver of or bar to any credit to which the defendant is entitled when he gave the bond, though the credit be not noticed in it; *Skinner v. Jayne*, 2 C. 567.

31. *No amendment of original judgment after forfeiture.* After a forthcoming bond has been given and forfeited, the original judgment, which is thereby satisfied, cannot be amended; *Burns v. Stanton*, 2 S. & M. 457; *Dowd v. Hunt*, 10 S. & M. 414.

3. Forfeiture satisfies Original Judgment.

32. *Forfeiture is satisfaction.* A forthcoming bond given under the statute, when forfeited, is a full satisfaction of the original judgment, and extinguishes its lien; *Connell v. Lewis*, W. 251; *Stewart v. Fuqua*, Ib. 175; *Sampson v. Breed*, Ib. 267; *Davis v. Dixon*, 1 H. 64; *Weathersby v. Proby*, 1 H. 98; *Bank of United States v. Patton*, 5 H. 200; *Chilton v. Cox*, 7 S. & M. 791; *McComb v. Ellett*, 8 S. & M. 505; *Robinson v. Painter*, Ib. 613; *Pritchard v. Myers*, 11 S. & M. 169. A forthcoming bond, however, is a satisfaction only of the judgment on which it is founded, and not of another judgment, though rendered on the same cause of action; *McNutt v. Wilcox*, 3 H. 417; *Kershaw v. The Merchants' Bank of New York*, 7 H. 386; *Benton v. Crowder*, 7 S. & M. 185. But if

the judgment were joint against several, a forthcoming bond given by one and forfeited, is a full satisfaction of the judgment against all; *McNutt v. Wilcox*, *supra*; *Coffee v. Planters' Bank*, 11 S. & M. 458. Nor in such case can an execution issue on the original judgment, which is merged in the statutory judgment on the bond; such execution would be void; *Bell v. Tombigbee R. R. Co.*, 4 S. & M. 549; *Moody v. Harper*, 6 C. 615; *Witherspoon v. Spring*, 3 H. 60; *King v. Terry*, 6 H. 513. And an acquiescence in the execution will not validate it; for consent cannot give jurisdiction as to the subject matter; *Bell v. Tombigbee R. R. Co.*, *supra*; *S. P.*, *McComb v. Ellett*, 8 S. & M. 505.

32a. *Same: Where the bond is void or voidable.* But if the forthcoming bond be absolutely void, it is no satisfaction; *Coffee v. Planters' Bank*, 11 S. & M. 458. But if it be merely irregular, and not set aside at the return term, it is a satisfaction; *Coffee v. Planters' Bank*, *supra*.

IV. Quashal of Forthcoming Bonds.

33. *Motion must be made at return term.* A forthcoming bond, after forfeiture, is an inchoate judgment until after the expiration of the term of the court to which it is returnable. At that term it is under the control of the court, the same as other judgments are at the term during which they are rendered. After the return term, though no actual judgment is rendered on the bond, this inchoate judgment becomes final, and the court has no more jurisdiction over it, if the bond be not void, than it has over other final judgments, after the expiration of the term at which they are rendered. Hence, a judgment quashing a forthcoming bond, rendered on a motion made after the return term, is an absolute nullity, and does not affect in the least the bond, or the judgment on it; and if after such judgment of quashal an execution on the original judgment be issued, and the defendant give another forthcoming bond, that bond may be quashed at the return term, and all executions issuing on the original judgment will be quashed; *Field v. Harrod*, 1 S. & M. 347; *S. P.*, *Miller v. Patton*, 3 S. & M. 463; *Conn v. Pender*, 1 S. & M. 386; *Merrett v. Vance*, 6 H. 498; *Kerningham v. Scanland*, 6 H. 540; *Jones v. Stanton*, 7 H. 601; *Parkinson v. Waldron*, 7 S. & M. 189; *Fellows v. Griffin*, 9 S. & M. 362; *Bell v. Tombigbee R. R. Co.*, 4 S. & M. 549; *Pucket v. Graves*, 6 S. & M. 384; *McComb v. Ellett*, 8 S. & M. 505; *Robinson v. Painter*, Ib. 613; *Dowd v. Hunt*, 10 S. & M. 414. And notwithstanding the order quashing the bond so made after the return term, execution may issue on it; *Bell v. Tombigbee R. R. Co.*, 4 S. & M. 549. And the rule is the same, though the judgment quashing the bond after the return term be affirmed by the High Court on a purely technical ground, viz.: The failure of the record to show when the quashal was made; *Pender v. Felts*, 2 S. & M. 535; *S. P.*, *Pucket v. Graves*, 6 S. & M. 384.

34. *When the bond is void.* A forthcoming bond, absolutely void, cannot be quashed on a motion made after the return term. An order so made, quashing it, would be itself void; *Clow v. Tharpe*, 3 S. & M. 64; yet the bond being void, it may be attacked collaterally at any time; *Doe v. Tupper*, 4 S. & M. 261; but in *Buckingham v. Bailly*, 4 S. & M. 538, it was held that the court might at a subsequent term quash a forthcoming bond, which was void, but could not if the bond was merely irregular and erroneous. And it was also decided in *Doe v. Tupper*, *supra*, that the rule requiring objections to be made to forthcoming bonds at the return term, did not apply to persons who were not parties to them, but who were sought to be charged therein as parties. In that case the objectors were partners in a firm, the name of which had been signed to the bond without their consent; yet in *McComb v. Ellett*, 8 S. & M. 505, the court say, that the judgment rendered at a subsequent term setting aside a void judgment is itself void, and that the proper course to pursue is to disregard the void judgment.

35. *Same.* If a writ of error *coram nobis* be sued out attacking the validity of a forthcoming bond, and on its return a motion be made to quash the bond, after the return term, the motion might be entertained, if the bond were void, and not merely voidable; *Parkinson v. Waldron*, 7 S. & M. 189; but the motion to quash on the writ of error *coram nobis*, is not an appropriate disposition of the writ, and if on such motion there be a judgment of quashal, it will be treated as made on the motion alone, unaided by the writ, and if entered after the return term the quashal will be void; *Fellows v. Griffin*, 9 S. & M. 362; S. P., *Miller v. Patton*, 3 S. & M. 463. Whether such a writ of error will lie to a judgment on a forthcoming bond; *Quære?* The court intimate it would not; *Fellows v. Griffin*, *supra*.

36. *Same: Where motion made and taken under advisement.* Where the record showed that a motion, to quash a forthcoming bond, was made at the return term, and taken under advisement, and was not decided; and also showed another motion at a subsequent term, to quash the bond, though no bond be in the record; it was held that it sufficiently appeared that the last motion was made at a term subsequent to the return term, and that the order then quashing it was void; *Held*, also, that the motion taken under advisement and not decided in four months, as required by the statute (H. & H. 481), will be considered as having expired with the term at which it was made; *Pucket v. Graves*, 6 S. & M. 384.

37. *Distinction between motion to quash the bond and to quash the execution.* There is a distinction between a motion to quash an execution issued on a forthcoming bond and a motion to quash the bond. The court will sustain the motion to quash the bond if the original judgment be void; but the motion to quash the execution does not call in question

the bond, and is considered as a waiver of the defect in the judgment; *Buckingham v. Bailey*, 4 S. & M. 538.

38. *Same.* Upon a motion to quash the execution issued on a forthcoming bond, defects in the original judgment and bond cannot be noticed; to reach them a motion to quash the forthcoming bond is the proper remedy; and in this case the judgment was void for uncertainty; *Weathersby v. Proby*, 1 H. 98.

39. *Surety's right to move to quash.* If the execution on a forthcoming bond be levied on sufficient property of the principal to satisfy it, the surety in it has no interest in its quashal, and no right, therefore, to make a motion to quash; *King v. Terry*, 6 H. 513. See *post*, 44.

39a. *Quashal: Cause for.* A forthcoming bond can be quashed only for some inherent defect. The return of the officer constitutes no part of the bond, and can furnish no ground for quashing it; *Shields v. Graves*, 6 H. 262.

39b. *Quashal as to one party.* When a forthcoming bond is forfeited, it becomes a joint judgment against the principal and surety, and it cannot be quashed as to one and left in force as to the other; because if defective as to one it is defective as to both, and a separate execution could not issue against one, there being no judgment to authorize it; *Conn v. Pender*, 1 S. & M. 386.

V. Miscellaneous.

40. *Writ of error.* A writ of error is not allowable after the forfeiture of a forthcoming bond; *Stamps v. Newton*, 3 H. 34; but it may issue after the execution of the bond and before forfeiture, the forfeiture being necessary to the bar; *Davis v. Jordan*, 5 H. 295; S. P., *Pucket v. Graves*, 6 S. & M. 384; A writ of error will, however, lie from the judgment of the court overruling or sustaining a motion to quash the bond, that being a distinct and separate proceeding; *Bank of United States v. Patton*, 5 H. 200; *Pucket v. Graves*, 6 S. & M. 384.

41. *Forthcoming bonds and executions no part of the record.* Forthcoming bonds and executions will not be noticed in the High Court, unless copied in the bill of exceptions. They are no part of the records in that court; *Grigsby v. Francis*, 2 H. 845; *Kerr v. Robertson*, 5 H. 278; *Brigs v. Clark*, 7 H. 457; Nor is a forthcoming bond a part of the record for the High Court on a writ of error to revise a motion to quash it, unless made so by bill of exceptions; *Shields v. Graves*, 6 H. 262; *Huston v. Hayter*, 6 H. 580; *Matthey v. Totten*, 2 S. & M. 52; *Sprawles v. Barnes*, 1 S. & M. 629.

42. *Statute: How construed.* The statute allowing forthcoming bonds, is to be construed strictly; *Jones v. Miles*, 1 H. 50.

43. *Injunction.* An injunction against proceeding on the original judgment does not restrain an execution on the forthcoming bond, and is no excuse to the sheriff for not levying the latter; *Davis v. Dixon*, 1 H. 64.

44. *Surety assailing original judgment.* A surety on a forthcoming bond becomes liable by executing the bond and its forfeiture; the consideration of the bond is the redelivery by the sheriff to the principal, of the property levied on. The surety has no such connection with the original judgment, as will enable him, apart from the principal, to go into a court of equity, and re-investigate the original judgment. Hence, the surety on a forthcoming bond cannot, on a bill filed by him against the creditor and the principal, assail the original judgment on the ground of usury; *Baines v. Williams*, 10 S. & M. 113. See *ante*, 39.

45. *Chancery: Jurisdiction after forfeiture.* Whether after forfeiture chancery has jurisdiction to go behind the judgment of forfeiture and inquire into the validity of the levy of the execution on which the bond is founded; *Quere? Baines v. Williams*, *supra*.

Franchise.

1. *Right of grantee to sue for.* It seems that proof of the legal existence of a franchise and possession of it by the plaintiff, is sufficient to enable him to maintain an action on the case for its disturbance; it is clearly so, if proof be superadded that the plaintiff is the legal grantee of the land to which the franchise (to wit, the right to have a toll bridge) is confined by act of the Legislature; *Townsend v. Biewett*, 5 H. 503.

2. *Disturbance of franchise.* A free bridge cannot be erected, without authority, within the limits in which the Legislature has granted the exclusive privilege of keeping a toll bridge, and so near as to interfere with the franchise thus granted; *Ib.*

3. *Action for disturbance: Evidence.* In an action on the case to recover damages for the diversion of travel from plaintiff's toll bridge by the erection of a free bridge, the plaintiff may give in evidence the number of persons crossing the free bridge at different times. The rule of law in relation to the giving in evidence repeated acts of trespass, has no application when the action is case; *Ib.*

4. *Action for tolls.* When the assignees of a turnpike company sue for tolls in passing over their road, it is not necessary to make profert in the declaration of the grant of the franchise, its transfer, and their authority to exact the toll. These are all matters of evidence, and need not be pleaded; *Dulaney v. Starke*, 7 S. & M. 375.

5. *Revocation of.* When a franchise is granted for a valuable consideration, it cannot be revoked; and the payment of \$25 to an incorporated town for the exclusive right to build a wharf in it, is a valuable consideration, and secures to the grantee the exclusive right; *Martin v. O'Brien*, 5 G. 21.

6. *Exclusive right not presumed.* The retention of power in the State is for the benefit of the public, to be exercised to that end whenever the State may deem it expedient; and, therefore, the State is never presumed to be precluded from its exercise, except by

a plain and manifest intention to surrender it expressed in the grant; *Collins v. Sherman*, 2 G. 679.

7. *Same.* Unless there be an express grant in the charter of a turnpike and ferry company, of an exclusive right to keep a ferry and turnpike over a particular river, and on a particular line of travel, the Legislature may afterward incorporate another, and authorize it to establish a turnpike and ferry on the same river and on the same line of travel, although the establishment of the latter may materially impair the value of the franchise granted to the former. That the Legislature, in granting the charter to the first company, required them to keep in good repair the improvements made thereunder, is no ground for inferring a grant of an exclusive privilege to the company to make such improvements over that stream, on that line of travel; *Ib.*

8. *Injunction against disturbance of franchise.* It is no ground for restraining a company from using their franchise, under a charter authorizing them to build a turnpike and establish a ferry, that they have located their road so near to the road of another company, which had been previously built under a charter granted for that purpose, that persons travelling the former might commit a trespass on the latter, by travelling on it without paying toll; *Ib.*

Fraudulent Assignments (as to Creditors.)

See FRAUDS AND FRAUDULENT REPRESENTATIONS.

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I. Statutes.

1. *Acts of 1822 and 1857.* The second section of the Act of 1822, to prevent frauds and perjuries, enacts as follows: "Every gift, grant or conveyance of lands, tenements, or hereditaments, goods or chattels, or of any

rent, common, or other profit or charge, out of the same, by writing or otherwise, and every bond, suit, judgment, or execution, had or made, and contrived of malice, fraud, covin, collusion or guile, to the intent and purpose to delay, hinder or defraud creditors, of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements, or herditaments, or any rent, profit, or commodity out of the same, shall be from henceforth deemed and taken only as against the person or persons, his, her, or their heirs, successors, executors, administrators, or assignees, and every of them, whose debts, suits, demands, estates, interests by such guileful and common devices and practices as aforesaid, shall or might be, in any wise "disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. And, moreover, if any conveyance be of goods or chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed or writing, acknowledged or proved; and such deed, if the same be for real estate, shall be acknowledged or proved, and recorded in the county where the land conveyed is situated; and if for personal property, then in the county where the donee shall reside, or the property shall be, and the proof or acknowledgment in either case, shall be taken, or made and certified, in the same manner as conveyances of lands and tenements are, by law, directed to be acknowledged, or proved and recorded within three months after the execution thereof, unless in the case of personalty, possession shall really and *bona fide* remain with donee." The statute then proceeds to provide for cases of loans and limitations of personalty for three years, for which see FRAUDS, STATUTE OF. This statute is re-enacted in the Rev. Code of 1857, p. 358.

1a. *Act of 1857, art. 3: Subsequent creditors.* In art. 3 of the Act of 1857, Rev. Code, p. 359, it is provided that the act shall not extend in any case, "to creditors whose debts were contracted after such fraudulent act, unless made with intent to defraud them; and though a conveyance be declared void as to prior creditors, it shall not on that account be void as to subsequent creditors or purchasers. This provision is not in the Act of 1822.

II. Voluntary Conveyance.

1. As to Existing Creditors.

2. *Voluntary deed void as to existing creditors.* A voluntary conveyance is *prima facie* fraudulent as to existing creditors, and the party claiming under it must rebut this presumption by clear and satisfactory proof. It will not be sufficient to show merely the fair intention of the grantor, and that by good management the property retained by him

was sufficient to pay his debts. The proof must show that by the ordinary course of human transactions, the conveyance could not operate to delay, hinder, or defeat the claims of prior creditors. The property conveyed must be so inconsiderable when compared with that retained by the grantor, and the debts owed by him, that it could not be supposed that the gift endangered the safety of any of his debts, or could delay their payment; *Young v. White*, 3 C. 146. In *Swayze v. McCrossin*, 13 S. & M. 317, it was said that a voluntary deed was not good against a creditor, whose debt was in existence at the time the deed was made; and in *Catchings v. Manlove*, 10 G. 655, it was decided that a voluntary assignment by an insolvent debtor was *per se* fraudulent as to existing creditors, whether made with a fraudulent intent or not; S. P., *Bogard v. Gurdley*, 4 S. & M. 302.

3. *Same: An instance.* A will was made by which the heir was disinherited, and all the testator's property, real and personal, devised to another, and proceedings were commenced by the heir to annul the will. These proceedings terminated in a compromise, by which one half of the property was secured to the devisee under the will, and the other half conveyed by the consent of the heir, to his own children; *Held*, that the interest so conveyed to the children of the heir, was liable to the heir's debts, existing at the date of the compromise. That that transaction was valid, and based on a sufficient consideration to be binding between the parties to it, but that it conferred no new title on either the heir or devisee; but that it in effect conceded to the heir, as such, one-half of the property, and to the devisee, in his character as devisee, the other half. That the interest of the heir being thus secured to him in virtue of his title as heir, the conveyance of his one-half interest to his children by the compromise was a voluntary gift of it by him to them; but that his creditors had no right to subject the interest which was allotted to the devisees under the compromise; *Robb v. McKinney*, 5 C. 98. For other instances of voluntary conveyances, see *post*, 52.

2. As to Subsequent Creditors.

4. *As to subsequent creditors.* Voluntary conveyances are not necessarily void as to subsequent creditors. The presumption of fraud arising from indebtedness, may be rebutted by circumstances tending to show the absence of actual fraud; but if a subsequent creditor can show fraud in fact, by proving that the conveyance was made to avoid future debts about to be contracted, or to defraud existing creditors, the conveyance is void, not only as to existing, but also as to subsequent creditors, and will be so declared at the instance of a subsequent creditor; *Henry v. Fullerton*, 13 S. & M. 631. If the grantee be insolvent at the time, the conveyance is void as to existing creditors; and if he be very largely indebted, as compared with his re-

sources, it is *prima facie* fraudulent as to subsequent creditors. And where this heavy indebtedness at the time of making the conveyance is shown, and there is nothing to rebut the fraudulent intent presumed therefrom, the conveyance will be declared fraudulent as to subsequent creditors (citing *Henry v. Fullerton*, *supra*); *Vertner v. Humphreys*, 14 S. & M. 130. And a bill by a subsequent creditor, to set aside the conveyance, which charges merely that the grantor was indebted for transactions before and since the transfer, and that without the transferred property there is not sufficient to pay his debts, is bad on demurrer; *Miles v. Richards*, W. 477.

See Statute on this subject, *ante*, 1a.

5. *Same*. An assignment is not fraudulent as to subsequent creditors, unless made expressly with the intent to defraud such creditors; *Wright v. Henderson*, 7 H. 539. And as a general rule, an assignment made by the debtor of his property, with *intent to hinder, delay and defraud his creditors*, can be avoided only by those whose debts existed at the time the assignment was made. Subsequent creditors cannot avoid the assignment, unless the property was in such a situation, after the assignment, that the grantor gained credit on the faith of it; or unless the fraudulent grantee held it in secret trust for the benefit of the grantor. And this rule was applied in this case to an assignment made by the husband to the wife; *Winn v. Barnett*, 2 G. 653; S. P., *Bullitt v. Taylor*, 5 G. 708. Whether a conveyance is fraudulent as to subsequent creditors, is peculiarly a matter for the determination of the jury; *Bogard v. Gartley*, 4 S. & M. 302. See *post*, 91, 92, 92a.

6. *Same: Rights of subsequent creditors, when conveyance set aside by existing creditor*. Whether a deed, fraudulent as to existing creditors, will be set aside at the instance of a subsequent creditor; *Quære?* But if it be set aside for fraud as to subsisting creditors, it becomes wholly void, and cannot stand in the way of subsequent creditors; *Trimble v. Turner*, 13 S. & M. 348. See *vide ante*, 5; see also, *post*, 91.

As to subsequent purchasers, see *post*, 92, 92a.

6a. *Same*. By art. 3 of Rev. Code of 1857, p. 359, it is provided that a conveyance, fraudulent and void as to existing creditors, shall not on that account be void as to subsequent creditors, unless the fraudulent act was made with intent to defraud them; *Summers v. Roos*, 42 M. 749.

III. Right of Debtor to prefer a Creditor.

7. *Right to prefer*. An insolvent debtor may prefer a creditor, if he reserve in the transaction no benefit to himself; *Ingraham v. Grigg*, 13 S. & M. 22; *Hunt v. Knox*, 5 G. 635; *Mangum v. Finucane*, 9 G. 354. And it does not necessarily make an assignment of a debt fraudulent that it was made to a *bona fide* creditor to give him a preference over others, and with the view of securing

him that preference over other creditors who might sue out garnishee process; *Swisher v. Fitch*, 1 S. & M. 541. And this right to prefer may be exercised by the husband in favor of the wife; *Mangum v. Finucane*, *supra*; and *post*, 11.

8. *Remedy of other creditors to reach the excess*. If the estate conveyed to a trustee to pay certain preferred debts be more than sufficient to pay the trust, or the trustee be remiss in executing the trust, the appropriate remedy for the other creditors of the grantor is by bill in equity to compel a fair settlement, and to have the several debts paid off, and the surplus, if any, paid over to them; *Wright v. Henderson*, 7 H. 539.

9. *Restrictions on right to prefer*. Such an assignment is fraudulent and void, if it secure lasting and mutual benefit to an insolvent debtor; *Harney v. Pack*, 4 S. & M. 229; *Hunt v. Knox*, 5 G. 655. A debtor in embarrassed circumstances executed a deed in trust on all his property to secure a debt due to his brother-in-law, providing that the trustee should apply the proceeds to the payment of the debt secured, and should pay the surplus, if any, to the grantor. Afterwards he executed another deed in trust, conveying the same property, besides land not embraced in the first deed, for the purpose of securing the same debt, but reserving a support for himself and family out of the rents and profits. The trustee, by virtue of the power vested in him, sold the whole, at an unusual season of the year, and for a very inadequate price, to the creditor whose debt was secured. The grantor, during the whole of the period from the execution of the first deed to the time of the trial, remained in the use and possession of the property, causing it to be assessed in his name, and paying the taxes thereon; *Heid*, that the conveyances were fraudulent as to creditors; *Hunt v. Knox*, *supra*.

10. *Same*. And the assignment must be *bona fide*, and not with a view of securing a benefit to the grantor from the property conveyed. And if it be made just before judgments, for large amounts are rendered against the grantor, the proof must show affirmatively the *bona fides* of the transaction; *Santon v. Green*, 5 G. 576.

11. *Power of husband to prefer wife: Case in judgment*. Where a creditor of an insolvent husband is indebted to the wife on account of her separate estate, and upon a settlement of the accounts the husband becomes by agreement of all the parties, substituted as debtor to the wife, the husband may, after such substitution, make a valid payment of such debt to the wife in preference to his other creditors, if it be done *bona fide* and without a design of securing a benefit to himself. But where the husband has advanced money to the wife to purchase property, and the purchase has been made, and legal proceedings have been commenced to subject the property to the husband's debts, then an agreement made between the parties, by which the advance made by the husband to purchase the property for the wife, was accepted by the

creditor of the husband as a satisfaction of the debt due by the husband to him, and by the wife, in payment of the debt due by the creditor to her, will not secure the property to the wife, exempt from the claims of the husband's creditors; *Mangum v. Finucane*, 9 G. 354.

11a. *Right to sell property to apply proceeds to preferred creditors.* While a man in failing circumstances has the right to sell his property, if unencumbered, and apply the proceeds to the payment of preferred creditors, yet such sale must be free from fraud, and if the purchaser knows the proceeds are to go to a particular preferred creditor, the sale must be for a full and adequate consideration, and however great suspicion may be thrown around the sale, if it comes up to those requirements, it may overcome the presumptions against it. And if the sale be for nine-tenths of the full value, this will be sufficient as to price, especially where there is a conflict in the evidence as to the value, and some of the witnesses place it below the sale price; *Farmers' Bank v. Douglass*, 11 S. & M. 469

IV. Fraudulent Intent.

1. Necessity for the Intent to exist.

12. *Main intent.* Where a conveyance may hinder and delay creditors, it is not for that reason alone void, if it were made with a proper intent; but it is void where the main intent is to hinder and delay creditors, and the conveyance is a mere contrivance for that purpose; *Farmers' Bank v. Douglass*, 11 S. & M. 469; S. P., *Ingraham v. Grigg*, 13 S. & M. 22.

13. *The unlawful intent, when necessary.* The unlawful intent is necessary to vitiate the conveyance, and must be so alleged in a bill to set it aside. The allegation that the conveyance "is void on its face and fraudulent as to creditors," is insufficient to render the facts appearing on the face of the conveyance, competent evidence to establish fraud, unless it be also alleged that the conveyance was made to hinder, delay or defraud creditors; *Hogan v. Burnett*, 8 G. 617.

Yet a voluntary conveyance by an insolvent debtor is fraudulent *per se* as to existing creditors, whether made with a fraudulent intent or not; *Catchings v. Manlove*, 10 G. 655; *ante*, 2. And in such a case it is not necessary in the bill to aver the fraudulent intent; *Catchings v. Manlove*, *supra*.

2. Where Fraudulent Intent exists only on the part of the Grantor.

14. *It vitiates conveyance to secure antecedent debt.* An assignment made to secure an antecedent debt is void if made with a fraudulent intent on the part of the grantor, though neither the trustee nor the creditor whose debt was secured, participated in the fraudulent design; *Harney v. Pack*, 4 S. & M. 229; *Farmers' Bank v. Douglass*, 11 S. & M. 469. And it is not necessary that the fraud should appear on the face of the deed; it is still void as to creditors if the beneficiary has advanced

no new credit on it; *Harney v. Pack*, *supra*; S. P., *Pope v. Pope*, 40 M. 516.

15. *Same: Case in judgment.* A debtor made a mortgage to secure a preferred creditor, which was fraudulent on its face, and afterwards sold his equity of redemption, taking to himself the promise of the vendee to pay the mortgage debt and the other legal encumbrances existing on the property, but the vendee at that time paid nothing, and did not become bound to the mortgagee or other encumbrancers to pay them anything. The effect of that sale is to place the vendee in the exact position of the vendor, and the vendee gets no rights which the vendor did not have, and if the vendee be innocent of all fraud, still the creditors of the vendor can subject the mortgaged property so sold to the payment of their debts. The vendee will be chargeable with full notice of the fraudulent character of the mortgage, and as to the creditors, will be considered a purchaser without value; since upon their subjecting the property to the payment of their debts, the vendee would be released from his promise to vendor to pay the mortgage. And if after such a sale of the equity of redemption, the vendee give his notes directly to the mortgagee and thereby become bound to pay the debt, it will make no difference, since the transaction will be determined by the circumstances under which it was made, and will not, if *then* fraudulent, be made good by subsequent changes. But it must be observed in this case, that the sale was of the mere equity of redemption, and no money was paid or obligation *then* assumed to the mortgagee or other encumbrancer, and there was no repudiation of the fraudulent mortgage. What would have been the effect as to creditors not *then* having liens, if the mortgagor, mortgagee and vendee had all agreed to a sale of the property embraced in the mortgage for a fair value, and the vendee had become directly responsible to the mortgagee for the debt, was not decided; *Farmers' Bank of Virginia v. Douglass*, 11 S. & M. 469. See *post*, 22.

16. *Same: Where new credit advanced.* But if the deed be not fraudulent on its face, yet be in fact made with a fraudulent intent on the part of the grantor, it will not be void as against a *cestui que trust*, who was innocent of the fraudulent design, and who advanced a credit on the faith of the execution of the conveyance; *Harney v. Pack*, 4 S. & M. 229. See *ante*, 15.

3 Purchaser from Fraudulent Grantee.

17. *Bona fide purchaser for value.* A *bona fide* purchaser for value, without notice, under a deed in trust, not void on its face, cannot be affected by any fraud intended on the part of the grantee; *Ewing v. Cargill*, 13 S. & M. 79; but if he have notice, or be not a *bona fide* purchaser, he stands in the same situation as his vendor; *Watson v. Dickens*, 12 S. & M. 608.

18. *What is notice: Bill to set aside no lis pendens.* A bill filed by a creditor to set aside a fraudulent conveyance, is not a *lis*

pendens in the sense of being notice, to a person purchasing from the debtor; and a *bona fide* purchaser of the property so sought to be subjected, after the bill is filed, will hold it, if he have not actual notice of the fraud, and there be no lien on the property, or if the lien be lost by lapse of time during the suit; *McCutchen v. Miller*, 2 G. 65.

18a. *Notice to trustee notice to creditor.* If a trustee in a conveyance to secure a creditor have notice of the fraudulent intent of the grantor, and if the trustee be agent for the beneficiary, the notice to the creditor is notice to the beneficiary; *Pope v. Pope*, 40 M. 516.

19. *Same: Property consumable in its use.* The conveyance of property consumable in its use being not *per se* fraudulent, but only *prima facie* evidence of fraud, unless it be stipulated in the mortgage that the mortgagor may use it, a purchaser under the mortgage (from the trustee) for valuable consideration, without other notice of fraud than arises from such conveyance of consumable property, will be protected. The rule would be different if the mortgagee or creditor were the purchaser, or if the deed were fraudulent *per se* on its face (citing *Harney v. Pack*, 4 S. & M. 229; *Farmers' Bank v. Douglass*, 11 S. & M. 469); *Ewing v. Cargill*, 13 S. & M. 79.

20. *Assignee of notes given to consummate fraudulent conveyance.* If a grantee in a fraudulent conveyance give his notes for the purchase money, secured by a mortgage on the property thus fraudulently conveyed to him, the assignee of the note and mortgage, for value and without notice, will not be entitled to enforce the mortgage against the creditors of the fraudulent grantor (citing *Farmers' Bank v. Douglass*, 11 S. & M. 469); *Johnston v. Dick*, 5 C. 277.

4. Where Fraudulent Intent is known to Purchaser for Value.

21. *It vitiates the sale.* A full and adequate consideration paid by vendee, though a circumstance of much weight, to repel the presumption of fraud, yet does not save a sale made with intent on the part of vendor to defeat his creditors from condemnation, if the vendee had notice of such intent. And the notice need not be direct, but may be inferred from circumstances; anything in the conduct of the vendor known to the vendee which ought reasonably to put the vendor on inquiry, is equivalent to notice; *Farmers' Bank v. Douglass*, 11 S. & M. 469.

22. *Same: Case in judgment.* A debtor in failing circumstances, residing in this State, and possessed of a large estate, mortgaged a part of it to secure a large debt due to a preferred creditor, which was to be paid by instalments. He refused the application of the creditor for a new mortgage on other property to secure further the same debt, the property already mortgaged being inadequate, but of his own motion procured a neighbor and friend to sign with him, and as his surety two notes for the last two instal-

ments, extending the time of payment, however, three years. To indemnify the surety, and secure the notes signed by him, he executed another mortgage on all the remainder of his property, except his watch and pencil, reserving the possession to himself until default made in the payment of the notes. This last mortgage was fraudulent on its face, in conveying property consumable in its use, and in reserving the use of it to the mortgagor. After this, fearing that his equity of redemption would be sold under some trivial execution against him, he wrote for his brother-in-law who resided in Kentucky, who thereupon came to Mississippi, and bought the equity of redemption in both mortgages, for the consideration that the brother-in-law would pay off the encumbrances, which were nearly, if not quite, equal in value to the property; this promise to pay being made to the vendor, and not to the encumbrancers. After the sale, judgments were rendered against the debtor and executions levied on the property embraced in the second mortgage, and the brother-in-law filed a bill in equity to enjoin the sale. The court reviewed at length all the circumstances attending the sale, both for and against its fairness. On the one hand the fraudulent character of the second mortgage, the expressed intention of the debtor to make some conveyance to save his property; the conveyance of his whole estate, and the subsequent retention of it by him for two years; the relationship between vendor and vendee; the knowledge of the latter of the embarrassed condition of the vendor; the strong probability that the vendee knew of the fraudulent intent of the vendor; that his undertaking to pay the encumbrances was to the vendor; and that he was written to by vendor to become the purchaser. On the other hand, that the price agreed to be paid was nearly, if not quite, equal to the value of the property; the opinion of the preferred creditor, who was thoroughly familiar with all the transactions, that it was fair and honest. The court gave no opinion as to whether the vendee participated in the fraud in the sale, but held, that he was not a *bona fide* purchaser for value without notice of the fraud of the debtor, as he had only assumed to the vendor the payment of the debts which were a lien on the property, and secured in part by a mortgage fraudulent on its face; and had paid no money and given no surety or obligation to the mortgage creditors until after the sale was completed. And that he stood in exactly the position of his vendor, and the sale being fraudulent as to him, was fraudulent also as to the purchaser; *Farmers' Bank v. Douglass*, 11 S. & M. 469. See *ante*, 15.

V. Conveyance Fraudulent on its Face.

1. The Mortgage of Property consumable by its use.

23. *Its effect.* The mortgaging of property, the use of which involves its consumption and destruction, is an evidence of fraud not conclusive, but of much weight; and unless it

is explained satisfactorily by him who sets up the mortgage, and on whom that duty is imposed, the mortgage will be adjudged fraudulent. But where the right to use such property is reserved to the mortgagor in the mortgage, it is fraudulent *per se* on its face; *Farmers' Bk v. Douglass*, 11 S. & M. 469; S. P., *Ewing v. Cargill*, 13 S. & M. 79. But the mere mortgaging of such property, without any stipulation as to its use, is not notice of the fraudulent character of the mortgage so as to affect a purchase for value from the trustee. *Aliter*. Where the stipulation that the mortgagor shall use it, is in the mortgage; *Ewing v. Cargill*, *supra*.

2. The Time given before Foreclosure.

24. *Indefinite time*. A mortgage by a debtor of all his property, by which it is provided that the trustees shall pay all his debts from the profits and income, thus tying up the estate indefinitely, is on that account fraudulent, and it is also fraudulent in reserving a benefit to the debtor by saving the corpus of the estate to him; *Arthur v. Com'l & R. R. Bk of Vicksburg*, 9 S. & M. 394. See *post*, 27.

25. *The time allowed to failing debtor*. It seems as a general rule, where a mortgage is executed by a debtor in failing circumstances to secure (the renewal of) a debt then past due, no further time should be granted before foreclosure, than the usual time of collecting debts by due course of law; yet there may be circumstances in which it would be proper to stipulate for greater delay, as where the debt is large and the property mortgaged also large, and where also the personal exertions of the debtor are relied on as one of the means of payment, yet in such a case no more property should be conveyed than is reasonably sufficient to pay the debt; *Farmers' Bk v. Douglass*, 11 S. & M. 469. But in *Henderson v. Downing*, 2 C. 106, the court declare that under no circumstances should longer delay be given than the usual time for collecting by due course of law, and reject the exception to this rule stated above, see *post*, 26, 72.

3. Reserving a Benefit to the Grantor.

26. *Reserving support to grantor's family*. A deed in trust made by an insolvent debtor to secure a part of his debts, conveyed a large amount of real and personal property, and it provided that no sale should take place for five years, and in the meantime the current expenses of the grantor's family should be paid out of the income: *Held*, that the deed was fraudulent as to creditors on two grounds. 1st. In reserving a benefit to the grantor and his family. 2d. In tying up the property from sale for five years (see *ante*, 25); *Henderson v. Downing*, 2 C. 106. And if a debtor in failing circumstances makes an absolute sale of his property, and stipulates for a support of himself and family for a term of years as a part of the price, the law will regard the transaction with suspicion, since he thereby enures a benefit to himself at the

expense of his creditors. For the property would not sell for as much thus encumbered as it would without it (citing *Arthur v. Com'l & R. R. Bk of Vicksburg*, 9 S. & M. 394); *Wooten v. Clark*, 1 C. 75; S. P., *Hunt v. Knox*, 5 G. 655. See *ante*, 10.

27. *No lasting benefit allowed to be reserved*. No permanent or lasting benefit can be reserved to the debtor in an assignment to pay debts, made by an insolvent debtor, and if such reservation be made, it will make the assignment fraudulent as to creditors. A railroad and banking company, assessed all its property of whatever kind, and the profits of the road to trustees for an indefinite time. 1st. To enable the trustees to borrow \$250,000, with which to complete the road. 2d. After paying all the expenses of running the road, and the salaries of the trustees, to pay the net profits *pro rata* on the debts of the corporation, and the arrangement was to continue until all the debts were paid: *Held*, that the deed was fraudulent as to creditors, in that it provided that the profits alone for an indefinite period should be applied to the payment of the debts of the corporation until all the debt were extinguished; that this was tying up the property for an indefinite period from creditors, and hindered and delayed them in the assertion of their rights, and reserved a benefit to the corporation, in keeping the corpus of the property from sale, for its use, until the debts were paid; *Arthur v. Com'l & R. R. Bk of Vicksburg*, 9 S. & M. 394. See *ante*, 24.

See RAILWAYS, 31.

28. *Reservation of surplus after sale by trustee*. As to this see *ante*, 9.

29. *Reservation of right to use property: Case in judgment*. A debtor in failing circumstances, who had already executed a mortgage on part of his property to secure a preferred creditor, afterwards gave an additional mortgage to secure said debt, and in this mortgage was embraced besides land and slaves, "75 mules, 2 horses, 2 carriages, 1 pair carriage horses, 150 head of cattle, 24 oxen, 6 wagons, 2 water carts, 175 plows, 500 hogs, 15,000 bushels of corn, 200 stacks of fodder, 7,000 bushels of potatoes, and all the debtor's household and kitchen furniture and farming utensils." The mortgage was executed in 1839 to secure a debt due in 1842, and one due in 1844, and it provided that the mortgagor was to remain in possession of the land and slaves until default made in the payment of either of the debts, and he was to use so much of the corn, potatoes, &c., as was necessary for the support of the slaves and so much of the cattle, mules, farming implements, &c., as was necessary to cultivate the plantation: *Held*, that the mortgage was fraudulent on its face as to creditors; *Farmers' Bk v. Douglass*, 11 S. & M. 469.

4. Miscellaneous.

30. *Assignment on condition of release*. An assignment by a debtor, of only part of his property for the benefit of his creditors, with a stipulation that the creditors shall

give a general release to the debtor as a condition of receiving a dividend, is fraudulent. A debtor in failing circumstances cannot devote a part of his property to the payment of his debts, and reserve a part upon a condition that the creditors shall not touch the part assigned, unless upon surrendering all claim to that which is reserved. But this principle does not prevent a debtor from making a partial assignment of his property for the payment of his debts, if the part reserved remained still liable to his debts; *Ingraham v. Grigg*, 13 S. & M. 22.

31. *Large salaries allowed trustees.* The fact that the assignees in an assignment for the benefit of creditors, are to receive large salaries from the trust estate, does not *per se* make the deed fraudulent; *Arthur v. Com'l & R. R. Bk of Vicksburg*, 9 S. & M. 394. And this is so, even where a bank is the assignor, and its president and cashier are the trustees; *Ingraham v. Grigg*, 13 S. & M. 22.

32. *Future advances.* A provision in a deed of assignment by an insolvent debtor to secure future advances, is not necessarily fraudulent. This depends upon the *bona fides* or *mala fides* of the transaction. If the future advances be necessary to save the *corpus* of the estate, for the benefit of creditors, the provision is a proper one; *Arthur v. Com'l & R. R. Bk of Vicksburg*, 9 S. & M. 394.

33. *The power to pledge: Sale of credit of assignor.* A deed of assignment by a bank to trustees for the benefit of creditors, authorized the trustees to pledge or sell any of the property conveyed, including the notes issued by the bank, in case any pressing emergency, not otherwise to be provided for, should render it necessary, so to employ the bank notes: *Held*, that this did not itself render the deed fraudulent in law; that such a provision was not an improper appropriation of the assets, although it may lead to such a result; and if the power thus given be improperly exercised, so as to amount to fraud in fact, a court of chancery may check and control the abuse upon the application of the creditors and stockholders; *Montgomery v. Galbraith*, 11 S. & M. 555.

VI. Badges of Fraud.

1. Possession by Seller after Absolute Sale.

34. *Possession prima facie fraudulent.* Possession of personalty by the seller, after an absolute sale, is *prima facie* fraudulent as to the creditors of the seller, and throws the burden of proof on vendee, to establish its fairness; *Comstock v. Rayford*, 12 S. & M. 369; *Carter v. Graves*, 6 H. 9; *Rankin v. Holloway*, 3 S. & M. 614. And, if the debtor be largely indebted, and the indebtedness about to ripen into judgment, when the sale is made, the subsequent retention of possession by him, creates such a presumption of fraud, as to require clear and satisfactory proof of the fairness of the transaction. And this presumption of fraud is strengthened if the sale be made to a near relative of ven-

dor, who also is laboring under pecuniary embarrassment; *Johnston v. Dick*, 5 C. 277. And this rule applies when the creditor is a subsequent one, if he have no notice of the sale; *Rankin v. Holloway*, *supra*. See *post*, 71, 72.

35. *Possession of land: Joint possession of vendor and vendee.* Possession of land by an insolvent vendor after an absolute sale, is evidence of a fraudulent design as to creditors; and if the possession be accompanied by acts of ownership, the evidence of fraud becomes very strong. And in the sense of this rule, if the vendee come into the joint possession of the land with the vendor, it is considered there has been no change of possession; *Wooten v. Clark*, 1 C. 75. See *post*.

2. Possession after Public Forced Sale.

35a. *Such possession no evidence of fraud.* Although it is well settled that possession of property by the vendor after a voluntary sale made by him, is *prima facie* evidence of fraud as to creditors, yet the rule does not apply to public forced sales made under executions and deeds of trust. In such sales, on account of their necessary notoriety in the neighborhood, fraud is not presumed from the fact that after the sale, the property is left in possession of the original owner or that of his family; but in such cases the question of fraud is to be determined from all the circumstances, without any presumption of fraud from the fact of possession by the original owner. This case is distinguished from *Rankin v. Holloway*, 3 S. & M. 620 (see *post*, 38); for in the latter, though the sale was public, it was also voluntary; and the very long possession of the vendor in that case, was also a circumstance of much prominence and weight; *Garland v. Chambers*, 11 S. & M. 337; *S. P. Foster v. Pugh*, 12 S. & M. 416; *Ewing v. Cargill*, 13 ib. 79. These cases seem to overrule *Stovall v. Farmers' & Merchants' Bk*, 8 S. & M. 305, where it was held, that the leaving of property sold at sheriff's sale, with the original owner for two years or more, and until it was levied on under other executions against him, was at least *prima facie* fraudulent; it may, however, be sustained on the principle applied in *Trimble v. Turner*, 13 S. & M. 348, for which see *post*, 36. If such possession of personalty could be considered as fraudulent, after a sheriff's sale, it could have no influence to make a sale of realty at the same time and place, fraudulent; *Foster v. Pugh*, 12 S. & M. 416.

36. *Modification of the principle as to sheriff's sales.* The principle, which protects execution sales from the presumption of fraud arising in private sales, from the continued possession of the original owner after the sale, does not apply, where the sheriff's sale is but the consummation of an agreement made between the parties anterior thereto, that the purchaser should buy at the sale. Such an agreement makes it a private sale as to this question; *Trimble v. Turner*, 13 S. & M. 348 (for the instance, see *post*).

37. Possession of realty after sheriff's sale.

Possession of realty is not delivered to the purchaser at sheriff's sale, and for this reason also, the retention of possession by the debtor is no evidence of fraud; nor is the fact that the debtor after the sale claimed rent on the realty, unless the proof connect the purchaser with an admission of the debtor's right to claim rent; *Foster v. Pugh*, 12 S. & M. 416.

38. Voluntary public sale. In the year 1823, E. F. being in debt, sold his slaves at public sale to G., who, as the consideration therefor, agreed to pay some, but not all of E. F.'s debts, and he left the slaves in E. F.'s possession. G., the first purchaser, afterwards sold the same slaves to J. F., the father of E. F., for the same consideration, J. F. refunding to G., the amount he had paid on E. F.'s debts. The slaves still remained with E. F., the original owner, till 1840, when he died. J. F., the last purchaser, died in 1826, and his executors never interfered with E. F.'s possession, except to hire out one slave for one year, and this was partly to pay a debt of E. F.'s. The will of J. F. was not in the record, though read in evidence: *Held*, that the long possession of the slaves by E. F. after he sold them, was *prima facie* fraudulent as to the creditors of E. F., though the debts were contracted after the sale; *Rankin v. Holloway*, 3 S. & M. 614.

3. Possession by Mortgagor under the Mortgage.

39. No evidence of fraud. The possession by the mortgagor of personalty conveyed in it will not be fraudulent, until after condition broken, if such possession be authorized by the mortgage, and the mortgage be duly recorded. But such possession, after forfeiture, may be *prima facie* fraudulent, but is not fraudulent *per se*; *Bogard v. Gardley*, 4 S. & M. 302; but if such possession be continued five years after forfeiture, it will be a fraud on the creditors of the grantor, and the mortgage will be no obstacle to the levy of an execution against mortgagor on the property; *Jayne v. Dillm*, 6 C. 283. But if possession be retained by mortgagor with power of sale, this will make it fraudulent; *Summers v. Roos*, 42 M. 749.

40. Possession by mortgagor. As to effect of reserving possession in the mortgage, as connected with a reservation of a benefit to mortgagor, see *ante*, 26, 27.

40a. Retention of use and possession in mortgagor. A stipulation that the mortgagor shall retain the use and possession of personalty embraced in the mortgage, and shall continue to use and have the right to dispose of the same, until the trustee shall deem it necessary to take possession, is voidable only by those creditors who obtain liens before the trustee takes possession; *Summers v. Roos*, 42 M. 749.

4. Miscellaneous Badges of Fraud.

41. Sale just before judgments rendered against vendor. A sale just before judgments

are rendered against vendor, is a circumstance to show fraud; *Johnson v. Dick*, 5 C. 277; *Stanton v. Green*, 5 G. 576; S. P., *Reed v. Carl*, 3 S. & M. 74.

41a. Voluntary giving new security, with indemnity by mortgage: Extending time of payment. The fact that a debtor in failing circumstances refused the application of the creditor to give an additional mortgage, but gave his note to the creditor with surety for two of the instalments secured by the first mortgage, but extending the time of payment three years, and then gave the surety, who was a friend and neighbor, a mortgage on the remainder of his property, to indemnify him and secure these last instalments on which he was surety, is a strong circumstance to show that the second mortgage is fraudulent; *Farmers' B'k v. Douglass*, 11 S. & M. 469.

42. Over caution to prevent suspicion. Where it is not necessary to record a bill of sale of slaves, and yet a record is made, it looks as though it were done for effect. So also, when both parties at the time a sale is made, state that it is fair, this gives just ground for suspicion as to its fairness; *Comstock v. Rayford*, 12 S. & M. 369. The court cannot, however, charge the jury that the recording of such bill of sale is an evidence of fraud, or is not an evidence of fraud, but the jury may consider it in connection with the other evidence; *Fairly v. Fairly*, 9 G. 280. See FRAUD AND FRAUDULENT REPRESENTATIVES, 36.

43. Inadequacy of price. Mere inadequacy of price in a sale by the sheriff is not necessarily evidence of fraud; very gross inadequacy under certain circumstances may be so; but if inadequacy be relied on, it must be shown by proving, not only the price paid, but the value of the thing sold. The fact that a lot sold at \$5 is no evidence of fraud, its value not being shown; *Foster v. Pugh*, 12 S. & M. 416; see *Stanton v. Green*, in post, 54; see also, 71.

44. Purchase by attorney. It is not a ground of complaint on the part of a creditor that the attorney of the plaintiff in execution bought the land sold at sheriff's sale. The plaintiff only can make complaint on that ground; *Ib*.

44a. One fraudulent deed evidence of fraud in another. A deed in trust was made by a failing debtor to secure one of his creditors on the 23d of February, and in April an absolute conveyance was made of the same property to the trustee. Both deeds were filed for record by the trustee at the same time, and it was shown that the last conveyance was fraudulent: *Held*, that the failure to record the deed in trust for some months, and then its being recorded by the trustee with the subsequent fraudulent conveyance, was a circumstance to show that the first deed was fraudulent; *Pope v. Pope*, 40 M. 516.

45. Release of securities by a corporation. A voluntary release of securities by a corporation is void as to its creditors, yet, if on

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a settlement of mutual and conflicting claims, a corporation allow a creditor more than he is strictly entitled to, that of itself is not a fraud. There must be some device to injure others, or the settlement must be so grossly extravagant and wasteful as to amount to fraud in law; *Petrie v. Wright*, 6 S. & M. 647.

46. *Preventing bidders at sheriff's sale.* The prevention by the purchaser or persons acting with him, of persons from bidding at a sheriff's, by a representation that the property is to be bought for the benefit of the debtor or his family, is fraudulent as to creditors; *Stovall v. Farmers' & Merchants' Bk.* 8 S. & M. 305; *Turner v. Trimble*, 13 S. & M. 348. See FRAUD AND FRAUDULENT REPRESENTATIONS, 22; see also, *Ragan v. Gray*, 5 C. 645, in § 66, post.

47. *Where debtor furnishes part of the means to buy his property sold at sheriff's sale,* see post, 53.

48. *Where agent and trustee are purchasers,* see post, 61, 63.

49. *Contradictory and inconsistent explanations,* see post, 54, 68.

VII. Miscellaneous Instances of, and Principles governing Fraudulent Assignments.

50. *Fairness and good faith required: Device to save property to debtor.* The law requires a debtor to devote the whole of his property, with some inconsiderable exceptions, fairly to the payment of his debts. It will not tolerate any device or subterfuge which is intended to divert the property from that purpose. The form of the transaction gives it no validity, when good faith, which is necessary to the obligation of all contracts, is absent. A sale under an execution for a valid and just debt confers no exemption from this principle in behalf of those who participate in such device. Hence, a sale under execution, though for a just debt, if so conducted by collusion between the debtor, plaintiff and purchaser as to cause the selling of a much larger amount of property than is necessary to pay the debt, with the view of securing to the debtor's family all the property not necessary to refund the bids, will be fraudulent, and no feeling of sympathy or benevolence can redeem the sale from the condemnation of the law; *Trimble v. Turner*, 13 S. & M. 348.

51. *Same: Case in judgment.* A sale of fifteen slaves, worth \$4,000, was made under an execution for \$2,500, the amount of the debt. The sale was made at a season of the year when money was most scarce, and by agreement between the agent of the plaintiff in execution and the intended purchaser, the bid, by agreement of these parties, was not to be paid for five months, a time when the maturing cotton crop could be gotten to market, but the other bidders were required to pay cash. The purchaser bought for the benefit of the debtor's family, intending to give them all the profits made, by surrendering all the slaves to them, if the purchase

money were refused, and if it were not refused, then after a sale of a part to pay the bid, to give the balance to the family. The execution debtor was active on the day of sale to prevent bidders from competing with the intended purchaser. The slaves after the sale went back into the debtor's possession, and before the credit (of five months on the bid) expired, the debtor, by direction of the purchaser (who was the person intended to be such), sold five of the slaves for \$2,000, and with this sum and the debtor's cotton, the bid of \$2,500 was paid when it fell due: *Held* that the sale was fraudulent as to creditors; *Id.*

52. *Case adjudged to be a voluntary conveyance.* In this case there was a conveyance by the debtor to his brother-in-law, who afterwards conveyed to the debtor's wife. The court reviewed the evidence, and came to the conclusion that the conveyances were voluntary, and mere contrivances to defeat creditors; *Henry v. Fullerton*, 13 S. & M. 631.

53. *Where one-fifth of the price was the debtor's means.* The property of an insolvent debtor was sold under a judgment against him, and purchased by another, who had become the purchaser of the judgment under which the sale took place. It was shown that about one-fifth of the price he paid for the purchase of the judgment was furnished by the means of the debtor: *Held*, that this made the purchase fraudulent, and the property still remained liable to the debts of the judgment debtor. And this, though the money furnished by the debtor was raised by a loan to him from a bank, and the debt to the bank was afterwards paid by the purchaser. For the actual furnishing of a part of the means by the debtor, made the purchase of the judgment fraudulent in part, and being fraudulent in part, it was fraudulent in toto, and the subsequent payment of the debt to the bank by the purchaser could not render the transaction valid; *Burke v. Murphy*, 5 C. 167.

54. *Case of fraudulent conveyance: False explanations: Inadequacy of price: Possession by vendor.* G., a debtor in failing circumstances, on the 12th of March, 1841, and just before a term of the court, at which judgments for a large amount were rendered against him, sold to one F. for \$30,000, payable in six annual instalments, without interest, all his property, consisting of a plantation and a large number of slaves, cattle, horses, &c., worth in cash \$43,000, reserving to himself the right of possession till 1st day of March, 1842, when the first instalment fell due. F., the purchaser, resided in another State, and owned but little property, and was of doubtful solvency. He had been overseer for G., and was very friendly to him. On the 21st of April, 1841, F. conveyed the property to W., the mother-in-law of G., she giving him a bond to pay the notes which he (F.) had executed to G. for the purchase money. On the 26th of April, 1841 (five days after her purchase), W. conveyed the property to a trustee, who was also a relative of G.'s wife, in trust, out of the profits, and by a sale, if

necessary, to pay the six notes of G. to F. for the original purchase price, and to convey the residue to G.'s wife and children. W. was at this time an elderly lady, owning a small plantation and a few slaves, and was delinquent in the payment of her debts, and on that account frequently sued. The trustee never took actual possession of the property, but permitted G. (the debtor and original vendor) to have possession, and use the property substantially as his own. The property was assessed in the name of G., who paid the taxes on it. G. also made a sale of a part of the land to one of his creditors for \$17,000, and he and his wife joined the trustee in making a deed to the same. In 1848, this bill was filed by the creditors of G., attacking the conveyances as fraudulent as to them. G. in his answer stated he made the sale to F. for the purpose of preferring some of his creditors, and that the reservation of the right of possession to him till 1st of March, 1842, was made because at the date of the sale to F. (12th of March, 1841), both he and F. had commenced their planting operations for 1841. F. answered that he sold to W., because he was alarmed at the magnitude of his purchase, and feared he would not be able to make the payments promptly. W. answered that she was ignorant of the sale by G. to F., until a short time after it took place, when hearing that F. was dissatisfied, she determined to purchase from him. G. and the trustee both answered that the possession of G. was as agent of the trustee. All the defendants denied any fraudulent intention, and insisted on the *bona fides* of the several transactions. There was no proof that G. had ever applied any of the proceeds of the six notes given to him for the property by F., to his debts: *Held*, that the several conveyances were merely colorable, and designed to secure the property to G. and his family, and were therefore fraudulent and void as to creditors; *Stanton v. Green*, 5 G. 576.

55. *Sale under confessed judgment: Prior proposal of compromise.* In a suit in this state by creditors to set aside a sheriff's sale made in Louisiana, under a confession of judgment and judicial mortgage, and seeking relief on the ground of a fraudulent combination between the son of the defendant in execution, who was the purchaser, and the defendant, and the creditor, whereby it was alleged other creditors were defeated; it was held to be no evidence of fraud on the part of the debtor, that about a month before the confession of the judgment (under which, in the shortest possible time after giving legal notice, the sale was made) he (the debtor) made a proposal of compromise to the complainant who resided in Alabama, such proposal having no tendency to mislead the creditor; *White v. Trotter*, 14 S. & M. 30.

56. *Same: Effect of confessing the judgment: Prior lien.* In the same suit it was also held, that the fact that the defendant in execution confessed the judgment under which the sale was made, to the creditor, who had already a first mortgage on six-sevenths of

the property sold, including all the property in controversy in this suit, was no evidence of fraud. For as to the property now in controversy, he gained no priority which he did not already have, and as to the one-seventh on which he gained a priority, that was not in controversy in the suit, and could have no influence as to that point, in this controversy; *Ib.*

58. *Same: Waiver by defendant of three days' notice of levy; Case in judgment.* And in this same suit the following additional facts also existed: Execution issued on the confessed judgment in three days after its rendition, and was levied the same or the next day—the defendant waiving his right secured by the law of Louisiana to three days' notice of the levy before advertisement. This waiver was made at the instance of plaintiff's attorney, (who was also defendant's attorney) and who wished the sale to come off as soon as possible, that he might return home, which was in a distant parish. The purchaser at the sheriff's sale (a son of the defendant) directed the property, viz., one thousand acres of land, sixty slaves, horses and plantation implements to be sold "in block," which however, was not an unusual mode of selling such property there, and it was also the defendant's legal right to have it so sold, and the proof left it doubtful whether it would have sold for more in detail. This direction was given at the request of the attorney, who acted as such for the plaintiff—the debtor, and the son of the debtor, who was the purchaser, and under an employment made by the son, who was agent for both debtor and creditor. The sale took place at the earliest possible date, the son, as agent for the debtor, claimed the benefit of the valuation law of Louisiana, which required that the property should bring two-thirds of its appraised value. The property was fairly appraised, and the son bought it at sheriff's sale at a little over two-thirds of the appraisement. He paid no money, but retained out of his bid, as the law allowed him to do, the amount of prior encumbrances, and receipted on the execution, as agent for the plaintiff for the balance, which was nearly sufficient to pay the plaintiff's debt, the plaintiff having agreed with him before that time, if he purchased, he might have time to make the payments on condition that he gave his father (the debtor) and his mother as sureties: *Held*, that these circumstances of themselves were not inconsistent with fairness on the part of the purchaser, and therefore do not constitute fraud in fact on his part, so as to make his purchase void as to creditors; *Ib.*

59. *Same: Failure of debtor to notify creditor of sale.* Nor would the additional fact that the complaining creditor had an agent in the State, but living at a distance from the place of sale, whom the defendant had promised to notify if proceedings for sale were instituted, but failed to do so, it not appearing when the promise was made, nor how much reliance was placed on it; *Ib.*

60. *Same: Sale tested by law of Louisi-*

ana. Such a sale would not be fraudulent under art. 1979 of the Civil Code of Louisiana, which provides that contracts shall be void as to creditors, when the obligee knows the obligor is insolvent, and the contract gives the obligee, he being a creditor, an advantage over the other creditors, because the purchaser in this case was not a creditor. And would that article apply to the creditor in the judgment unless it were shown that he knew of the insolvency of the debtor? *Ib.*

61. *Same: The sale is a constructive fraud.* Nevertheless, whilst the foregoing facts would not amount to actual fraud, yet they exhibit the purchaser in such a relation to the parties as to make the sale fraudulent in law. The purchaser was agent for both debtor and creditor; as agent for the debtor he was bound to make the property bring as much as possible, and such also was his duty as agent for the creditor to the extent of his debt; but as purchaser he was interested in buying it as low as possible. His duties and interests were inconsistent and conflicting, and his purchase under these circumstances is, it seems, absolutely prohibited by law, and would be fraudulent and void. But whether it would be absolutely fraudulent, or according to the milder rule only presumptively fraudulent, whereby the burden is thrown on him of showing, by proof, the entire fairness of the transaction, the result is the same, as the circumstances show that the sale was suspicious; *Ib.*; *S. P., Lawrence v. Hand*, 1 C. 103, and *post*, 63.

62. *Right of junior incumbrancer in such cases.* And it is undoubted, that a junior incumbrancer in such cases has the right to annul the sale on the foregoing ground, it being void as to both creditor and debtor, who in such case could not affirm it to the prejudice of the junior incumbrancer's rights; *Ib.*

63. *Where trustee is purchaser.* Where the trustee in a deed of assignment for the benefit of creditors, lends himself to an arrangement by which the property is sold by him for the debtor's benefit, and in order to get rid of the encumbrance of the trust deed, it will be fraudulent; and neither the purchaser under the sale, having cognizance of the fraudulent arrangement, nor the debtor, can derive any benefit from it. And if the trustee be the actual bidder, it will be for that reason void, as he could not act as buyer and seller at the same time; *Lawrence v. Hand*, 1 C. 103.

64. *Right of debtor to stipulate that principal shall be paid first.* In a general assignment for the benefit of all his creditors, the debtor may stipulate that the dividends shall go *pro rata* to the principal of all his debts, and that no interest shall be paid until the principal of all his debts is extinguished. And this does not exclude the statutory mode of calculating interest, since, if the dividends exceed the principal of the debts, interest can then be calculated according to the statute for the application of

payments in such cases; *Ingraham v. Grigg*, 13 S. & M. 22.

65. *Conveyance of land to be levied on: Case in judgment.* Land was conveyed to Taylor for the use of Hunt, and soon thereafter was levied on under an execution against both Taylor and Hunt, and the benefit of the delay of the valuation law taken. Both Taylor and Hunt then gave their obligation to return the land or pay \$5,000 therefor, and also promised to get the signature of G. as surety to the obligation. The grantor knew of the levy on the land, and made no objection to it. After the time expired for a new execution under the valuation law, a *vendi.* was issued to sell the land, and thereupon the grantor in the deed to Taylor brought his bill in chancery to restrain the sale, upon the ground that Taylor and Hunt had never complied with their promise to get the signature of G. to their obligation to return the land, or pay \$5,000, and asking also an annulment of the deed. The creditor, whose execution had been levied on the land, insisted that the deed was made to Taylor, for the purpose of having the execution levied on the land, and thereby getting the benefit of the valuation law, and the deputy sheriff, who made levy on the land, so testified. But Hunt testified there were several judgments against him, and only that judgment against Taylor, and the conveyance was made to Taylor for the benefit of Hunt, rather than to Hunt expressly, because of these several judgments against Hunt, and on account of his embarrassed condition. The court held, that it did not sufficiently appear that the conveyance was made to delay the creditors of Taylor and Hunt, and that the grantor was entitled to relief; and held also, that if, when the land was levied on, the grantor had expressed his willingness that it should be sold, this would not have defeated his right, unless an actual sale had taken place; *Taylor v. Strong*, 10 S. & M. 63.

66. *Sale by agreement of parties under trust deed: Inadequacy of price: Case in judgment.* A debtor to secure a debt of \$100,000 payable in four annual instalments, gave a deed in trust on land and slaves, with power to sell enough to pay any instalment which might be unpaid at its maturity. As soon as the first instalment fell due, an assignee of the creditor, who held the notes for the first three instalments, by arrangement between the original creditor, the debtor, and the trustee, the latter, having become liable as endorser on the three first instalments, caused a sale to be made of the whole property by the trustee at public auction, when the assignee became the purchaser of all at the exact amount due on the first instalments, which was, however, but little more than one-third of the value of the property. This sale was made in pursuance of an arrangement that the sale should be made for the first instalment, and the assignee should buy all the property in for the amount of the first, but should surrender up the two last in-

stalments as satisfied. At the sale, efforts were made, but not by the assignee, to induce persons not to bid. It was shown that, owing to a continued depreciation of property that when the fourth instalment fell due, the estate conveyed in the deed in trust would not have been more than sufficient to pay the three first instalments. It also appeared that at the time of the sale the original creditor, who was a party to the arrangement, had transferred the note for the fourth instalment, but this was unknown to the assignee of the three first instalments. It was also shown, that after the sale the original creditor had become re-invested with the title to the note for the last instalment, and had afterward re-transferred it to the same person who held it when the sale was made; and it was further shown, that the motive which influenced the assignee of the three first instalments to consent to the sale was, that the debtor threatened to file a bill for a rescission of the contract by which the debt was created: *Held*.

1. That the sale was not fraudulent: the purchaser, from a proper motive to prevent litigation, and to save his debt, consenting to the arrangement by which the sale was brought about, and having, by the surrender of his whole debt, paid a full price for the property, being ignorant at the time that his assignor had transferred the fourth instalment, the omission to provide for which was the gravamen of the complaint.

2. That if the sale was objectionable on the ground that the fourth instalment had been assigned, and was not provided for, yet, as the original creditor had afterwards become invested with the title to the fourth instalment and had assented to the sale, he was bound by the sale; and when he re-transferred the note to the original transferee, the latter took it clothed with all the equities attaching to it in the hands of the original creditor, and was bound by his action; *Ragan v. Gray*, 5 C. 645.

67. *Fraudulent contrivance: Case in judgment.* B., whilst suit was pending against him, bought a tract of land from his infant brother, at a high price, and gave his note therefor, payable on demand, and to secure the note, executed a deed in trust on the land so bought, and on another tract, and on seven slaves, and on future crops to be grown; with authority to the trustee to sell at any time on ten day's notice: *Held*, that the transaction was a mere contrivance to hinder and delay the creditors of B., and was void; *Reed v. Carl*, 3 S. & M. 74.

68. *Same: Contradictory explanations.* To bill by creditors, to subject to the payment of their debts, slaves, which had been sold by the debtor to his father, the debtor answered, disclaiming all interest in the slaves, and that in May, 1842, he had sold them to his father, who also answered asserting his claim. It appeared from the proof that the father, who was now the claimant, was in embarrassed circumstances, and had sold these same slaves to the son (the debtor), in 1840, and he now

claimed title under a resale made to him in 1842. The proof in reference to the last sale was contradictory and impossible of reconciliation. The court reviewed all the evidence in the case, and concluded that the sale was fraudulent, principally on these grounds: That the son (who was vendor of the slaves) retained possession of the slaves for two months after the sale, and up to the time when they were suddenly, if not clandestinely, removed from Alabama, where the parties resided, and the transactions took place—a part of them to Georgia, and a part to Mississippi. The son aided in this removal, saying at the time they were started, that the removal was on account of some old debts against them; that at the time of the sale there were suits pending in the Supreme Court of Alabama against the son, which were on the point of being decided against him, and were soon afterwards so decided, and these were the judgments which complainants were seeking to enforce; that after the sale to the son by the father in 1840, some of the slaves were levied on as the father's property; and on an issue formed to buy the son's right under that sale, the father had testified and had given a wholly different account of the consideration for that sale, than the one he now sets up in this suit; that the reason given by the father and son for the sudden removal of the slaves to Georgia and this State, viz.: to raise money to prevent a trustees' sale of the father's land, which was to take place in ten days after the removal, was shown to be false, by the fact that there was not time enough to complete the removal, make the sale and return with the money by the sale day; and that the agent running the slaves was not instructed to sell but to deposit them; and when a sale was made of a part of the slaves, it was made on a credit; *Comstock v. Rayford*, 12 S. & M. 369.

69. *Debt created for fraudulent purchase: No consideration for re-sale.* In the foregoing case it was alleged by the debtor, that the sale was made by the father to the son in 1840, in consideration of the son's agreement to pay a debt of the father's secured by a deed in trust on the father's property. That the son failed to pay over half of it, and that the re-sale (being part of the slaves sold in 1840), made by the son to the father in 1842 (the sale now in controversy), was to release the son from the obligation to pay this other half of the debt, secured by deed in trust as aforesaid. The court say, that the sale of 1840 was most probably but a device, and fraudulent as to the father's creditors; and if so, there was no consideration for the re-sale in 1842, and that sale was therefore no obstacle to subjecting the shares to the son's debts; *Ib*.

70. *Preventing bidders: Declarations of conspirators.* Q. was applied to by a judgment debtor, whose property was levied on, to buy it for his benefit, but Q. being unwilling to do so, applied to S., a nephew of J.'s and requested him to buy. S. made no reply to the proposition, but afterwards stated he

bought for the benefit of J. The property was left in possession of J. for two years, and until levied on under another execution against J. Q. during the sale asked several parties not to bid, as S. was bidding for the benefit of J.: *Held*, that the sale was fraudulent in fact, as to the creditors of J., and that these declarations of Q. were admissible in evidence against S., on the trial of his right to the property, on two grounds:

1st. They constituted a part of the *res gestæ*, and as such were admissible, though not made in the presence of the party to be affected by them.

2d. They were the declarations of one of several conspirators to defraud the creditors of J., and were made in pursuance of that design, and as a means of carrying it out. That when once a fraudulent combination is made to defraud creditors, there is no difference between those who formed it, and those who afterwards enter into it. They are all equally affected by the fraud; *Stovall v. Farmers' and Merchants' Bank*, 8 S. & M. 305.

71. *Inadequacy of price: Possession and use, by debtor.* A house and lot in Vicksburg, worth from \$10,000 to \$15,000, was levied on under execution, and the benefit of the valuation law claimed. During the stay of twelve months thus occasioned, the lot was sold under a mortgage executed by a former owner, and was bought by complainant for \$325, for which sum he gave his check, which, however, had never been presented for payment. The defendant in execution continued in possession, apparently exercising all the acts of ownership which were exercised over it—making and paying for valuable improvements, and, so far as the proof showed, paying no rent. Upon a bill filed by the purchaser at the mortgage sale, to enjoin the sale of the property under the said execution, it was held that the foregoing facts showed that the sale was colorable, and void as to creditors; *Roach v. Deering*, 9 S. & M. 316.

72. *Length of time: Possession and use.* A person who was both executor and guardian, made an assignment long after his appointment, by deed in trust to secure and indemnify his sureties on his official bond, by which he conveyed to trustees his land and slaves, all his household and kitchen furniture, his horses, mules, farming utensils, and crops to be afterwards raised, upon the following trusts:

1st. Whenever the share of a ward or heir should become due, to sell, on the request of either of the sureties, so much of the property as might be necessary to pay such share, and from time to time to proceed in this way till the sureties were fully exonerated, and if either surety should become chargeable, then a sale was to be made for his indemnification.

2d. To take the crops, when gathered, and sell the same, and out of the proceeds, after paying the expense of raising it (not including any expenses of the grantor and his family), to pay the balance into the Probate Court, or to its order, towards the extinction

of the debts due the wards, and so on, annually until the debt shall be extinguished.

3d. That the grantor shall retain possession, until a sale, and have such use of the property as is consistent with the trusts. (The grantor was insolvent, and it was not shown that the trustees had shipped and sold any of the crops of cotton which had been raised.)

Held, that the above circumstances were strong badges of fraud, but that they did not make the deed absolutely void on its face, and that it should be submitted to a jury; *Parney v. Park*, 4 S. & M. 229.

73. *Sale by father to son, and re-conveyance.* The father, in 1840, sold the son the tract of land on which the father resided, for \$500, and it was stipulated that the father should reside with the son, on the tract, for four or five years, and that the family should be supported. One hundred and fifty dollars was paid at the time of the sale, in corn and fodder, and the remainder was to be paid in discharge of the debts of the father, on which the son was surety; but those debts were mostly paid by the sale of other land of the father, under execution, and the remainder by the son. The father also assigned to the son a note for \$320, and in 1843 was discharged as a bankrupt, and in 1844 the land was re-conveyed by the son to the father, the latter giving his son his note for \$500 as the consideration for the re-conveyance. At the time of this re-conveyance, the father remarked "he was too smart for them." The father and his family resided on the land with his son during the whole time, and the father rented out a part of the land and received the rent, and at one time received the rents for a part the son had rented: *Held*, that the conveyance was merely colorable, and intended to defeat the father's creditors, and was still liable to his debts; *Wooten v. Clark*, 1 C. 75.

73a. *When fraudulent as to subsequent purchases: Case in judgment.* If the father purchase land in the name of the son, and then sell it, procuring the deed to his son to be destroyed, and another deed in lieu thereof to be made to the vendee, the transaction will be an advancement, and the destruction of the son's deed and the sale will not divest the son's title; and if the vendee rely upon the purchase in the name of the son, being made with intent to defraud purchasers, he must show it; and on showing that fact, it seems the son's title will be void; *Lisloff v. Hart*, 3 C. 245.

73b. *Subsequent fraud.* A mortgage valid, and *bona fide* in its creation, will not be invalidated by subsequent fraudulent or illegal acts of the parties thereto; *Summers v. Roos*, 42 M. 749.

73c. *Agreement to purchase for heirs.* It seems that an agreement between a purchaser at executor's sale, and the executor and other heirs made before the sale, by which the purchaser agreed to keep the property bought by him together, and permit one of the heirs to manage it, and refund to him in three annual instalments, the price he

had paid, and when he was fully paid to re-convey the property to the heirs, would not necessarily make the sale fraudulent, if the property sold for a fair price; and the sale was in other respects fair. And if such agreement was made after such sale, if binding, it would only give the parties a right to redeem; *Grant v. Lloyd*, 12 S. & M. 191.

73d. *Combination between creditors to exclude others.* A combination between a certain class of creditors of an estate to purchase the property at a low price, by preventing others from bidding, is fraudulent; *Id.*

73e. *Unusual recitals in deed.* Unusual recitals in an executor's deed, giving the reasons why lands sold by him brought an unusually low price, are suspicious, and look as if they were intended to give apparent fairness to a fraudulent transaction; *Id.*

73f. *Degrees in fraud.* There are no degrees in fraud; and when a sale is attacked on the ground of a fraudulent combination to prevent bidding, if it be shown that the purchaser and his confederates prevented a party from bidding, who only intended to bid for an insignificant portion of the property, the whole sale will be fraudulent; *Id.*

73g. *Judgment fraudulent as to creditors.* See JUDGMENT, 16, 17, 18.

VIII. Proof of Fraud.

See *ante*. sub-division VI. Badges of Fraud.

74. *Proof by circumstances: Suspicious.* Fraud may be proven by strong circumstantial evidence even against positive proof on the other side; *Petrie v. Wright*, 6 S. & M. 647; yet the proof must be satisfactory. A sale will not be set aside as fraudulent in fact, merely because it is doubtful and suspicious; *White v. Trotter*, 14 S. & M. 30. Circumstances calculated to excite suspicion that there was an understanding between the defendant in execution, and the purchaser of real estate thereunder, are not sufficient to justify the court in declaring the sale void, in the absence of all proof showing unfairness in the sale, or an effort to keep off bidders, or to make the property sell for a low price; *Foster v. Pugh*, 12 S. & M. 416.

75. *When positively denied: Case in judgment.* Where to a bill to set aside a fraudulent conveyance, the claimant who was administrator, answered positively, denying the fraud, and the debtor, who was a witness, testified positively to the *bona fides* of the sale of the property to the claimant; and on the contrary, several witnesses testified to declarations of the intestate to the effect, that the debtor (who was his brother) had conveyed his property to him to avoid a debt, but only one witness stated, that the property now in controversy was referred to in these declarations of the intestate; it was held that in view of the positive answer and proof of *bona fides*, the sale could not be decided fraudulent; *Mizel v. Herbert*, 12 S. & M.

547; See FRAUD AND FRAUDULENT REPRESENTATIONS, 34, 35, 36 and 37.

76. *Declarations of conspirators: Res gestæ.* See *ante*, 70.

77. *Declarations of vendor.* There is a conflict in the authorities as to whether the declarations of the vendor tending to prove fraud in the sale, are admissible against the vendee, but the weight of authority is, that these omissions made whilst vendor was owner, are admissible against one who claims title through him, and of this opinion was this court; but such declarations must have been made before the sale, and they will not affect the vendee if he had no notice of them and his purchase be in other respects free from objection; *Farmers' Bank v. Douglass*, 11 S. & M. 469.

See VENDOR AND VENDEE, 225.

IX. Rights and Liabilities of Parties to Fraudulent Assignments.

78. *Liability of fraudulent grantee.* A party who has acquired property by an assignment which is fraudulent as to creditors, is liable to the creditors of his fraudulent grantor for the avails of the property in case he has disposed of it, upon the same principle that he would be liable as *executor de son tort* of the grantor in case he were dead; *Van Winkle v. Smith*, 4 C. 491. And after the grantor's death he may be treated as his *executor de son tort*.

See EXECUTORS AND ADMINISTRATORS, 225.

79. *Same: Case in judgment.* And if the fraudulent grantor have only a life interest in the property, and the grantee claim that he bought her interest and sold it, he will be liable for the whole proceeds of the sale, even though he sold the property for more than the value of the life estate; for he will be presumed to have sold the life estate only, and will not be permitted to say that he committed a fraud on the remainderman by selling a greater interest than was conveyed to him; *Id.*

80. *Rights of fraudulent purchaser when sale set aside: His lien.* Where the sale or conveyance is fraudulent in fact, the purchaser will not be entitled, upon its being set aside, to retain the price he paid for the property, though it went to extinguish an encumbrance; *Stovall v. Farmers' and Merchants' Bank*, 8 S. & M. 305.

See VENDOR AND VENDEE, 206. FRAUDS, &c., 28.

81. *Same: Where the fraud is constructive only.* Ordinarily in cases at law, a party to a fraudulent assignment must lose all advantages gained thereby, as well as the money which he has paid in furtherance of it; but this rule does not apply in equity. Where the sale is set aside on the ground of constructive fraud, the fraudulent purchaser in such a case must be put in the same condition he was before the purchase; *White v. Trotter*, 14 S. & M. 30; S. C., 4 C. 88.

82. *Same.* And if the sale which is set aside be made under a decree to foreclose a

mortgage, the mortgagee will be reinstated to his rights and will be entitled to be paid out of the property before the creditor seeking to set aside the sale, and whose lien is subsequent to that of the mortgagee. In all such cases the purchaser and creditor under whose mortgage or lien the property was sold, upon the setting aside of the sale, are entitled to be put in the same condition in which they stood before the sale; *Trotter v. White*, 4 C. 88. And in doing this, if the purchase be of slaves the purchaser will be charged with hire, and if he give away one of them he will be charged with its value and interest from the date of the gift, and up to that time with the hire; *Trotter v. White*, *supra*.

83. *Same*. And in setting aside such a sale, it is no objection to remitting the prior mortgagee to his rights under the mortgage; that the mortgage was satisfied by the sale, which took place under a decree of a court in another State; for whilst the courts of this State cannot set aside a decree in another State, nor the entry of satisfaction of it made there in consequence of a sale made under the decree, yet where the sale itself is set aside for constructive fraud only, the courts here have power to preserve the equities of the parties by treating the mortgage as still existing; *Ib*.

84. *Same*. In such a case the sale being void, a party claiming under a junior encumbrance can claim nothing for the transaction; for the sale is void, and the claim of the original incumbrancer not affected by it; *Lawrence v. Hand*, 1 C. 103.

85. *Fraudulent conveyance binding between the parties*. A conveyance made to defraud creditors, by the express terms of the statute, is void only as to creditors, and is good between the parties; *Armstrong v. Stovall*, 4 C. 275; *Parkhurst v. McGraw*, 2 C. 134; *Prewett v. Coopwood*, 1 G. 369; *Snodgrass v. Andrews*, 1 G. 472; *Winn v. Barnett*, 2 G. 653; *Gully v. Hull*, 2 G. 20; *Newell v. Newell*, 5 G. 385. And the administrator of the grantor will not be permitted to defeat the purchaser's right by setting up the fraud of his intestate; *Armstrong v. Stovall*, *supra*. Nor will the sale be set aside at the instance of the administrator of the grantor, though the estate be insolvent; *Winn v. Barnett*, *supra*. But if the deed was never in fact delivered, but merely put on record by the fraudulent debtor, to give an appearance that a deed had been made, it is utterly void, and not binding even between the parties; *Parkhurst v. McGraw*, 2 C. 134. See *post*, 90.

86. *Same*. But equity will grant relief to the administrator against a fraudulent assignee of his intestate's property, if it appear that the assignment was procured by the fraudulent conduct of the assignee. Thus: C. in his last illness, and when generally debilitated in body and mind, made a conveyance to his brother-in-law P., clothed with a secret trust for his wife and children, under the mistaken apprehension produced by the false and fraudulent representation of P., that unless such conveyance were made the

property would be taken to pay an alleged security debt of C. After C's death his administrator filed his bill to recover the property for the benefit of the wife and child, there being no debts; and the court decided he was entitled to recover; *Prewett v. Coopwood*, 1 G. 369. See *post*, 93, 94. FRAUD AND FRAUDULENT REPRESENTATIONS, 27.

X. Proceedings to set aside a Fraudulent Conveyance.

1. Who may and may not Attack it.

87. *Only creditors can attack*. An assignment fraudulent as to creditors, can be set aside only by a creditor (see *ante*, 85), and if all the creditors assent, it is good; and so a non-assenting creditor cannot object, if the trustee in the assignment offer to pay him; *Whitney v. Freeland*, 4 C. 481.

See PRINCIPAL AND SURETY, 50.

88. *Right of parties and privies to object*. See *ante*, 85, 86.

89. *Where all the creditors assent: Case in judgment*. A bank, before judgment of forfeiture of its charter was pronounced under the *Quo Warranto* Act, made a general assignment of all its assets to trustees for the benefit of all its creditors, which was fraudulent on its face. After the judgment of forfeiture, the trustee appointed by the court under the *Quo Warranto* Act of 1843 to collect the assets and pay the debts filed his bill to set aside the assignment. But it appearing that all the known creditors of the bank had assented to the assignment, there being only \$1700 in notes of the bank outstanding in the hands of unknown parties who had not assented. And it not being known whether these notes were lost or destroyed, or held by creditors, and no debts having been proven before the trustee appointed by the court, and the trustees in the assignment offering to pay any of the bills and notes so outstanding which might be presented; it was held that the trustee filing the bill was representing no creditor, and could not have the assignment set aside; *Whitney v. Freeland*, 4 C. 481.

90. *Creditor acting for fraudulent assignee*. A fraudulent assignment of property, by the husband to his wife, will not be set aside in favor of a judgment creditor of the husband, who seeks to annul it in combination with the husband, and for his benefit, and at his instance; *Hemphill v. Hemphill*, 5 G. 68.

91. *Right of subsequent creditors*. Whether a deed, fraudulent as to creditors, will be set aside at the instance of a subsequent creditor; *Quære?* But if set aside for fraud as to existing creditors, it becomes wholly void, and cannot stand in the way of a subsequent creditor; *Trimble v. Turner*, 13 S. & M. 348. But if the subsequent creditor can show fraud in fact, by showing that the conveyance was made with intent to defeat debts about to be contracted, or to defraud existing creditors, the conveyance will be wholly void, and will be set aside at his instance; *Henry v. Fullerton*, 13 S. & M. 631. And so if the grantor has been permitted to remain in pos-

session of property for a long time, and has gained credit on the faith of it; *Rankin v. Holloway*, 3 S. & M. 614. See *ante*, 4, 5, 6, and 6a.

92. *Subsequent purchaser.* A conveyance for a valuable consideration, made with intent on the part of the grantor, to hinder and defeat his creditors, of which the grantee had notice at the time of the purchase, is not void as to a subsequent purchaser from the grantor, with notice of the grantee's claim: *Aliter* where the consideration is merely colorable and without consideration; *Coppage v. Barnett*, 5 G. 621.

92a. *Same: Subsequent purchaser.* The statute of frauds does not make voluntary conveyances, but only fraudulent conveyances, void as to subsequent purchasers from the grantor. But a subsequent sale by the grantor, in a voluntary conveyance, is presumptive evidence of fraud in the settlement, and throws the burden of showing the *bona fides* of the transaction on the donor; *Wells v. Treadwell*, 6 C. 717.

93. *The grantor cannot set it aside: Nor enforce stipulations in his favor: Pari delicto.* A debtor who has made a fraudulent conveyance, to defeat or delay his creditors, cannot enforce against his confederate any stipulation in it for his benefit; nor recover back, according to their agreement, any property which the debtor has thus gotten. He is in *pari delicto* with his confederate, and the court will not interfere in his behalf. But this rule will not prevent him from having an account stated, as to their dealings, where nothing is sought to be recovered, which had been fraudulently assigned; *Walt v. Conger*, 13 S. & M. 412. See *ante*, 85, 86.

94. *Same: Case in judgment.* C. filed his bill against W. to obtain relief against certain alleged frauds of W., and to compel an account. He charged that W. had for a long time been his commission merchant in New Orleans; had obtained a judgment against him in the State for a large amount, under which W. induced C. to consent to a sale of about ninety of his slaves, after the judgment had been paid, under a promise from W. that C. should retain possession of the slaves, and have the proceeds of their labor, and thus enable him to pay off his debt to W. and others, and secure him a home; but W. had by various devices obtained possession of the slaves and carried them off. That C. had shipped to W., after the judgment, various amounts of cotton at different times; that W. had charged usurious interest, and had paid money for him at different times, constituting a running account of several years, upon which W. claimed that C. was largely in his debt; yet the truth was W. was in C.'s debt. W. demurred generally to the bill. The court held, that as to the alleged fraud in reference to the slaves, C. was in *pari delicto*, and no relief would be granted; but as to the other matters, the bill should be answered; *Ib.* See *ante*, 86.

97. *Same: Court will not assist party to a fraud.* Where a trustee, in an assignment to

pay debts, lends himself to an arrangement, through which the trust property is sold by him for the debtor's benefit, and in order to get rid of the encumbrance of the trust deed, it will be fraudulent, and neither the purchaser under this sale, nor the debtor, can derive any benefit from it; and if they afterwards dispute as to the fruits of the transaction, equity will assist neither of them; *Lawrence v. Hand*, 1 C. 103.

But where an executor made a combination with a third person, to purchase for the benefit of the heirs, and to defeat certain creditors of the estate, it was held that they could file a bill to set aside the sale, as no act of theirs could defeat the rights of the heirs; *Grant v. Lloyd*, 1 S. & M. 191.

See FRAUDS, &c., 27.

2. The Lien necessary to the Attack.

98. *The attacking creditor must have a lien.* Only creditors who have a lien, by judgment or otherwise, on the property fraudulently assigned, can attack the assignment. This lien need not exist at the time the assignment was made, if the debt then existed. Hence, in an action of replevin, it is not competent for the defendant to justify his seizure and possession of the property, by showing that it has been fraudulently assigned, and that he was a creditor of the debtor; *Hiltzheim v. Drane*, 10 S. & M. 556.

99. *Same: Case in judgment.* And so where a creditor, who has a judgment in another State, brought a foreign attachment bill in this State, to subject to his debt, property here situate, which had been fraudulently assigned, the court say that the foreign judgment is no lien, and intimate that the want of a lien was a serious obstacle to complainant's success. And it also decreed that such a bill should pray for a decree establishing the complainant's debt, and for want of such prayer, remanded the cause that complainant might amend; *Comstock v. Rayford*, 12 S. & M. 369. And this principle was applied where a creditor having such foreign judgment, sought to subject to its payment land held by a third party in this State, for the use of his debtor, the court dismissing his bill because no lien had been established; *Farned v. Harris*, 11 S. & M. 366.

See CHANCERY, sub-division Attachment.

100. *The lien essential, and must exist before the bill is filed.* A court of chancery has no jurisdiction to entertain such a bill until a judgment has been obtained, and there is a return of *nulla bona* (citing *Farned v. Harris*, 11 S. & M. 366). And this defect cannot be cured by obtaining the judgment and *nulla bona* after the suit has been commenced; *Brown v. Bank of Mississippi*, 2 G. 454.

101. *Same: Modification of the rule.* Whilst this is the general rule, yet it is dispensed with, as to the lien, where the judgment from the peculiar nature of the property, is no lien on it. Hence a judgment against an administrator, and a return of *nulla bona* is sufficient to enable the creditor to proceed by

bill to set aside a fraudulent conveyance of his land made by the intestate; *Snodgrass v. Andrews*, 1 G. 472. And so when an estate has been declared insolvent, it is sufficient if the creditor has established his debt in the Probate Court, according to the statute; *Winn v. Barnett*, 2 G. 653.

3. Miscellaneous.

102. *The older lien preferred.* When two creditors unite on a bill to set aside a fraudulent conveyance, and they succeed, the property will be decreed to satisfy the prior lien first; and if the creditor having the youngest judgment have also a mortgage on the same property for the same debt, older than either judgment, the lien of the mortgage will be preferred; *Trimble v. Turner*, 13 S. & M. 348.

103. *Fraudulent sale in another State.* A sale of personal property under execution in another State will, if fraudulent, be set aside by the courts of this State—the property having been brought within the jurisdiction of the State; *White v. Trotter*, 14 S. & M. 30. See ante, 83.

104. *Creditors' bill not a lis pendens.* The pendency of a creditor's bill is not a *lis pendens* as against a purchaser, without actual notice, of the property fraudulently assigned. And if the creditors have no lien at law, or his judgment has lost its lien by lapse of time pending the litigation, a *bona fide* purchaser from the fraudulent grantee will hold it; *McCutchen v. Miller*, 2 G. 65.

105. *When debtor is a discharged bankrupt.* The Bankrupt Act of 1841 reserved to a creditor who did not receive any *pro rata* of the bankrupt's assets, his liens which he had acquired by the State laws. And such a creditor having a lien by judgment before the debtor applied to be discharged as a bankrupt, may, after his discharge, proceed in the State courts to set aside a fraudulent conveyance made by the bankrupt before his application (citing *Talbot v. Melton*, 9 S. & M. 9; *Russell v. Cheatham*, 8 id. 710); *Wooten v. Clark*, 2 C. 75.

106. *Allegata and probata must correspond.* A deed made to defraud creditors is binding between grantor and grantee; but a deed put on record by the grantor to give an appearance that a conveyance had been made, if in fact it had never been delivered, is utterly void and not binding even between the parties. The two things are distinct and not the same; and hence, when a bill charges that "the deed was executed to defraud creditors," proof cannot be introduced that it was never executed for want of delivery, but was put on record by the grantor to give it the appearance of a conveyance and thereby defraud creditors; *Parkhurst v. McGraw*, 2 C. 134.

107. *Parties to the bill.* Where a bill is filed by a junior encumbrancer to set aside a sale under a prior mortgage, on the ground of fraud in the sale by the trustee, the beneficiary under the first mortgage is a necessary party defendant; *Lawrence v. Hund*, 1 C. 103.

XI. What property is embraced in the rule against Fraudulent Conveyances.

108. *All property not exempt from execution embraced: Chose in action.* All species of property not specially exempt by law from seizure and sale under execution are within the statute against fraudulent conveyances; and hence the voluntary assignment by an insolvent debtor of a chose in action is fraudulent and void as to existing creditors (citing *Wright v. Petrie*, 1 S. & M. Ch. R. 320); *Catchings v. Munlove*, 10 G. 655.

109. *Same: Life policy.* A policy of insurance upon the life of a person is a chose in action, and as such is liable to the payment of the debts of the party in whose favor it is issued, and is therefore within the statute against fraudulent conveyances. Thus when a debtor in insolvent circumstances, on the day before his death, made a voluntary assignment to his wife and children of a policy of insurance upon his life for \$5000, it was held that the assignment was fraudulent and the avails liable to his debts; *Id.*

110. *Exempt personally not embraced.* But an insolvent debtor may make a valid gift of personally exempt by law from execution; *Smith v. Allen*, 10 G. 469.

As to jurisdiction of chancery in these matters, see CHANCERY, sub-division Jurisdiction.

Frauds and Fraudulent Representations.

See FRAUDULENT ASSIGNMENTS. VENDOR AND VENDEE, sub-division Rescission of Contract of Sale.

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I. What is Fraud, and the Instances.

See VENDOR AND VENDEE, 116 to 125.

1. Subtle Machinations and Concealment.

1. *Subtle machinations, silence: Case in judgment.* Any subtle machination, whether in words or deeds, designed to circumvent, and which have that effect, amount to fraud. Silence, or a suppression of the truth by a person whose duty it is to speak, equally with misrepresentation, is a fraud. Hence, it being the duty of an administrator to sell for the best price, if he purposely remain silent and permit a person desiring to bid to remain under a delusion as to the time of the sale, and whereby he is prevented from attending, such silence is a fraud, if the property bring less than its value; *Planters' Bank v. Neely*, 7 H. 80; *S. P., Hall v. Thompson*, 1 S. & M. 443.

2. Concealment: Vendor and vendee.

Where the subject matter of representations is not equally open to the observation of both parties, or the vendee has not equal means of knowledge with the vendor, the latter is

bound to state nothing but what is true, and to conceal no material fact connected with the condition of the estate sold; *Anderson v. Burnett*, 5 H. 165. But this duty to disclose ceases where there is an opportunity to the vendee to examine, and he does examine, and does not rely upon the statement of the vendee; *Hall v. Thompson*, 1 S. & M. 443. S. P., *Ayres v. Mitchell*, 3 S. & M. 683.

See VENDOR AND VENDEE, sub-division Rescission of Contracts, 116, 121, *et seq.*

3. *Same: Secret defect in sale of chattel.* If the seller of a chattel which is worthless, from a secret defect, conceal the defect, and it be unknown to the buyer, and be not so apparent as to be easily discovered, it will be a fraud, which will vitiate the sale; *Simmons v. Cutrer*, 12 S. & M. 584.

See WARRANTY, 113.

4. *Same: Assignor and assignee.* If the assignor of a note or other evidence of debt, know there is nothing due on it, and conceal that fact from the assignee, it is a fraud on the latter; *Hoopes v. Newman*, 2 S. & M. 71.

5. *Same: Sale: Rumor affecting price.* If a party be in possession of material information, which is unknown to the seller, and calculated to affect the price of any commodity, and he purchase it, without communicating this news to the vendor, and by reason thereof he purchase it far below its value at the time, it is such a suppression of the truth as will avoid the contract. Thus, in 1815, the buyer of cotton was in possession, at the time, of a rumor of the conclusion of peace between the United States and Great Britain, and failed to communicate it to the seller, who was ignorant of it, and he purchased the cotton at a price which would have been its value in a state of war, but was greatly less than its value, peace being concluded. It was held, that the contract could not be enforced by the vendee; *Frazier v. Gervais*, W. 72. but it seems that this rule is not established as law; *Laidlaw v. Organ*, 2 Wheaton R. 179.

6. *Fraudulent misrepresentation: When the party has notice.* False representations in relation to the quality of the thing sold, are not fraudulent unless they deceive, and hence, are no ground of defence to the buyer if he knew the true condition of the thing sold, or the defect was so patent that it must have been discovered by prudent attention. Thus where, in an advertisement of town lots for sale, the town was represented, contrary to the fact, to be situated at the head of navigation of the river on which it was situated, and the vendee was well acquainted with that section of the country and the river, it was held that the false representation was not fraudulent; *Anderson v. Burnett*, 5 H. 165. It is a universal principle that a party cannot be relieved, if he had full notice of the fraud; *Anderson v. Lincoln*, 5 H. 279; S. P., *Bell v. Henderson*, 6 H. 311.

7. *Same: When the matter is public and notorious.* Fraud cannot be predicated of a representation of a public and notorious character, in relation to the situation and pros-

pects of a town, which were open to the observation of the vendee, and if such a representation be exaggerated, it is no ground for a rescission of a contract for the sale of a town lot; *Bell v. Henderson*, 6 H. 311; *Anderson v. Burnett*, 5 H. 165; *Anderson v. Hill*, 12 S. & M. 679.

See VENDOR AND VENDEE, 125 to 127.

8. *Same: Where the defect is patent.* Misrepresentation by the vendor in relation to patent defects in the estate, are no ground for rescission if the vendee had opportunity to examine and did examine the estate, and it no fraudulent means be used by vendor to prevent a discovery of the defects. Thus, if vendor represent that there are only sixty acres of land, in a tract of 900 acres, unfit for cultivation, when in fact there are 300 acres unfit for cultivation, and the vendee examined the tract twice, and it not appearing that it was shown to him in such a way as to prevent his making a fair examination, the misrepresentation is no fraud; *Halls v. Thompson*, 1 S. & M. 443.

9. *Fraudulent representation where defect not easily ascertained: Overflow.* The vendor represented that the land sold, which was near Pearl river, was not subject to overflow only from extraordinary freshets, and then only through a bayou, and that the overflow remained only a few days, and that the land was "good land for farming." This statement was false and fraudulent, the land overflowing generally every year, whereby it was nearly useless for farming. The vendee was a stranger and trusted to the statement of the vendor, the examination being made at that season of the year when it was impossible to detect the falsity of the statement: *Held*, that the vendee was entitled to a rescission, and also that the above statement, though not made directly to vendee, but to another in his presence during the progress of the trade, was as fraudulent as if made to vendee himself; *Alexander v. Beresford*, 5 C. 747.

2. *Innocent Representations believed to be true.*

10. *Representations innocently made and believed to be true.* The vendor who makes a statement which he knows to be untrue, is guilty of direct fraud, if the vendee be thereby deceived to his prejudice. And if he make a statement without knowing it to be true or false, but believing it to be true, and it turn out to be untrue, this is a fraud in law, and he must make his statements good: *Halls v. Thompson*, 1 S. & M. 443; *Oswald v. McGehee*, 6 C. 340; *Davidson v. Moss*, 5 H. 673; *Rimer v. Dugan*, 10 G. 479; *Parham v. Randolph*, 4 H. 435; *Gilpin v. Smith*, 11 S. & M. 109; S. P., *Clopton v. Cozart*, 13 S. & M. 363; *Lindsey v. Lindsey*, 5 G. 432.

See VENDOR AND VENDEE, 117, 118, 119.

11. *Same: Qualification of the doctrine.* But this rule does not apply when the party making the representation, expressly states that it is but a repetition of what he has heard from others, and when he also expressly de-

clines to be responsible for it; *Miss. Union Bk v. Wilkinson*, 3 S. & M. 78. Nor does the rule apply, where the representation is, that a defect exists (as coco grass) to a certain extent, which is specified, and that if it (the grass) extended farther, the vendor did not know it. In that case, if it be shown that the grass extended materially beyond what was stated, the contract will not be rescinded, unless it be shown that the vendor knew the statement to be false; *Oswald v. McGehee*, 6 C. 340.

3. Opinions and Statements as to Title and Advantages.

12. *Opinions expressed: As to title.* Where the vendor fully declares the nature of his title, and that there is an adverse claim, his confident expression of the opinion, that his title is good, would not be such a misrepresentation as would be deemed fraudulent, in case he is mistaken; *Vick v. Percy*, 7 S. & M. 256. Yet the rule (as stated in *ante*, 10) was applied to the following case, vendor only had a tax title, and so stated to vendee, who consulted a lawyer about it, and was informed that it was good, if the law had been complied with. When the trade was made, vendee stated to vendor he would "rely upon his word about it," and vendor responded, "that his title was as good as any man's, and if not, he would make it so, and if vendee found a better owner than he was, he, vendor, would cancel papers, without any law about it," and it was held, the tax deed being shown to be void, though without any proceedings threatened for eviction, that vendor was bound by his representations, and that vendee was entitled to a rescission; *Rimer v. Deegan*, 10 G. 477.

See VENDOR AND VENDEE, 38, 39, 116, 117.

12a. *Fraudulent statement as to title.* Any intentional misrepresentation or concealment in relation to the land sold, either as to quality or title, by which the purchaser is imposed upon is fraudulent, and it is immaterial whether the representation (as to quality or title) be intentionally fraudulent or not. If vendor undertake to make statements, he is responsible for them; *Parham v. Radolph*, 4 H. 435; *English v. Benedict*, 3 C. 167.

See VENDOR AND VENDEE, 39.

13. *Opinions as to advantages.* The representations by a railway agent, employed in obtaining subscriptions for stock in the company, in reference to the value of the stock, profits, &c., though false and exaggerated are mere expressions of opinions, and a person subscribing for stock has no right to rely on them, and they do not amount to fraud; *Walker v. Mobile & Ohio R. R. Co.*, 5 G. 245.

4. Miscellaneous.

14. *False statement that another party is a stockholder.* A subscriber for stock in a railway company cannot avoid the contract of subscription upon the ground that the agent who procured it, had obtained from an in-

fluential person in the neighborhood, whom he represented to be well acquainted with such matters, a colorable subscription for stock, with the secret understanding that such subscriber was not to be bound thereby, and represented said subscription to the subscriber and others as *bona fide*, with the view of inducing them to subscribe, unless it also appear that he relied upon that fact and was induced thereby to make the subscription; *Ib.*

15. *Fraud in procuring work to be done on the credit of another.* A landlord showed to a carpenter a contract with his tenant, by which the latter agreed to leave the premises in as good repair as he found them, and he also showed the carpenter certain injuries, which he alleged the tenant had done to the premises, and that the repair of which was within the terms of the contract, and thereupon the landlord agreed with the carpenter that he might make the repairs if he would look to the tenant alone for payment. In a suit against the tenant brought by the carpenter in the landlord's name and with his consent, the tenant proved that he had complied with his contract, and was not liable for the repairs, and the verdict and judgment were for him: *Held*, that the misrepresentation of the landlord to the carpenter was a fraud and made him liable for the work. Whether in such a case the judgment in favor of the tenant was *prima facie* or conclusive evidence in the suit against the landlord; *Quære?* *Cartwright v. Carpenter*, 7 H. 38.

16. *Fraud by failure to comply after sale with a promise.* The plaintiffs who were trustees of a small village, advertised lots in the village for sale, and stated in the advertisement that they would build a male and female academy. They failed to do so, and in consequence thereof the lots became worthless. In a suit against the purchaser of one of the lots, it was held that these facts ought to go to the jury, both upon the question of whether the sale was procured by false representations, and also upon the question of failure of consideration; *Brewer v. Harris*, 2 S. & M. 84.

17. *Same.* At a public sale of town lots in the town of Aberdeen, a particular lot was reserved from sale as the terminus or depot of a projected railroad, and the adjoining lots were sold at that sale, "as front lots;" the depot lot so reserved lying between them and the river; and in consequence of this they brought a much higher price than they otherwise would have brought. Afterwards the railroad was abandoned, and the intended depot lot was sold out by the trustees in small lots on which the purchasers erected cotton sheds, which cut off the said adjoining lots sold as aforesaid, from direct communication with the river, and made them "back" instead of "front" lots, by which they were greatly depreciated in value: *Held*, that the purchase money could not be recovered for the purchase of these lots, thus made "back" lots; *Anderson v. Hill*, 12 S. & M. 679.

18. *Same.* And so if a physician sell his dwelling and office expressly as a stand for a physician, and promise to remove from the

State, and to recommend his vendee to his former patrons, he is bound to carry out his agreement in good faith, and if he afterwards settle in the same neighborhood and practice his profession among his former patrons, it will be a fraud on the vendee and entitle him to a rescission of the contract; *Townsend v. Hurst*, 8 G. 679.

19. *Where fraudulent statement is made to another.* Where a vendor, during the negotiation for a sale, makes a fraudulent statement in relation to the land, to another, but in the presence and hearing of the vendee, it is as binding on him as if made to the vendee directly; *Alexander v. Beresford*, 5 C. 747; see *ante*, 9.

20. *Fraud, as between trustees and beneficiaries: Guardian and ward: Attorney and client.* See those titles.

21. *Fraud in false reading an agreement.* A. agreed to pay certain debts for B., mentioned in a schedule. B., in drawing up the schedule, mentioned two debts, not embraced in the agreement, and in reading the schedule to A., omitted those two debts: *Held*, that this conduct of B. was a fraud on A., and therefore A. was not liable to a security of B., who had paid one of those two debts so fraudulently inserted; *Stamps v. Bracy*, 1 H. 312.

22. *Fraud in executor's sale.* In this case it was charged, that a purchaser at an executor's sale of realty and personalty, had purchased by fraud and collusion with the executor, at a price less than a fair value. The court reviewed the evidence, and reached the conclusion, that, as to the sale of the personalty, no fraud was proven; but as to the realty, it being shown that a person who intended to bid was prevented from so doing, by being told by the purchaser that the property would be bought in for the benefit of the endorers of the testator, of whom the person desiring to bid was one, and that the land sold for a small part of its value, the sale was fraudulent. The court held, also, that an agreement between the executor and the purchaser, that the latter would purchase for the benefit of the heirs, and give them three years in which to repay the purchase money and interest, would not necessarily make the sale fraudulent, if in all other respects the sale was fair, though the executor himself was an heir; *Grant v. Lloyd*, 12 S. & M. 191.

See EXECUTORS AND ADMINISTRATORS, subdivision Sales of Personalty.

See FRAUDULENT ASSIGNMENT, 46.

23. *Same: Combination between creditors.* A combination between a certain class of creditors of a decedent, to buy in the property for their own benefit, at less than its real value, and by which persons of that class are prevented from bidding against each other, is fraudulent as to the other creditors, and all others interested in the sale; *Id.*

II. Effects of Fraud.

24. *It vitiates in all instances.* Fraud avoids, both at law and equity, every contract

however solemn; *Frazer v. Gervais*, W. 72; *Davidson v. Moss*, 5 H. 673; *Halls v. Thompson*, 1 S. & M. 443; *Harris v. Ransom*, 2 C. 504. Even judgments and decrees obtained by fraud will be set aside; *Niles v. Anderson*, 5 H. 365; *Hurd v. Smith*, 1b. 562; *Ross v. Lane*, 3 S. & M. 695; *Pearson v. Nesbit*, 3 G. 180; *Fairly v. Thompson*, 5 G. 101.

25. *Fraud without damage.* But if the fraud be not prejudicial, it is no ground for relief; *Davidson v. Moss*, 5 H. 673; *Halls v. Thompson*, 1 S. & M. 443; *Harris v. Ransom*, 2 C. 504.

26. *Waiver of fraud.* It is well settled, that if a party has knowledge that he has been defrauded, and subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud and abandons his claim for relief. Hence, where a vendee was defrauded in the sale, both as to the quality and the title of the land sold to him, and he commenced an action on the title bond and then submitted the matter to arbitrators, who could not agree, and he then agreed with vendor that they should divide the difference in the amount which separated the arbitrators, and in pursuance thereof gave a new note and dismissed his action on the title bond, it was held that he had waived the original fraud and was not entitled to relief on that account; *Edwards v. Roberts*, 7 S. & M. 544.

27. *Particeps criminis.* A party endeavoring to perpetrate a fraud, cannot get relief in equity against a *particeps criminis*; but a party making a voluntary conveyance to a friend to bar certain supposed rights of his wife in the land conveyed, with the understanding that his friend should hold in secret trust for him does not commit such a fraud as to bar him from all right to relief; *Dismukes v. Terry*, W. 197. See FRAUDULENT ASSIGNMENT, 86.

28. *No lien for advances in favor of fraudulent purchaser.* No lien for his investment, can arise in favor of a party guilty of a fraud in making a purchase. The fraudulent intent vitiates the entire transaction. Hence, if a party knowing that another has an equitable title to land sold by an Indian, and that his deed is lost, go to the Indian territory and procure the Indian to make a deed to him, with intent thereby to deprive the party, having the equity and whose deed is lost, of the land, and to secure a debt due him by the original grantee of the Indian, his conduct will be fraudulent, and he will be compelled to surrender the title so acquired, and will not be allowed anything for his expenses in procuring the deed from the Indian (Citing *Stovall v. Farmers' & Mechanics' Bank*, 8 S. & M. 316); *McClosky v. Gordon*, 4 C. 260. See FRAUDULENT ASSIGNMENTS, 80 *et seq.*

29. *Fraud committed by another.* A person innocent himself of fraud, cannot hold property, or an advantage gained for him by the fraud of another; *Planters' B'k v. Neely*, 7 H. 80. Hence, where a trustee sold the trust property, for the purpose of getting rid of the encumbrance of the trust, and pur-

chased it for the benefit of another, the intended beneficiary cannot hold it (citing *White v. Trotter*, 14 S. & M. 30, and *Bowers v. Johnson*, 10 S. & M. 169); *Lawrence v. Hand*, 1 C. 103.

III. Miscellaneous.

30. *Refusal to deliver slaves.* A refusal, without color of title, to deliver a slave, upon the demand of the true owner, is such a fraud as will bring the case within the act allowing a writ of *habeas corpus* for the recovery of a slave, when the owner is deprived of the possession by fraud; *Scudder v. Seals*, W. 154.

31. *How pleaded.* Fraud cannot be set up by way of inducement, but must be directly charged; *Gibson v. Newman*, 1 H. 341.

32. *A question of fact in certain cases.* Whether representations are fraudulent or not, is a question of fact for the jury; *Anderson v. Burnett*, 5 H. 165.

33. *Cognizable both at law and in equity.* Courts of law have concurrent jurisdiction with courts of equity, in questions of fraud. Fraud saps the foundation of every contract into which it enters, and where it evinces that a plaintiff is not entitled to recover anything, because of its existence, it is properly cognizable in a court of law; *Brewer v. Harris*, 2 S. & M. 84.

34. *Proof of fraud.* Fraud may be proven by positive or circumstantial evidence. The proof is sufficient when it satisfies the jury, and nothing more is meant when it is said that fraud must be clearly proven; *Doe v. Dignowitty*, 4 S. & M. 57.

See FRAUDULENT ASSIGNMENT, 74, et seq.

35. *Will not be presumed.* Fraud will not be presumed; he who alleges fraud must show it; but fraud like every other fact, may be proven by circumstances from what it will be inferred or presumed. Circumstances, however, will not be deemed sufficient, which are merely suspicious, and lead to no certain results. But circumstances affording a strong presumption will alone be sufficient; *Parkhurst v. McGraw*, 2 C. 134.

36. *Same: Suspicious recitals.* Unusual recitals in an executor's deed, giving reasons why the lands conveyed were sold for a very low price, look suspicious, as if intended to give apparent fairness to a fraudulent transaction, and are to be considered in connection with other evidence of fraud; *Grant v. Lloyd*, 12 S. & M. 191.

See FRAUDULENT ASSIGNMENT, 40.

37. *Collateral facts evidence.* In questions of fraudulent intent, it is frequently necessary to consider collateral matters not involved in the issue, but which tend to throw light on the acts of the parties, and the relationship, and connection in business between them become important; *Strong v. Hines*, 6 G. 201.

See FRAUDULENT ASSIGNMENT, 74, 75.

38. *As to fraud affecting statute of limitations,* see LIMITATIONS OF ACTIONS, 101 to 112.

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I. Statutes.

1. *Statutes of 1822 and 1857.* The concluding part of section 2 of the Act of 1822 (the former part is copied in No. 1. Fraudulent Assignment) is as follows: "Where any loan of goods and chattels shall be pretended to have been made to any person with whom, and those claiming under him, possession shall have remained for the space of three years, without demand made and pursued by due course of law on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of a use or property, by way of condition, reversion, remainder, or otherwise, in goods or chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken as to the creditors and purchasers of the person aforesaid so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession; unless such loan, reservation or limitation of use or property, were declared by will, or by deed, in writing, proven, and acknowledged and recorded as aforesaid;" see H. & H., p. 371; The Rev. Code of 1857 is the same, see p. 358.

2. *Same: 1st section.* The 1st section of the statute of frauds of 1822 and 1857 (H. & H. 370; Rev. Code of 1857, 358) is as follows: "No action shall be brought whereby to charge an executor or administrator upon any special promise to answer any debt or damage out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year; or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which the action shall be brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person, by him or her thereunto lawfully authorized."

3. *Act of 1857, art. 5: Trusts.* This article is as follows: "Hereafter all declarations or creations of trusts, or confidence of, or in any lands, tenements, or hereditaments (or of any slave), shall be made and manifested by deed, in writing, signed by the party who creates or declares such trust, or by his

last will in writing, or else they shall be utterly void; and every deed declaring or creating a trust, shall be acknowledged or proved as other deeds, and shall be lodged with the probate clerk of the proper county, to be recorded; and shall only take effect from the time they are so lodged for record; *Provided*, that when any trust shall arise or result by implication of law, out of a conveyance of lands or tenements (or slaves), then such trust and confidence shall be of the like force and effect as the same would have been if this act had not been passed."

This provision was not in the Act of 1822.

II. The three years' Possession by Loanee, &c.

4. *Statute: Does not apply to possession in another State.* That provision of the Act of 1822, which provides that the possession by a loanee, &c., of personal property for three years, without record of the loan, &c. (see *ante*, 1), shall cause the property to be liable to the loanee's debts, does not apply to a possession in another State. The possession must be for the whole of the three years in the State, in order to make the property liable under that statute; *Moseley v. Williams*, 5 H. 520; S. P., *Palmer v. Cross*, 1 S. & M. 48. But the failure to put the evidence of the loan on record, is a strong circumstance to show that a delivery of personalty by the parent to the child, was intended as a gift, and not as a loan; *Falconer v. Holland*, 5 S. & M. 689.

5. *Sale on condition.* A sale of a chattel, on condition that the title shall not vest until the purchase money is paid, is within the statute; and unless it be registered, if the chattel remain three years with the vendee, it will be liable for his debts, as against the claim of the vendor; *Lewis v. Gilmer*, 3 S. & M. 560.

5a. *Sale of slave with reservation as to his freedom.* A sale of a slave, reserving his freedom at the end of a term of years, is within the statute; and if the bill of sale containing the reservation be not registered, as the statute requires, a purchaser from the vendee, without notice, after the latter has held possession in this State for three years, will get a good title to the slave, in fee. And it makes no difference that the first sale was made in another State, if the possession continued in this State for three years without registration; *Roach v. Anderson*, 6 C. 234.

6. *Sale under three years'; notice.* The right of a remainderman entitled to a chattel, under a deed which has never been recorded, will not be defeated by a sale thereof made by the tenant of the particular estate in possession, unless such possession has continued for three years before the sale; nor even then, if the purchaser has notice; *Gibson v. Jayne*, 8 G. 164.

7. *Case in judgment decided not a loan.* A purchaser of land and slaves sold under a deed in trust, allowed the grantor in the trust deed, out of kindness, to remain on the

property, and exercise a sort of agency over it; but the purchaser employed overseers, and received the proceeds of the crops; and the right and nature of the grantor's possession was well known in the neighborhood; *Held*, that three years of his possession did not render the property liable to the grantor's debts under the statute; it was, in fact, the possession of the purchaser, the grantor having no loan of the property or other interest in it which required that an instrument stating the nature of his interest should be put on record; *Ewing v. Cargill*, 13 S. & M. 79.

8. *Does not apply to property mortgaged in another State.* The statute under consideration does not apply, where personal property has been validly mortgaged in another State and removed here, so as to make it liable for the mortgagor's debts, as against the right of the mortgagee, where the former has been in possession here for three years without registration of the mortgage; *Barker v. Stacy*, 3 C. 471.

9. *Hiring from year to year.* Nor does the statute apply in a case of continuous hiring of personal property from year to year for three years; *Armstrong v. Stovall*, 4 C. 275.

III. The Promise to Answer for the Debt, &c., of Another.

10. *The consideration need not be in writing.* The statute of frauds of this State requires the promise or agreement to answer for the debt, &c., of another to be in writing. It is in this respect unlike the English statute of Charles II., which requires the *agreement* to be in writing. Under our statute, therefore, it is unnecessary that the consideration of the promise should be in writing; *Pearce v. Wren*, 4 S. & M. 91.

11. *Where the promise is original, not collateral: Case in judgment.* The evidence was, "that before a sale of the goods to one N., that defendant requested plaintiff to sell them to N., and that the sale was induced alone by the promise of defendant to pay for them:" *Held*, that this was sufficient to uphold a verdict against the defendant for the price of the goods; that the rule in such cases is, that if the credit were given to the defendant alone, and he alone were liable, that the promise need not be in writing; *Wallace v. Wortham*, 3 C. 119.

12. *Case in judgment: Words held no promise.* C. had been purchasing goods at the plaintiff's store on a credit; plaintiff determined to sell C. no more goods until he could see defendant; plaintiff called on defendant and told him that C. was making an account with him, and that he did not wish to let C. go any further unless he knew more about him. Defendant replied that C. was getting \$300 a year and his board, and to "let him have on," which plaintiff did: *Held*, that there was no promise on the part of the defendant to become either primarily or second-

arily liable for the goods sold to C.; *Lombard v. Martin*, 10 G. 147.

13. *Instance where the debt was held to be the defendant's.* A party who was sued, procured a note against the plaintiff from another, upon an agreement that if he could use it as a set off, he was to pay for the note, and if he failed, the party furnishing the note should pay all the costs and expenses of the attempt to set off the note in that action: *Held*, that the agreement was not within the statute, and was valid without being in writing; *Brantley v. Carter*, 4 C. 282.

14. *Promise by executor: Parol acceptance of written promise: Certainty in.* A proposition by an executor, asking indulgence on a debt due by the testator, and offering to become personally responsible for it, does not bind him personally for the debt, unless the proposition be accepted. And though the acceptance may be by parol, yet it must, in that case, be an unqualified acceptance of the written proposition. An acceptance of the proposition with parol variations, will be void to bind the executor, since in that event his promise would not rest in writing entirely, for the rule on that subject is, that the writing must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or from some other writing to which it refers, without resorting to parol evidence. And when reference is made to another writing, it must be so clear as to prevent the possibility of one paper being substituted for another: *Waul v. Kirkman*, 5 C. 823. S. C., 13 S. & M. 599.

15. *Same: Proposition accepted but not carried out.* A proposition by an executor, to give his notes for the debt of the testator, and to secure them by a lien on property, though assented to by the creditor, will not bind the executor personally, if it be not carried out by taking the notes, if also it appear that in making the proposition he did not intend to bind himself personally, notwithstanding, if the notes had actually been made, he would have thereby become personally liable for the debt; *Id.*

IV. Agreements in reference to Land.

1. Parol Sale and what is included in it.

16 *Parol sale: Not absolutely void.* That a contract for the sale of land is not in writing, is a good ground of defence when a specific performance of the contract is sought to be enforced against the vendor, for whose benefit the statute of frauds was enacted, but the contract is not absolutely void, but only voidable, at the election of the vendor. Hence, if money be paid by the vendee, on a parol contract for the sale of land, he cannot recover it back, if the vendor be ready and willing, and offer to carry out the contract; *Sims v. Hutchins*, 8 S. & M. 328.

But this case appears to be overruled by *Hairston v. Jaudon*, 42 M. 380, where, upon the vendor being sued for a part of the pur-

chase money, which had been paid under a parol contract for the sale of land, he pleaded that fact, and that he was ready and willing, and then offered to carry out the contract, and tendered a deed with the plea, and the plaintiff demurred to the plea, which the court sustained, stating that the defendant (vendor) had no right to the money unless the contract was valid, and holding that it was invalid; (citing *Beaman v. Buck*, 9 S. & M. 207; *Box v. Stanford*, 13 S. & M. 93.)

17. *Same: Rescission.* Beaman was a defendant in an execution and his land was sold and Buck, the plaintiff in execution, became the purchaser of it. Buck then agreed with Beaman by parol, that the latter might sell the land and reap any profit on the sale over the sum of \$375, the amount of the judgment. Beaman sold the land, by parol, to Dent, for \$650, and the purchaser was to pay Buck, the plaintiff in execution, \$375, and the residue to Beaman. In pursuance thereof, Dent paid Buck (the plaintiff in execution,) \$375, but becoming embarrassed, was unable to pay the balance, and he surrendered the land to Buck, and Dent being indebted to Buck, it was agreed that the payment he had made on the parol contract for the land, should be applied to his indebtedness to Buck. Beaman then filed this bill against Buck and Dent, for a specific performance of the parol contract of sale, or for the money which Dent had paid Buck on the contract: *Held*, that Beaman was entitled to neither relief: he was not entitled to a specific performance, because the contract was in parol: nor was he entitled to the money paid on the contract by Dent, because Dent, if any one, was entitled to recover back the money paid by him on a parol contract for the sale of land, on the contract being held invalid; *Beaman v. Buck*, 9 S. & M. 207; see *post*, 34a. 34b.

18. *Parol sale: Case in judgment.* A. claimed an invalid lien on land, for work done in repairing a levee thereon, under the Act of 1839 (H. & H. 465). He also purchased the land under an invalid sale for taxes. The owner then agreed to sell the land to A., allowing him, as part payment of the purchase money, the amounts due for the work on the levee, and the costs of the tax deed: *Held*, that this was an agreement within the statute of frauds, and invalid, if not in writing; *Skipwith v. Dodd*, 2 C. 487.

19. *Mortgage lien: Deposit of title deeds.* A mortgage is a conveyance of an estate by way of pledge, or security for a debt, and to become void on payment of it. By the statute of frauds, a greater interest in land than a term for one year cannot be created, except in writing. Hence, a mortgage of realty, by a deposit of the title deeds, and a parol agreement that it shall operate as such, cannot be created; *Gothard v. Flynn*, 3 C. 58.

20. *Vendor's lien: Parol agreement to create.* An agreement by a person who advances money for a vendee to buy land, by which the creditor is to be considered as the vendee, and is to have a lien on the land for the amount of his advance, is void if not in

writing; *Skaggs v. Nelson*, 3 C. 88; S. P., *Pitts v. Parker*, 44 M. 247.

See VENDOR AND VENDEE, 76.

21. *Sale of growing timber must be in writing.* The term "land" embraces not only the soil, but its natural produce growing upon and affixed to it. Such things are a part and parcel of the realty, and pass by a grant of the land; and hence a sale of growing timber is within the statute of frauds and void unless in writing; *Harrell v. Miller*, 6 G. 700.

22. *Agreement in parol as to extent of execution in ejectment.* A parol agreement between the parties, that the plaintiff in ejectment should have judgment for all the land sued for, but should have execution only for that part to which it was conceded his title extended, is valid; *City of Natchez v. Vandervelde*, 2 G. 706.

23. *Same: Partition by parol.* And such an agreement, extending to a partition of the land in controversy, is good as a partition if followed by possession in severalty according to the partition thus made; *Id.* Partition may be made by parol, and possession afterwards in severalty according to the parol agreement; *Willey v. Bonny's Lessee*, 2 G. 644. See *post*, .6.

24. *Parol submission in relation to land.* Wherever the agreement of parties in relation to the possession of land, would be binding if made by parol, then a parol submission to arbitration of a dispute in relation to that possession would be binding, but in no other case. A submission in reference to a lease for a longer term than one year will not, therefore, be good; *McMullen v. Mayo*, 8 S. & M. 298. See *post*, sub-division Parol Trusts, 28.

24a. *Lease for longer term than one year.* A parol lease of land for a longer term than one year is void by the statute of frauds; *Phipps v. Ingraham*, 41 M. 256.

2. Part Performance.

25. *Part performance no exception.* A parol contract for the sale of land is invalid though partly performed; there is no exception in the statute, and the courts will engraft none; *Beaman v. Buck*, 9 S. & M. 207. (See *ante*, 17.) S. P., *Payson v. West*, W. 515; *Box v. Stanford*, 13 S. & M. 93; *Bacon v. Callett*, 4 G. 269; *McGuire v. Stevens*, 42 M. 724.

26. *Same: When the agreement was to reduce it to writing.* It is settled doctrine in this State, that no exception will be engrafted on the statute of frauds, whereby a parol sale of land will be enforced; neither part performance, nor an agreement that the contract shall be reduced to writing, which was fraudulently prevented by the vendor, will be sufficient to dispense with the writing required by the statute. And a demurrer to a bill seeking the specific performance of such a contract is good, notwithstanding the charge of fraud against the vendor; for if the fraud were confessed it would give no ground for relief, and so if the agreement were con-

fessed it could not be enforced if the statute be insisted on; *Box v. Stanford*, 13 S. & M. 93; see *post*, 44.

3. Remedy of Vendee in Parol Sale.

27. *Damages to vendee.* The vendee of land, under a parol agreement, may maintain an action against the vendor, for compensation for his trouble, loss of time, expense, &c., incurred upon the faith that the contract would be consummated, if the latter refuse to consummate the sale by reducing it to writing, as was agreed upon by parol; but the vendee can recover nothing for the loss of the bargain; *Welch v. Lawson*, 3 G. 170.

V. Parol Trusts in Land.

See MORTGAGE, 8, 11, 12. TRUSTS AND TRUSTEES, 5 to 9, 20 to 23.

28. *Agreement between trustee and cestui que trust to sell land.* A parol agreement between a trustee in an assignment for the benefit of creditors and one of the *cestuis que trust*, that the latter should, at a sale of land made by the trustee, purchase in the land for the benefit of the trust fund, is within the statute and void; *Walker v. Brungard*, 13 S. & M. 723.

29. *Parol trusts in land valid.* By the common law, a parol declaration of a trust both in real and personal estate is valid. The seventh section of the English statute of frauds, which prohibits the creation of express trusts in land except by writing, was not embodied in the legislation of this State previous to the enactment of the Rev. Code of 1837 (see *ante*, 3); and hence, prior to that date, a parol declaration of a trust in land was valid in this State; *Anding v. Davis*, 9 G. 574.

30. *Same.* Therefore, parol evidence is admissible to show that an absolute deed of real and personal property was accepted by the grantee upon the condition, that he would hold the property conveyed subject to a trust in favor of the grantor, or a third person; and so an absolute deed may be shown by parol to be a mortgage only, and it makes no difference in this respect, whether, the debt intended to be secured, was then contracted, or was a pre-existing liability; *Id.*; S. P., *Vasser v. Vasser*, 1 C. 378; *Prewett v. Dobbs*, 13 S. & M. 431.

31. *Same: Parol obligation to make a will.* And so a party who receives a deed, conveying to him property absolutely, may, in consideration thereof, bind himself by parol to dispose of the property to a designated beneficiary by will; and if he execute the will, it will be irrevocable; if he fail to execute it, it will be a fraudulent violation of his contract; against which equity will give relief to the beneficiary; *Id.*

32. *Same: Case in judgment.* D. conveyed lands and personalty to A. absolutely, and in fee simple, and delivered possession. A., when he accepted the deed, made a parol agreement, that he would hold the property and use it so as to produce profits, and that he would apply the profits to a debt due by D

to him, and after the debt was paid, would convey the property to D.'s children; and in furtherance of this agreement, that he would immediately execute and keep on hand a will, thus disposing of the property. A. executed the will as he had agreed to do, but afterwards destroyed it. After the death of A., and the payment of the debt due him by D., the children of D. filed a bill to recover the property: *Held*, that the trust in favor of the children of D. was valid, and they were entitled to recover; *Ib*.

33. *Agreement between debtor and a third party to buy for him at sheriff's sale.* It is well settled, that when a party agrees, before the sale, with the judgment debtor, whose land has been levied on, that he will purchase it, and give the debtor the benefit of the purchase, that the agreement is binding, and not within the statute of frauds; and a purchaser under such circumstances is a trustee for the debtor; *Soggins v. Heard*, 2 G. 426.

34. *Agreement between the party and vendee.* A parol agreement between the vendee of land, who holds a title bond, and a third person, by which the latter advanced the money and took a deed to the land in his own name, as security for the loan, is valid; and the trust thereby created in favor of the vendee in the title bond, will be enforced in a court of equity, upon an offer by the vendee to pay the advance, and a refusal of the lender to convey according to the agreement; *Jones v. McDougal*, 3 G. 179.

34a. *A parol agreement to buy land in name of one for the use of both parties.* A., who had made an improvement on public land, agreed with B., that the latter should purchase the whole quarter section; and that on A.'s paying back to B. one-half of the purchase-money, B. should convey to A. the one-half part thereof by designated boundaries, which were to embrace A.'s improvements: *Held*, that this was not a contract for the sale of land by B. to A., but an agreement by which the parties were to become jointly interested in the purchase, and was not within the statute of frauds, and would be enforced, though not in writing, if the parol proof of it was clear and beyond doubt, but not otherwise (citing *Runnells v. Jackson*, 1 H. 358;) *Evans v. Green*, 1 U. 294. See post, 38.

34b. *Agreement to divide profits of sale of land by agent.* An agreement by which the defendant's land is to be sold to other parties, at an improved value to be caused by the exertions of complainant, and that after the sale is so made, that complainant should receive one-half the proceeds, he first paying a price agreed on, and performing the acts stipulated to be performed by him to entitle him to his share, is not a contract for the sale of land, and need not be in writing; *Lesley v. Rosson*, 10 G. 368.

35. *Resulting trust.* That they may be established by parol.

See TRUSTS AND TRUSTEES, sub-division Resulting Trusts, 18, *et seq*.

36. *Agreement as to partition, where one*

party has a resulting trust in the land. When, by the manner of the investment of the owner's money, he is entitled to a resulting trust in an undesignated and unspecified part of several tracts of land, bought in the name of his agent, the parties may agree by parol, as to the part to which the resulting trust attaches; *Mahorner v. Harrison*, 13 S. & M. 53. See ante, 23.

VI. Boundaries.

See BOUNDARIES.

37. *Proof and establishment by parol.* Proof of established boundaries may be made by parol; but a new boundary different from and changing the true one, cannot be established between adjoining proprietors by parol. Such an agreement is within the statute of frauds, and must be in writing; *May v. Baskin*, 12 S. & M. 428.

38. *May be established by parol.* The deed conveyed "the tract of land known by the name Point a Cadet, containing 20 arpents front, bounded on the south by the bay of Biloxi, east by the bay of Biloxi, north by the bay of Biloxi, and west by the property of the seller." The grantor owned 25 arpents, and the controversy was as to the remaining 5 arpents. It was proven that after the sale a line was marked out by grantor and grantee between the 20 arpents sold and the 5 arpents reserved, and that grantor continued to reside on the 5 arpents reserved till his death: *Held*, that this was competent evidence to show its boundary; *McCa'eb v. Pradat*, 3 C. 257. See ante, 34a.

VII. What the Writing must be.

1. The Signing and Delivery.

39. *The writing must be signed: Case in judgment.* A debtor executed a deed in trust attempting to convey for the purpose of securing his indebtedness, certain lands owned by the creditor. The deed recited that, upon payment of the debt thus secured, the creditor had agreed to convey the land to the debtor: *Held*, that the deed, not being signed by the creditor, imposed no obligations on him to convey the land upon payment of the debt, and that the trust deed was therefore void for want of consideration; *Callett v. Bacon*, 4 G. 269.

40. *Signing by one of two joint tenants: Parol estoppel.* Where one of two joint tenants sold the whole interest in the estate and made a deed therefor in his own name, and took notes for the purchase money in the names of both, and the co-tenant afterwards transferred his interest in the notes to the tenant making the sale and deed, this is not a sufficient writing as between the joint tenants to take the case out of the statute of frauds, and the interest of the joint tenant not joining in the deed, will not be conveyed. But if after such sale by a joint tenant, the other state to the purchaser, before payment, that the sale was good and he had no interest in the land, and thereupon the purchaser pay the price, the tenant making such state-

ment will be estopped thereby from setting up his title to the lands, upon the principle, that where one knowingly, even though passively, suffers another to purchase and expend money on land under an erroneous opinion of the title, without making known his claim, he will not be permitted afterwards to exercise his legal right against such person; *Dickson v. Green*, 2 C. 612; S. P., *Nixon's Heirs v. Carco's Heirs*, 6 C. 414.

See ESTOPPEL 5.

41. *Signing alone by one of two joint grantors in a deed.* The signing by one of two joint grantors alone, of a deed drawn up in the names of both, is not a sufficient memorandum of the contract to take it out of the statute of frauds and make it binding on him. Until signed by the other the writing is incomplete and cannot be evidence of a contract; *Johnson v. Brooks*, 2 G. 17.

See DEED, 9. CONTRACT, 46.

42. *The writing must be delivered.* A memorandum of a sale of land, though complete in all other respects, is not a sufficient compliance with the statute of frauds unless delivered to the vendee. Thus, where a husband delivered to a justice of the peace, for the purpose of getting his wife's signature and acknowledgment thereto, a deed in the joint names of himself and wife, signed by him alone, it was held that the delivery was insufficient, the wife refusing to sign and acknowledge the deed; *Ib.*

2. Certainty in the Writing.

43. *The writing must be certain.* An instrument in writing for the sale of land must not leave it uncertain what interest was intended to be conveyed, and if it does, the uncertainty cannot be removed by parol evidence. Hence a sale by the following contract is void for uncertainty: "Received of Micajah Bennett, one hundred dollars, for an interest I have let said Bennett have, in a section of land located in Range 8, East Township 17, Section 17;" *Allen v. Bennett*, 8 S. & M. 672; S. P., *McGuire v. Stevens*, 42 M. 724.

See DEED, 21 to 25.

44. *Same.* C. & M. made the following agreement, viz.: "C. agrees to take M. into partnership in a certain lot in the city of Jackson, for the consideration of \$165, and both parties are to hold the land in company; M. is to pay C. one-half of said sum, viz., \$82.50, by 1st May next, and failing to do so, shall forfeit his claim thereto." C. paid the \$165, to the party who owned the lot, and took title in his own name, and M., within the time prescribed, tendered C. the \$82.50, which C. refused to take, and thereupon M. filed his bill for a specific performance: Held, that the agreement was sufficiently certain under the statute of frauds, and that it was no objection that it was uncertain as to the lot, since C., in his answer, admitted that the agreement referred to lot No. 56, which he was to buy from one G.; *Connell v. Mulligan*, 13 S. & M. 388. See ante, 26.

44a. *Same.* A receipt for a sum of money, expressing that it was for cash paid for the

purchase of a lot of land, without specifying the terms of the contract, is not a sufficient memorandum within the statute of frauds; *McGuire v. Stevens*, 42 M. 724.

VIII. Correcting and Reforming the Writing.

45. *Parol evidence to correct mistake.* The statute of frauds does not prevent the correction of a mistake in a deed concerning the description of the land sold, when the proof of the mistake rests entirely in parol; *Simmons v. North*, 3 S. & M. 67. See EVIDENCE, 155, et seq.

46. *To correct fraudulent misrecital.* If by the fraud of the vendor, the land office numbers of the land sold be misdescribed in the deed, the vendor is entitled to have the deed corrected so as to embrace the land really agreed to be sold; and in order to do this he may resort to parol evidence to show what land was really included in the parol agreement which preceded the writing, and which it was understood the writing should really recite. The statute of frauds has no application to a case like this; *Howell v. Gibson*, 1 G. 464.

IX. Miscellaneous.

47. *A parol agreement changing performance of the contract.* A parol agreement to accept performance of an executory contract for the sale of land at a time, and in a mode different from the stipulations of the written agreement, is, when executed, valid and binding on the parties; and hence, when the written agreement bound the vendor to convey title to the vendee by a day named, if the title be afterwards conveyed to a third party, at the request of vendee, it will be a sufficient performance; *Moore v. McAllister*, 5 G. 500.

48. *Parol evidence to show real interest sold at auction.* Parol evidence is admissible to show what particular interest, in land sold at auction, was stated by the auctioneer to be offered for sale. Hence, when, at an administrator's sale of land, the auctioneer stated that the individual interest of the administrator in the land would be sold, it was held that in an action on the note for the purchase money, the statement of the auctioneer ought to be proven to show the consideration of the note sued on; *Matlock v. Livingston*, 9 S. & M. 489.

49. *Annulling private statute for fraud.* See STATUTES, 61.

See MORTGAGE, 8, 11, 12. SHERIFF AND SHERIFF'S SALE, 111, 114.

Free Negroes and Mulattoes.

See SLAVES AND SLAVERY.

Free White Person.

1. *Proof of that condition.* Proof that a party to a suit married in this state in 1859, kept a boarding house here and hired slaves, was sufficient at that time, to raise the pre-

sumption that he is a free white person, so as to give him the benefit of the exemption law, if there be no other proof to rebut it; *Trotter v. Dobbs*, 9 G. 198.

Gaming.

See CRIMINAL LAW, sub-division Gaming.

1. *Gaming contract void.* When the whole or any part of the consideration of a contract is money or other thing won by betting, the whole contract is void; *Crawford v. Storms*, 41 M. 540; S. P., *Holman v. Ringo*, 7 G. 690.

2. *Judgment on, void.* A judgment rendered on a note given for a gaming consideration is void; *McAuly v. Mardis*, W. 307. And it will be annulled even at the instance of a judgment creditor of the defendant; *Smither v. Keyes*, 1 G. 179. And equity will give relief against such judgment, though the defence may have been made at law; and this though the note on which the judgment was rendered has passed into the hands of an innocent purchaser without notice. The statute is peremptory, and makes the judgment and the contract void absolutely; *Lucas v. Wauls*, 12 S. & M. 157 (citing *Bartee v. Humphreys*, 10 S. & M. 282; *Adams v. Rowan*, 8 S. & M. 624, for which see CONTRACT, 27). And so if the maker, though knowing the assignee has given a valuable consideration for the note, then give him a new note, the first is a nullity, and cannot support the second, and a judgment rendered on the second note is void. It might be otherwise, however, if the maker induced the assignee to take the note by assuring him that it was good and would be paid. *Sed Quere?* But it would not estop the maker from setting up the defence that he induced the assignee to take it by promising to pay it if the assignee then knew of its illegal character (citing *Torry v. Grant*, 10 S. & M. 89); *Martin v. Terrill*, 12 S. & M. 571.

3. *Money lent to bet.* Money lent to bet on an election cannot be recovered back, and it makes no difference that the election had transpired, but the result was not known when the bet was made; *Terrall v. Adams*, 1 U. 570.

Garnishment.

See ATTACHMENT.

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I. Statutes.

1. *Statute of 1857, art. 313, p. 537.* By this statute the clerk of any court of law or equity, on the suggestion of the plaintiff in any judgment or decree therein rendered, that any person is indebted to or has effects of the defendant, shall issue garnishee process against such person, returnable to the next term of the court; the plaintiff, his agent or

attorney first filing an affidavit, that he does not believe the defendant has in his possession visible property on which a levy can be made sufficient to satisfy the judgment or decree, and the garnishee is required to answer on oath as to his indebtedness, and to the effects in his possession of the defendant at the time of serving the writ, and also to disclose any other person whom he knows is so indebted or has such effects.

2. *Statute of 1857, art. 4, p. 373: Attachment cases.* By this act when an attachment is placed in the hands of a sheriff or constable, he is required to summons as garnishee any person having effects of the defendant in his hands or indebted to him. Provision is also made for the contest of the garnishee's answer, and to summon adverse claimants to the fund in his hands and to try the question of title.

II. The Writ.

3. *How returnable under Act of 1842.* Under the Act of 1842 (Session Laws, p. 14), in relation to the practice on writs of garnishment, a garnishee summons issuing from a judgment in one county against a garnishee residing in another county, was returnable to the Circuit Court of the county in which the garnishee resides; *O'Brien v. Liddell*, 10 S. & M. 371. By statute of 1857 (see ante, 1), the writ in such cases is returnable to the court in which the judgment is rendered.

4. *How executed and returned.* As to the garnishee, the writ of garnishment is original process, and must be therefore executed and returned in the same manner as other original process, the return must show the mode of its execution. A simple return of "executed" will not do; *Jeffries v. Harvie*, 9 G. 97; *Roy v. Heard*, 1b. 544. And a return of "executed by summoning E. F. as garnishee," is insufficient; *Moore v. Coats*, 43 M. 225. But if it be returned simply "executed," and the garnishee answer, it will be sufficient if he deny indebtedness at the time of the answer, since there was no legal service before; *Roy v. Heard, supra*. But if it be insufficiently executed as to a partnership, the answer of one partner admitting an indebtedness of the firm does not cure the defect: this case is distinguished from *Anderson v. Wanzer*, 5 H. 587, because in the latter the execution was good on both, (for this case see post, 29); *Mitchell v. Greenwald*, 43 M. 167.

See PROCESS, 12, et seq.

5. *Same: In attachment cases.* But when a writ of attachment is sued out, no process is required against a garnishee, but the sheriff, on suggestion, is required to summon him, and in his return must note the manner in which he summoned the garnishee to appear and answer. The return on the writ "executed upon J. W. Field as garnishee" is insufficient; *Ezelle v. Simpson*, 42 M. 515. The sheriff must state on the writ fully how he served it, and that he summoned the garnishee to attend at the proper court to make answer as garnishee. A return "summoned as gar-

nishee herein, J. C.," will not do; *Crizer v. Gorren*, 41 M. 563.

See ATTACHMENT, 58.

6. *Form of the writ where judgment has been assigned.* The assignee of a judgment sued out a writ of garnishment in his own name, reciting however the judgment and its transfer to him, and on the garnishee's answer admitting an indebtedness to the defendant a judgment was rendered against him: *Held*, on writ of error to this judgment, that the assignee had only an equitable title to the judgment, and could only enforce it in the name of the plaintiff, and if objection had been made to the writ, it would have been quashed, but no objection having been made, the judgment against the garnishee was a protection to him against the claim of the judgment debtor, if there was a valid assignment of the judgment, and that his answer must be treated as admitting that; *McGill v. Bone*, 13 S. & M. 592.

7. *Issuance of, in attachment cases.* Garnishee process, issued in an attachment case from the circuit clerk's office before the writ of attachment was issued by the justice of the peace, is void, and a judgment entered on it by default against the garnishee is void; *Buckingham v. Bailey*, 4 S. & M. 538.

III. The Judgment against Garnishee.

8. *No judgment against garnishee till judgment against attachment debtor.* There is no authority for entering a judgment against the garnishee in an attachment case until judgment has been rendered against the defendant; *Roberts v. Barry*, 42 M. 260; *Metcalf v. Steele*, 42 M. 511; *Mandell v. McClure*, 14 S. & M. 11. This last case citing *Whitehead v. Henderson*, 4 S. & M. 704; *Ford v. Heard*, 14 ib. 11. A judgment *nisi* against garnishee before judgment against the defendant is only an irregularity of which the garnishee cannot complain after final judgment; *Matthey v. Galloway*, 12 S. & M. 475.

9. *The judgment nisi.* If the answer of garnishee be stricken out as insufficient, a judgment *nisi* must be entered, and not judgment final; *Holmes v. Herndon*, 2 G. 296. (But by Statute of 1857 no judgment *nisi* is now entered, judgment final is entered in the first instance for want of an answer, G.)

10. *Same.* If on garnishee process a *sci. fa.* be issued as on judgment *nisi* against the garnishee, and there be no such judgment, and on the return of the *sci. fa.* judgment final be entered, that judgment is void for want of a judgment *nisi* to support it; *Buckingham v. Bailey*, 4 S. & M. 538; *S. P., Whitehead v. Henderson*, *Id.* 704.

11. *Judgment for want of answer.* Under the statute (H. & H. 533, § 24), where a garnishee fails to answer, and judgment *nisi* is rendered and then *sci. fa.* on that is issued and served, then the plaintiff is entitled, if there still be no answer to judgment final against the garnishee for the full amount of his judgment, and the costs and also for the amount of the costs of the garnishee process;

Matthey v. Galloway, 12 S. & M. 475. The Act of 1857, gives the same right to final judgment for the whole debt and costs, where there is no answer; Rev. Code of 1857, p. 37), art. 25.

12. *Judgment on answer.* When a garnishee neither admits nor denies his liability, but states all the facts and leaves the court to decide the matter of law arising thereon, there can be no judgment against him unless there clearly appears on the face of these facts sufficient to justify the court in pronouncing such judgment. If it be left in reasonable doubt, whether he is chargeable or not he is entitled to judgment in his favor; *Williams v. Jones*, 42 M. 270.

13. *Judgment on answer admitting indebtedness and effects.* Where the garnishee answers that he is indebted to the defendant in the judgment, the plaintiff is entitled to enter judgment against him for the amount so admitted, but if he answer he has effects of such defendant in his hands, he is entitled to his discharge upon surrendering them. An answer that he has so many dollars in the notes of a specified bank, in his hands, is not an admission of indebtedness, but an admission of having in possession effects of the defendant. And in such a case it will be error to enter judgment against him for the amount of the bank notes. He is entitled to be discharged upon a surrender of the notes, and upon a failure to do so, he might be held liable for their value (when they are constantly fluctuating) at the time he received them; *Jennings v. Summers*, 7 H. 453.

14. *Judgment on answer.* If the answer admit an indebtedness, judgment may be rendered on it for the amount so admitted, if it do not admit an indebtedness, no judgment can be rendered against garnishee except upon the verdict of a jury rendered upon an issue framed to contest the answer; *Harvey v. Ellis*, 11 S. & M. 348.

15. *Same: Where a debt by note is admitted, but garnishee has no knowledge of assignment.* The garnishee answered that he bought from the defendant, several town lots in the State of Texas, and executed his note to him for balance of purchase money, that the note might have been assigned, though he had received no notice of assignment, that he had been informed that his vendor's title to a part of the lots was defective, and he asked for time to make investigations as to his liability: *Held*, that the plaintiff was not entitled to a judgment on this answer; that before he could get judgment he should show that by the law of Texas if the note were assigned the garnishee would be protected by the judgment against him, and as to the town lots, that by that law partial failure of consideration could not be set up to the note. *Id.*

16. *Same.* When the maker of a promissory note is summoned as a garnishee for the payee, and he answers that he gave the note, but does not know whether it has been assigned or not; no judgment can be rendered against him on the answer; *Yarborough v.*

Thompson, 3 S. & M. 291. And so, if he answer, that he has received notice of the assignment of the note either from the assignee or assignor; *Thompson v. Shelby*, 3 S. & M. 296. And so, if he state positively an assignment of the note. For the judgment can be entered on the answer only when an indebtedness is admitted; *Frost v. Patrick*, 3 S. & M. 783.

17. *Same: Practice on contest of answer.* The garnishee answered, that he was not indebted to the debtor. That in March, 1861, he was indebted to him, to the amount of \$4,000, for which he executed to him three notes, of the transfer of which to other parties he had notice. One of the notes, he had notice, was assigned to C., in 1866, and in May last he was informed by the payee that the other two notes had passed out of his hands to his creditors, "therefore affiant affirms, he is not in any manner indebted to the defendant, nor was he at the time of service of garnishment." The attachment and garnishment were issued 26th May, 1866, and the answer was sworn to 13th August, 1866. On what day the garnishee was summoned does not appear: *Held*, that plaintiff was not entitled to judgment on this answer, for any amount: *Held*, also, that the plaintiff was not entitled to judgment, by introducing evidence to the court tending to show there was no assignment, without an issue framed to contest the answer; *Williams v. Jones*, 42 M. 270. See *ante*, 15, 16, and *post*, 20, 21.

18. *Same: Answer admitting conditional liability.* It is error to enter judgment against a garnishee upon his answer, "that upon defendant's complying with his contract with garnishee, he would be indebted to him" in a sum stated; *Russell v. Clingan*, 4 G. 535.

IV. The Answer and Proceedings to Contest it.

19. *When answer to be made.* The answer of the garnishee must be made and filed at the return term. That provision of the Rev. Code, art. 150, p. 503, which allows a defendant sued at law to file a written notice with the clerk, that he desires a continuance, does not apply to attachment, replevin or garnishment cases; *Thrasher v. Buckingham*, 40 M. 67.

20. *The answer to be taken as true.* The answer of a garnishee is to be taken as true, unless issue be taken on it; *Smither v. Fitch*, 1 S. & M. 541; and the *onus* is on the plaintiff, if it be contested, to show that it is false; and if it appear by the answer that the garnishee was indebted by note, and that it had been assigned, the assignment will be presumed fair and *bona fide*, and the burden of proof is on the plaintiff to show the contrary; *Thomas v. Surgess*, 3 G. 261; *S. P., Williams v. Jones*, 42 M. 270.

21. *Same: Case in judgment.* If the answer of the garnishee acknowledge an indebtedness at one time, to defendant, but state that by consent of the defendant and his father, he had, before the service of the gar-

nishment, assumed to pay the debt to the father of the defendant, who, the answer states, claims to be a creditor of the defendant; the answer is to be taken as true, and as showing no indebtedness to the defendant. In such a case, the court will not, on a motion for a judgment on the garnishee's answer, presume the arrangement fraudulent, from the relationship of the father; nor from the further fact disclosed in the answer, that the defendant said at the time of arrangement above stated, he owed his father and others, and preferred paying him to them, and desired the assumption of garnishee to pay the father, so as to give him a preference over other creditors, who might reach the debt by garnishment; *Swisher v. Fitch*, 1 S. & M. 541. See *ante*, 15, 16, 17, 20.

22. *Vague denial in the answer.* If the answer contain a substantial denial of indebtedness, though vaguely and inartificially drawn, judgment cannot be rendered on it in favor of the garnishee; *Smith v. Bruner*, 1 C. 508.

23. *Demurrer to answer.* It is unnecessary to demur to the answer of a garnishee, in order to test the legal sufficiency of the facts therein stated, to show that no judgment should be rendered for plaintiff; a motion for judgment on the answer is sufficient; *Brer v. Hooper*, 3 G. 246.

24. *Answer stating plea of payment on a suit by debtor.* The answer of a garnishee stating that he executed his note to the defendant for a sum specified; that he was sued on the note, and had pleaded payment, and the issue on that plea, was undisposed of, and asking that the proceedings against him as garnishee might be stayed, until the trial of that issue, will authorize a judgment against the garnishee for the amount of the note, as the answer states only that the garnishee had pleaded payment, without stating that the plea was true; *Thrasher v. Buckingham*, 40 M. 67.

25. *Contest of answer: Pleading.* When the answer of a garnishee is contested, the statute (H. & H. 558, § 12), authorizes a trial by jury and dispenses with the formality of pleading; *O'Brien v. Liddell*, 10 S. & M. 371. But the provisions of art. 28, p. 389, of the Rev. Code, contemplates that the answer of a garnishee, and the ground upon which it is contested, shall be in writing; and no issue between the creditor and the garnishee could be properly submitted to a jury, unless the answer and the contest thereof appear in the record; *Roberts v. Barry*, 42 M. 260.

26. *Same: Proof overturning answer.* When on the trial of an issue contesting the garnishee's answer denying indebtedness, the plaintiff introduces in evidence a judgment against the garnishee, in favor of the defendant, this will authorize the rendition of a judgment against the garnishee, unless he show that it has been paid; *O'Brien v. Liddell*, 10 S. & M. 371.

27. *Same: When answer contested.* If the garnishee answer denying indebtedness, and do not move for and get a judgment of dis-

charge, he is still legally in court, and the plaintiff may, at the next (or a subsequent) term, contest the answer and call a jury to try the issue, without any further notice to the garnishee; and a verdict so rendered against the garnishee will not be set aside because he thought he was discharged, and was therefore not present at the trial of the issue; *O'Brien v. Liddell*, *supra*. But by art. 28, Rev. Code of 1857, p. 380, the contest and issue must be made at the term, at which the answer is filed, unless the court shall grant further time; *Roberts v. Barry*, 42 M. 260.

28. *Trial of the issue on contest of answer.* The contest of a garnishee's answer, and the issue between the plaintiff and defendant in attachment, are separate and distinct, and must not be submitted to a jury at the same time. A separate verdict must be found on the garnishee's answer; *Ib.*

29. *Answer of partners.* If garnishee process be served on both partners, one may answer in the name of both, and judgment may be rendered against both for the amount admitted by the answer to be due; *Anderson v. Wanzer*, 5 H. 587. But if the service be bad, the answer of one does not cure the defect as to the other; *Mitchell v. Greenwald*, 43 M. 167.

V. The Garnishee: his Rights, Liabilities, and Duties.

30. *He is a trustee.* The garnishee is a trustee, and it is his duty to take legal steps to protect the rights of all parties to the goods or effects attached in his hands. Hence, after judgment is awarded against him on his answer, admitting an indebtedness, it is his duty to enjoin its collection, if before payment he receive notice that the debt was assigned to another before the service of the garnishment; *Oldham v. Ledbetter*, 1 H. 43. And he is also bound to see that the bond required of the plaintiff in attachment, as a condition of granting him execution, has been given. And if he fail, payment by him will be in his own wrong; *Oldham v. Ledbetter*, *supra*; S. P., *Berry v. Anderson*, 2 H. 649. And so if the attachment be void for irregularity, it will not support a judgment against the garnishee, and he is bound to see that the law has been complied with before satisfaction by him; *Berry v. Anderson*, *supra*. And he must see that the judgment against the defendant is valid; for if it be void, it will be no protection to him; *Ford v. Hurd*, 4 S. & M. 683; *Whitehead v. Henderson*, 4 S. & M. 704. And this court on writ of error to the judgment against the garnishee will look into the validity of the judgment against the defendant, but will not notice errors which do not invalidate it; *Whitehead v. Henderson*, *supra*. The garnishee cannot complain of errors merely in the judgment and proceedings, if they be not void; *Matheny v. Galloway*, 12 S. & M. 475 (citing *Whitehead v. Henderson*, and *Ford v. Hurd*, *supra*). See PROCESS, 17.

31. *Where garnishee's debt is not due.* When it appears by the answer that the garnishee's debt is not due, the execution on the judgment against him will be stayed till the maturity of the debt, without any formal order to that effect; *Anderson v. Wanzer*, 5 H. 587.

32. *Judgment debtor may be garnished.* A judgment debtor is subject to garnishee process, and it is no objection to this that he may be subject to two executions for the same debt. He has his remedy by injunction against his creditor; *Gray v. Hemby*, 1 S. & M. 598; S. P., *O'Brien v. Liddell*, 10 S. & M. 371.

33. *Debts in custodia legis.* Whether the position recognized by some of the authorities that goods and all unadministered assets are in *custodia legis*, and therefore not liable to garnishment, though the estate is not declared insolvent, is correct; *Quære?* But however this may be, the rule is by statute (Rev. Code, p. 379, art. 24) that executors and administrators may be garnished for a debt due by their intestate or testator to the defendant. This provision removes all doubt as to the general principle of garnishing funds in *custodia legis*, so far as executors and administrators are concerned; and hence, when an estate has not been declared insolvent, a creditor who has a judgment against the administrator or executor, can sue out garnishment against the debtors of the estate and subject assets in their hands to the payment of his judgment. This proceeding is but process to execute the judgment by subjecting assets not seizable under execution, and is no more objectionable than the levy of an execution on goods and chattels in the hands of the executor or administrator (citing *Sanders v. Douglass*, 3 S. & M. 454); *Thrasher v. Buckingham*, 40 M. 67.

34. *Where garnishee has been sued by the debtor.* It is no objection to the issuing of a writ of garnishment or proceeding with it to final judgment, that the garnishee has been sued on the debt by the debtor; *Thrasher v. Buckingham*, *supra*. But the garnishee, in such a case, has a right to insist that no judgment shall be rendered against him in favor of his creditor, until the garnishment proceedings are disposed of; *Preston v. Harris*, 2 C. 247.

35. *Same: Case in judgment.* A debtor was garnished in an attachment suit against his creditor, and then sued at law by his creditor. The attachment case was first reached and decided in favor of the defendant therein, whereby no defence remained to the garnishee debtor to defend the action brought against him by his creditor, and judgment in that suit was accordingly rendered against him. Afterwards the plaintiff in the attachment suit sued out a writ of error to revise the judgment in that suit against him, and the defendant in the attachment (who was plaintiff in the other suit), sued out execution on his judgment against the garnishee, who thereupon filed this bill to enjoin the collection of the judgment against him until the final

decision in the attachment case: *Held*, he was entitled to the injunction; that the pendency of the garnishment was a conditional defence to the action against him, until the attachment was quashed; after the quashal the garnishee could no longer make the defence, but the writ of error had revived the defence as well as the conditional assignment of the debt created by service of the garnishee process, and the garnishee was entitled to have the execution enjoined until it could be ascertained to whom he was liable to pay the debt; *Ib*.

36. *Judgment in favor of garnishee after wards reversed on writ of error.* A garnishee answered admitting a small indebtedness, and stated he had been sued by his creditor and asked to be protected against the suit, and he was discharged on his answer from the garnishment, and he then settled with and paid his creditor; afterwards the plaintiff in the garnishment sued out a writ of error to the judgment discharging the garnishee, and the judgment was reversed, and the garnishee then applied for leave to file an amended answer, showing the payment as above stated, and the court below refused the leave: *Held*, this was error, that the judgment discharging the garnishee was not void, but good till reversed; that that judgment left the garnishee without means of defence against his creditor, and that the possibility that the plaintiff in the garnishment might sue out a writ of error, was no reason why the garnishee should not pay his creditor, and hence that payment between the judgment of discharge and the suing out the writ of error was good; *Webb v. Miller*, 2 C. 638.

37. *Plea of payment under garnishment.* A plea of payment based on garnishment against the defendant must show that the judgment against him as garnishee was based on the identical debt sued on, and on no other; *Reed v. Cage*, 4 H. 253.

38. *Garnishee's costs.* The garnishee is entitled to satisfaction for his attendance; *Jennings v. Summers*, 7 H. 453; but only when he appears and answers; *Matheny v. Galloway*, 12 S. & M. 475.

VI. Miscellaneous.

39. *Rights when law changed after garnishment served.* The rights of parties to a garnishee process must be determined by the law as it was when the process was served, any subsequent change in the law cannot affect rights thus acquired. Hence a law, passed after service of garnishee process against a debtor of a bank, which allowed such garnishees to pay to the garnishing creditors, the notes of the bank, will not defeat the right of the garnishing creditors acquired by service of the process, before its passage, to have the debt paid in legal currency; *Robson v. Benton and Manchester R. R. and Banking Co.*, 7 S. & M. 724.

40. *Change of law as to service of the writ.* A writ of garnishment was issued before the Rev. Code of 1857 went into operation, but

was made returnable, and actually executed after that event took place: *Held*, that it was governed by the provisions of the Code as to the mode of its execution and the return, and in all subsequent proceedings; *Jeffries v. Harvie*, 9 G. 97.

41. *As to effect of foreign attachment and garnishment in another State on right of set-off.* See *Riggs v. Dyche*, digested in *Set-off*, 18, 19.

42. *Equitable assignment good against garnishee process.* An instrument for the payment of money, though not payable to bearer, is assignable without endorsement, so as to vest an equitable title in the assignee; and the promisor, after such assignment, is no longer a debtor to the payee, and is bound after notice thereof to pay the money to the equitable assignee; and hence, if he be summoned as a garnishee of the payee, after such equitable assignment has been made, he ought to be discharged; *Byar's Garnishees v. Griffin*, 2 G. 603.

42a. *Partnership dismissal as to one.* If an attachment be sued out against two as partners, and garnishee process served, and then the suit be dismissed as to one, a garnishee who owes that one alone is to be discharged; *Mitchell v. Greenwald*, 43 M. 167.

42b. *Garnishment of debtor to partners.* When a judgment has been rendered in favor of two partners, and one dies, the legal title survives to the other, who alone is entitled to collect it. Hence, if the judgment debtor be garnished as a debtor of the deceased partner, he should be discharged, notwithstanding the administrator of the deceased partner may be entitled to one-half the proceeds; the garnishee has nothing to do with this trust; *Hoover v. Chambers*, 5 C. 606.

43. *Where garnishee is surety.* If the answer of the garnishee disclose that his indebtedness is as surety for another, and does not show that the principal resides in the State, it will not be error to render judgment against him without summoning the principal and entering judgment against him also. If he desire to take advantage of the statute, Rev. Code, 380, art. 39, prohibiting the rendition of a judgment on garnishment against the surety without judgment being rendered against the principal where the latter resides in the State, he should show in his answer that he is a resident; *Thrasher v. Buckingham*, 40 M. 67.

43a. *Where garnishee has been sued in another State: Case in judgment.* A debtor to an administrator in Louisiana, and who was also sued in that State, was summoned in this State by a creditor of the estate as garnishee; and the garnishing creditor assured the garnishee if he would answer showing an indebtedness, and allow judgment to go against him, the judgment should never be used to his prejudice. After the judgment, the garnishing creditor procured the written agreement of the administrator in Louisiana that the garnishee might pay the judgment here, and that such payment should be a valid discharge *pro tanto*, of the judgment

the administrator had against the garnishee in Louisiana: *Held*, that the garnishee was bound to pay the judgment against him here, as the written agreement above stated prevented such payment from being prejudicial to him; *McGill v. Bone*, 4 C. 446.

Gift.

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I. Delivery of Chattel by Parent to Child.

1. *Delivery of chattel to child on marriage or afterwards.* The delivery of personalty by the parent to the child, upon or after marriage of the latter, without more, is a gift, and is so presumed in law; but if the delivery be expressly as a loan, it will have that effect; *Williams v. Mosely*, 5 H. 520; *Falconer v. Holland*, 5 S. & M. 689; *Whitfield v. Whitfield*, 40 M. 352; *Fatherree v. Fletcher*, 2 G. 265; *Woods v. Sturdevant*, 9 G. 68; *Keaton v. Miller*, 9 G. 630.

2. *Presumption of gift weakened by insolvency of child.* And in a case where the evidence left it doubtful whether the delivery was in virtue of a loan or gift, the notorious insolvency of the child, and the fact that his creditors for many years did not seize the chattel so delivered, are circumstances to be considered in favor of the theory of a loan; *Williams v. Mosely*, 5 H. 520.

3. *Same: Policy of law to presume the possessor as the true owner.* It is the policy of the law of this State to construe all possession of personal property to be under the ownership of the possessor; and when a controversy arises between the creditors of such possessor, and a person claiming as owner, as to whether the possession is under a loan or gift, and the evidence is conflicting, and there is no positive documentary evidence on record showing the nature of the title and possession, the presumption of law operates in full force to regard the possession as under a gift. And if the verdict be in favor of a gift, it will not be disturbed, unless the evidence preponderate greatly the other way; *Falconer v. Holland*, 5 S. & M. 689.

4. *Circumstances showing a gift.* In a controversy between the legal representatives of the mother, and the creditors of the son, about the ownership of slaves delivered by the mother to the son, the following circumstances were held, in the absence of positive proof of a loan, sufficient to uphold the verdict of a jury, that the possession of the son was under a gift, viz. :—

The delivery, in this State, of the slaves, by the mother to the son, in 1837, and the removal of them to Tennessee, where the mother and son resided, and the son's removal of the slaves back to this State in 1839, where he kept them till 1841, when they were levied on by the creditors of the son; also the fact that he paid no hire, and there was no agreement or limitation as to the time he was to hold them, and no agreement to redeliver them.

2. The silence of her mother in her will as to these slaves, her other slaves being all disposed of in it.

3. A direction by the mother to the son to sell a part of the slaves so delivered, to pay a debt of the son on which she was surety.

4. The failure to put on record any writing showing the nature of the son's title.

5. The failure to produce such an instrument, when it was alleged that one was in existence; *Falconer v. Holland*, 5 S. & M. 689.

5. *Evidence to show a loan: Assessors' rolls, &c.* The fact that the child after such delivery did not assess the property as his own, but that it was assessed in the name of the parent, is competent evidence in support of the theory of a loan. And the assessors' rolls may be introduced to show how the assessment was made; but it is not competent to show, in support of that theory, that the land on which the child lived belonged to the parent, nor that the child was a spendthrift and drunkard; *Whitfield v. Whitfield*, 40 M. 352.

6. *Same: Declaration of donor after delivery.* Nor is it competent to introduce in evidence, in favor of the donor, his declarations made after the delivery, to the effect that he made a loan and not a gift; *Ib.*

7. *A gift presumed though property is mortgaged.* When a grantor in a deed in trust given to secure the payment of a debt, afterwards gives to his daughter upon her marriage, a part of the personal property so conveyed in the trust deed, the donor will have given a good and perfect title, subject only to the superior right of the creditor, notwithstanding there may be a stipulation in the deed in trust, that the grantor will not part with the possession of the property except to the trustee, when a sale shall become necessary; *Keaton v. Miller*, 9 G. 630.

8. *Circumstances tending to show gift by a stepfather.* G. married the widow of C., and lived with her during her life, in the occupancy and enjoyment of C.'s estate, and continued to occupy the same after her decease, till the time of his death, being in all about twenty years; and he preferred no charge against the estate of C. during all that time, for the support and maintenance of C.'s children who lived with him, nor for money paid out on account of the estate. After G.'s death, his administrator presented an account against C.'s estate, for the support and maintenance of C.'s children, and for money paid out for the estate: *Held*, that the facts raised a fair presumption that G. never intended to make such charge, and the account was disallowed; *Carter v. Probate Judge*, 2 S. & M. 42.

II. The Necessity for a Delivery in Case of Gift.

9. *Gift in writing not under seal.* A gift of personalty in writing, but not under seal, is invalid without delivery of the chattel, though the writing provided for the retention of possession by the donor; and this is so as to

the undelivered part, though there has been a complete delivery of a part of the property embraced in the gift, and in reference to which there was no stipulation as to the possession; *Thompson v. Thompson*, 2 H. 737; *Wheatley v. Abbott*, 3 G. 343; *Conner v. Hull*, 7 G. 424; *Young v. Power*, 41 M. 197.

10. *Gift by deed.* And if the gift be by deed, and there is no delivery, a subsequent donee by deed of the same property, to whom delivery is made, will take in preference to the grantee in the prior deed; *Marshall v. Fulgham* (decided in 1835). See *post*, 12, 14, 15, 16, 22.

11. *Constructive delivery sufficient.* The gift of a chattel is incomplete without delivery, or some act equivalent to delivery; if at the time the thing given be susceptible of transmission, actual delivery is not necessary, and it may be constructive or symbolical: *Perhaps*, the delivery of a deed, or having it recorded, might be regarded as a circumstance sufficient to amount to delivery, or to justify the presumption that a delivery had been made (citing *Thompson v. Thompson*, 2 H. 737; *Marshall v. Fulgham*, 4 ib. 216); *Carradine v. Collins*, 7 S. & M. 428 (decided in 1846).

12. *Same.* It is not essential to the validity of a gift of personalty by a recorded deed, that there should be an actual delivery of the property; it is sufficient if there be a constructive delivery, with a continued, open acknowledgment by the donor, of the donee's right. Hence, when a father made such a gift of several slaves to his minor child, then residing with another, and delivered a portion of the slaves under the deed, which however returned to the possession of the father when the child returned home; and thereafter all the slaves remained with the father and child, and the father and all the family from the date of the deed, always spoke of, and recognized the child's title as valid, it was held that the gift was good and effectual in law, and vested a good title to all the slaves in the donee; *Cuppage v. Barnett*, 5 G. 621 (anno, 1857).

13. *Same: Declaration of donor.* The rule is well settled that there can be no valid *parol* gift of a personal chattel, unless there be an actual delivery of possession to the donee, or an absolute parting with all dominion and ownership over it by the donor, for the use and benefit of the donee; and without this, a mere intention to give, however strongly manifested, will not divest the donor's title. The mere declaration of the donor, that he has made a gift, unaccompanied by acts showing a delivery, or an absolute parting with all dominion and interest in the chattel, are insufficient to establish a valid gift, and especially where his acts are inconsistent with his having parted with the possession and the control over it (citing *Carradine v. Collins*, *supra*, 11); *Wheatley v. Abbott*, 3 G. 343 (anno, 1856). But, when the gift is by deed recorded, an acknowledgment in it that a delivery has been made, will estop the donor to deny the delivery; *New-*

ell v. Newell, 5 G. 385 (anno, 1857). See *post*, 19.

14. *Gift by deed without delivery of possession: Case in judgment.* A deed in consideration of love and affection, and one dollar, granted slaves to the daughter-in-law of the donor, but "upon the condition, and with the reservation, that the slaves were to remain in the possession and under the control of the grantor, during her natural life." This deed was dated in 1812, and recorded in Oct. 1844, two days after the donor's death. There was no proof of delivery; the son of donor and husband of donee, resided on the same plantation with donor from 1839 till the donor's death. The decree of the court below, holding the gift bad, was affirmed by a divided court—*Smith, C. J.*, for affirmance; *Handy, J.*, for reversal; *Judge Fisher* had resigned.

SMITH, C. J., held, that the deed, notwithstanding the recital of the consideration of one dollar, was voluntary, and that a gift of a personal chattel is the act of transferring the right and possession thereto, whereby the donor renounces, and the donee acquires all right and title to the subject of the donation; and that it was essential to the validity of a gift, whether made by *parol* or deed, that it be accompanied by a delivery of possession, and if the possession be not delivered, it was not a gift, but a contract, which being without consideration could not be enforced (citing 2 Kent Com., 439, *Marshall v. Fulgham*, *ante*, 10; *Thompson v. Thompson*, *ante*, 9; *Carradine v. Collins*, *ante*, 112; *Newell v. Newell*, *ante*, 13); that, as delivery was the act by which the donor parted with and the donee acquired title and ownership in the subject of the donation, there could be no perfect gift without a delivery of possession, and hence, that a deed of gift of personal chattels, which purports to convey a present interest in them, to take effect in possession in *future* when the possession is not altered, is invalid.

HAND, J. held. That in *parol* gifts of chattels delivery of possession is essential as evidence of the donation; but when the gift is by deed no such evidence is required, as the deed itself is clear and certain evidence of the title conveyed to the donee, and is an *estoppel*, to the donor from setting up any title or interest inconsistent with his own solemn act; and hence a valid gift of a chattel may be made by deed without delivery of possession (citing *Wall v. Wall*, 1 G. 91); *McWillie v. Van Vacter*, 6 G. 428 (anno, 1858). See *post*, 22.

15. *Statute of frauds on the subject.* The statute of frauds (H. C. p. 638, § 20, see FRAUDULENT ASSIGNMENT, sub-division Statutes) does not affect the validity of a gift of chattels as between the donor and donee; it was intended to protect purchasers and creditors without notice of fraudulent sales and voluntary gifts; and proceeds on the assumption that a valid gift, as between the parties, had already been made, but declaring such gift void as to the creditors of and purchasers from the donor, unless possession of the

chattel shall remain with the donee, or the gift be evidenced by deed duly recorded; *Per Smith, C. J.* But *Hardy, J. held*, that the validity of a gift of chattels by deed, without a delivery of possession is clearly recognized by this statute; *Ib.*

16. *Gift: When use reserved by donor.* A gift in writing of a slave to a trustee "to manage and control the same" for the use and benefit of the donor during his life, and afterwards for the use and benefit of the donee during his life, is valid if there be an actual delivery of the property to the donee; and an immediate re-delivery of property to the donor by the trustee will not defeat the gift, for the trustee has no power to defeat the title of the *cestui que trust* by such act; *Conner v. Hull*, 7 G. 424.

17. *Same: Case in judgment.* The donor made an instrument in writing, not under seal, by which he conveyed a slave to his grandchild, "saving myself the use and benefits arising from such property during my natural life," and he appointed W. "my trustee and guardian to manage and control the above mentioned property, until the above-mentioned grandchild becomes of age or marries." At the time of the delivery of the instrument to the trustee, the donor called up the slave and pointed him out to the trustee and two other persons present, and stated he gave the slave to the trustee, for the purpose mentioned in the writing, and called on those two persons to witness the delivery of the instrument and of the slave, and told the slave to obey the trustee. The trustee then went out into the yard, where the slave was, and ordered him to go about the donor's business: *Held*, that the gift was good and there was a valid delivery of the slave; *Ib.*

18. *Parol gift: Delivery: Case in judgment.* A father, owning several slaves, called his children together and made a verbal gift to each, of a slave. The children, who were of full age, took their slaves away; two of them were minors and lived with their father, the donor, but the slaves were pointed out to them, as given to them, when the gifts were made. These slaves, with the minors, remained with the donor till his death, the donor exercising control over and managing them, the minors having no probate guardian: *Held*, that this was sufficient to uphold a verdict in favor of the gift to the minors; that the jury were authorized to infer, in the absence of proof to the contrary, that after this gift, the possession of the father, was in law, the possession of the donees; *Young v. Young*, 3 O. 38.

19. *Delivery is question of fact for the jury.* Whether there has been a delivery under a gift, is a question of fact for the jury to determine. And in doing so, they may take into consideration the repeated declarations of the donor, that a gift has been made, the situation of the parties,—as the donee being a minor and living with the donor—the delivery and recording of a deed of gift, and all the other circumstances of the case; *Car-*

radine v. Collins, 7 S. & M. 428. See *ante*, 13.

20. *Gift of debt to debtor.* There can be no valid gift to the debtor of a debt resting in parol or upon account, except by release in writing under seal; it is otherwise when the debt is evidenced by note or bill; then the delivery of the note or bill, with intent to give the debt, is good. And if the debt be by open account, and the debtor make and tender his note to the creditor, who refuses to receive it, saying that he did not want it and would not call on defendant for payment unless he should need it, this is no gift, and there is no delivery of the note to the debtor because there was no acceptance of it by the creditor; *Young v. Powell*, 41 M. 197.

21. *Delivery: Conditional sale: Case in judgment.* An administrator made a gift of slaves, (expressed to be in consideration of love and affection), to the minor distributees of the estate, but on condition that the gift was not to vest, unless the guardian of the minors would release him from his liability to the minors, for their distributive shares in the estate. A guardian for the distributees was afterward appointed, and he refused to give the release, but took a mortgage on the slaves to secure their distributive shares; there was no delivery under the deed of gift: *Held*, that the deed was a conditional sale, and that the release of the grantor as administrator was a condition precedent to the vesting of title in the grantees, and that it could not be treated as a gift, because there was no delivery of possession; (citing *Thompson v. Thompson*, 2 H. 737; *Marshall v. Fulgham*, 4 ib. 216); *Lusk v. McNamer*, 2 O. 58 (anno, 1852).

22. *Deed in consideration of love and "one dollar."* A deed which, in consideration "of love and one dollar," conveys all the grantor's interest in a deceased person's estate, is sufficient to divest the grantor of all interest in the estate, real and personal, without a delivery of possession; and so, if the consideration of one dollar recited in it, be shown not to have been paid (anno, 1859); *Fairley v. Fairley*, 9 G. 280, S. P. in S. C., (anno, 1857), 5 G. 18: where it was also held, that if the deed was in consideration of love alone, the gift would be invalid without delivery. See also *ante*, 14, 15.

Governor of the State.

1. *Suit in name of.* A suit brought in the name of the governor of the State, as successor in office to another governor, to whom the note sued on is made payable, is presumed, without further proof, to be prosecuted for the benefit of the State; *Parmilee v. McNutt*, Gov. &c., 1 S. & M. 179.

2. *Power to pardon for contempt.* The Governor of the State has power to pardon for a contempt of a Circuit Court, and to release the offender from the fine and imprisonment imposed on him for the contempt; *Ex parte Hickey*, 4 S. & M. 751, per Thatcher, J., on *habeas corpus*.

Good Character

See CRIMINAL LAW; sub-division Evidence.

Grant.

See DEED, *passim*. SWAMP AND OVERFLOWED LAND, 1.

1. *Dedication.* A deed or written grant is not necessary to the dedication of highways to the public use; *Vick v. Mayor of Vicksburg*, 1 H. 379.

2. *There must be a grantee.* The whole doctrine of grants and contracts rests upon the idea, that there must be parties capable of contracting; and though this rule has been relaxed in reference to the public and its claim to easements in land, yet the relaxation cannot go to the extent, that there can be a valid grant or dedication without there being some other party beneficially interested in it, besides the grantor; *Ib.*

3. *The interest liable to be granted: Case in judgment.* In 1785, the Legislature of Georgia passed an act allowing Wm. Downs 10,000 acres of land, to be located on the Tennessee river, in consideration of his services in surveying the country in the Tennessee bend. Before the location was made this tract of country was ceded to the United States, and Wm. Downs sold his interest to his son Henry. In 1824, Congress recognized the claim of Wm. Downs, who was then dead, and authorized his heirs to enter in any land office of the United States located in Alabama or Mississippi, 5,000 acres of land. Entries were made in the name of Henry Downs, but the patents were issued to the heirs of Wm. Downs: *Held*, that Wm. Downs, under the act of the Legislature of Georgia, possessed such an interest as was the subject of a grant, and that his heirs, to whom the patents were issued, were but trustees for Henry Downs; *Downs v. Downs*, 2 H. 915.

4. *For conditions in grants*, see CONDITIONS, 1, 2, 3, 4, 10, 11, 12, 13.

Guaranty.

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I. What is a Guaranty, and its Form.

1. *Endorsement on a note: Case in judgment.* The following endorsement on a promissory note, viz., "I do assign the within note to J. Ely, for value received, and guaranty the punctual payment of the same at maturity," is not a simple endorsement, but a guaranty. And the guarantor is not entitled to notice of the non-payment of the note, as in cases of an endorser; *Thrasher v. Ely*, 2 S. & M. 139. And so, of the following endorsement on a promissory note, "I assign the within to D., for value received, and bind myself to pay promptly after maturity, if not paid by the drawers at maturity; *Baker v.*

Kelly, 41 M. 696. And so of the following, "I assign the within note to C. & H., and endorse prompt payment of the same;" *Tatum v. Bonner*, 5 C. 760.

2. *Other instances of form.* An instrument in the following words, "W. C. I will guaranty the payment to you of \$652 in treasury warrants, to be paid on or before 20th August, on account of J. W." is not a guaranty in the legal sense of the term, but an original promise to pay C. the amount specified; and no notice of its acceptance by C. or of its non-payment by J. W. is necessary; but if conceded to be a guaranty, still notice was unnecessary, as it was not for future and contingent advances, but for a sum certain payable at a specified time; *Matthews v. Chrisman*, 12 S. & M. 595. See *post*, 15, *et seq.*

3. *Same: Statement of consideration.* A guaranty, written at the bottom of an account in these words, "I will guaranty the payment of the above," is valid, if based on a valid consideration, which need not be specified in the guaranty. Our statute of frauds, unlike the statute of Charles II., requiring only the promise (not the agreement) to be in writing; *Wren v. Pearce*, 4 S. & M. 91.

4. *Same: Another form.* An instrument in these words, "To J. W. If E. should buy a jackass from you, I will go his security for that amount of money," is a complete guaranty to pay the debt thus contracted, without any further act being done by the guarantor in the way of going E.'s security; *Williams v. Staton*, 5 S. & M. 347.

5. *Guaranty of the consideration of a note transferred by executor.* An executor, in payment of a debt against his testator, made an assignment to the creditor of a note, in these words: "For value received, I assign the within note to L. (the creditor), and warrant the consideration for which it was given; but as to the solvency or insolvency of the makers, to be without recourse." *Held*, this was a guaranty that the note was on a valid consideration, and bound the executor individually; *Robinson v. Lane*, 14 S. & M. 161. See *post*, 22 and 23.

6. *Guaranty for acts of one does not embrace the acts of him and another.* An engagement to guaranty for a particular person relates to the acts of such person alone, as a single individual, and does not extend to acts done by him jointly with another; hence, when A. guaranteed to B. the punctual payment of all drafts which C. might draw on B., it was held that the guarantor was not bound to pay a draft drawn on B. by C., and another, jointly; *Dick v. Crowder*, 10 S. & M. 71.

See *post*, 24.

II. The Consideration.

7. *Need not be in writing.* As to this, see *ante*, 3.

8. *Cotemporaneous guaranty.* When the guaranty or promise, though collateral to the principal contract, is made at the same time with it, and is an essential ground of the credit given to the principal debtor, the whole

is one entire transaction, and the credit given to the principal debtor, is a sufficient consideration to support the guaranty. Thus, if a guaranty be written at the bottom of an account for goods sold to the principal, the facts that the goods were sold and delivered at the request of the guarantor, and on his promise to make the guaranty, which he did immediately on the sale of the goods, constitute a good consideration for the guaranty; *Wren v. Pearce*, 4 S. & M. 91.

9. *Guaranty of pre-existing debt.* A guaranty of a debt already contracted, is not binding unless based on some sufficient consideration, besides the mere giving of the original credit to the principal debtor; *Dick v. Crowder*, 10 S. & M. 71; S. P., *Standly v. Miles & Adams*, 7 G. 434. And this is so, though the guaranty be dated before the original credit was given; the true date of the guaranty may be shown by proof; *Crowder v. Dick*, 2 C. 39.

10. *Same: Where credit given at request of guarantor.* But when the guaranty, though executed after the debt was created, is connected with, and an inducement to, the original credit, or the result of a previous verbal promise by the guarantor, upon the faith of which the credit was obtained by the principal debtor, it requires no new or independent consideration to make it valid; but it is considered as a part of the original transaction, and constitutes the consideration on which the credit was given; *Standley v. Miles & Adams*, 7 G. 434.

See CONSIDERATION, 3 to 18.

11. *Same: Case in judgment.* The defendant gave a verbal authority to C. & S. to promise for him that he would guaranty any debt they might contract in New Orleans. C. & S. informed the plaintiff of this, and promised them that they would procure the guaranty of the defendant for the debt. Thereupon and in consideration of the promise, the plaintiff extended a credit to C. & S. to the amount of \$3,600. Soon afterwards the plaintiff sent the following instrument to defendant for his signature: "Messrs. M. & A., New Orleans. Gentlemen: I hereby agree to guaranty all drafts drawn on your house by C. & S., of Sidon, Miss." This instrument the defendant refused to sign, but executed the following, and sent the same to plaintiffs: "Messrs. M. & A., New Orleans. Your form of a letter of credit, that you wished me to give Messrs. C. & S., of Sidon, is before me. I am not disposed to give my name only for a specified amount, say for three thousand dollars. The above amount I will underwrite for the house of C. & S. at Sidon." *Held*, 1st, that the promise made by defendant through C. & S., was a sufficient consideration to support the guaranty afterwards executed; 2d, that in construing the guaranty, reference might be had to the form of a letter of credit sent by plaintiff to defendant, for his signature, and which form was referred to in the guaranty actually signed; 3d, the guaranty was executed to secure the debt, which had already

been created, on the faith that the defendant would afterwards execute it; *Id.*

12. *Disputed liability of guarantor for the debt, as a consideration.* Notwithstanding the guaranty is for a past debt, yet if the creditor claim that the guarantor is already liable for the original debt, and this be a matter of dispute, and the guarantor execute his note for the original debt, thereby acknowledging his liability, and include in the same note his individual liability to the creditor, and afterwards, at his request, the individual indebtedness of himself and of his principal, are separated, and he then gives a guaranty for the debt of his principal, the guaranty will be binding. The settlement of the disputed liability, and the taking from him his guaranty, which is a secondary liability, in the place of his note, which is a primary liability, are a sufficient consideration to support the guaranty. Hence, if under a guaranty of drafts drawn by A., credit be given also to a draft drawn by A. and another jointly, and the guarantor afterwards give his note for all the drafts drawn by A. alone, and A. jointly with another, and also for his own indebtedness to the creditor, and after this he pays his own debt, and at his request the note is surrendered, and he then give a guaranty for the debt of A., including in it the amount accruing from the joint drafts of A. and another, he will be liable on the last guaranty for the whole amount; *Dick v. Crowder*, 10 S. & M. 71.

13. *Same.* But it is not a good consideration for the guaranty of the debt of another, that said debt has been, by the creditor, included without authority, in a blank note sent to the creditor by the guarantor, to cover his own individual indebtedness, and being so included in the note, is taken out of it, at the request of the guarantor. The creditor's act in including the debt in the note was unauthorized, and created no liability on the maker, and his taking it out was but the discharge of a plain duty; and was no such benefit to the guarantor, or injury to the creditor, as would constitute a valid consideration for a guaranty to pay it; *Crowder v. Dick*, 2 C. 39.

14. *Same: Case in judgment.* C. guaranteed to plaintiffs the payment of all debts which R. D. might draw on them, and R. D. drew on plaintiffs for \$5,000. Afterwards C. sent his two blank notes to plaintiffs, one to renew his individual indebtedness to plaintiffs, and the other to renew the indebtedness of R. D. The plaintiffs inserted in one of these notes the amount due by C. individually, and the amount due by R. D. alone, and also a debt due by R. D. and J. J. jointly, on a draft drawn by them before the execution of the guaranty. C. afterwards complained of this, and at his request the amounts due by R. D. alone, and by R. D. and J. J. jointly, were deducted from the note, and C. then paid the balance of the note, being his own indebtedness, and took it up, and at the same time executed a guaranty for the payment of the debt due by R. D. alone, and R. D. and J. J.

jointly: *Held*, C. was liable on the guaranty only for so much of the \$5,000, which had been advanced to R. D. on the first guaranty, as then remained unpaid, and that he was not liable for the joint debt of R. D. and J. J., there being no consideration for the guaranty as to that; *Ib.*

III. Notice of Acceptance and of Non-payment.

15. *Notice of acceptance.* Where the guaranty is for a debt yet to be created, and for an amount not ascertained, the guarantor is entitled to have notice in a reasonable time, of the acceptance of the guaranty, and that credit has been given on the faith of it; *Williams v. Staton*, 5 S. & M. 347; *Montgomery v. Kellogg*, 43 M. 486. And so, if the guaranty be by general letter of credit directed to any merchant in a particular city, the guarantor is entitled to notice of its acceptance, and of credit given on it; *Hill v. Calvin*, 4 H. 231; S. P., *Thrasher v. Ely*, 2 S. & M. 139. But when the guaranty is absolute and for a specified amount, notice of acceptance is unnecessary; *Thrasher v. Ely*, *supra*; *Matthews v. Chrisman*, 12 S. & M. 595, and *ante*, 2.

16. *Notice of non-payment.* The guarantor of a specified amount, or of a promissory note—the guaranty being absolute and not contingent—is not entitled to have demand made and notice of non-payment given, in order to fix his liability; *Thrasher v. Ely*, 2 S. & M. 139; *Baker v. Kelly*, 41 M. 696.

16a. *Same: Case in judgment.* M. gave to K. & S. a written guaranty, that if they would credit C. for "\$400 worth of goods, or less, to be paid out of the first proceeds of C.'s crop, he (M.) would see the amount was paid, as agreed on between C. and K. & S." In less than ten days afterwards M. asked K. & S. if goods were furnished to C. on the faith of this paper, and he was answered in the affirmative. About the time cotton picking had fairly commenced, M. acknowledged that he had received a letter from K. & S. stating that C.'s account was due and unpaid, and asking him what arrangements he would make to pay it. Demand of payment on C. was made soon after the account was due, and a letter written to M. notifying him of non-payment; *Held*, that a verdict against M. for the amount of the account was warranted by these facts; *Montgomery v. Kellogg*, 43 M. 486.

16b. *What is reasonable notice.* The same strictness in giving notice to the guarantor is not required, as in cases of endorsers of negotiable instruments. The notice must be reasonable, but what is reasonable notice can be fixed by no definite rule, but it must be determined according to the circumstances of the case. The test is, whether the guarantor received notice in time to prevent injury resulting to him from the delay; *Ib.*

16c. *Form of notice.* No particular form of notice of the acceptance of the guaranty or its non-payment by the principal is required. The notice may be inferred from the circumstances; *Ib.*

IV. Actions on Guaranty, Pleadings, &c.

17. *Declaration: Averment of notice.* An averment of notice to the guarantor "of all which the defendant had notice," inserted in the declaration after a full statement of the cause of action, is sufficient; *Williams v. Staton*, 5 S. & M. 347. But if notice of non-payment be averred, when it is unnecessary, it will be surplusage, and need not be proven; *Thrasher v. Ely*, 2 S. & M. 139.

18. *Same: Averment of default.* A declaration in assumpsit against a guarantor ought to assign as a breach of the contract, non-payment by the guarantor, as well as by the principal debtor; *Williams v. Staton*, 5 S. & M. 347.

20. *When principal need not be sued.* If the guaranty be for the payment of the debt of the principal debtor, and not of his solvency, it is unnecessary to sue the principal debtor before resorting to legal proceedings on the guaranty; *Wren v. Pearce*, 4 S. & M. 91.

See *post*, 23, 24.

V. Miscellaneous.

21. *When guaranty considered a primary obligation.* Where the guaranty is that the debt shall be paid by a particular day, the guarantor's obligation is not considered secondary, but primary and positive; *Baker v. Kelly*, 41 M. 696.

22. *Guaranty of consideration of assigned note.* Where an executor guarantees the consideration of a note, as stated in *ante* 5, his liability is not at all dependent upon the amount of assets in his hands; but he can impeach the consideration of the guaranty by showing that the debt of testator, for the payment of which it was given, was invalid. And in such a case, as the guaranty extends only to the consideration of the note assigned, if there be no legal consideration of the assigned note, the guarantor would be liable for the full amount of the note, if the makers were solvent; but if they are insolvent, he is liable only for such sum as might have been reasonably made out of the makers in case judgment had been obtained against them; *Robinson v. Lane*, 14 S. & M. 161.

23. *Same: Action on proof.* And in such case, if suit has been brought on the note against the makers by the assignee, and judgment rendered for the makers, it is competent to introduce this judgment in evidence in an action on the guaranty, if it be shown that the guarantor had notice of the suit and permission to assist in prosecuting the claim; and it is also competent to show by parol—if the record do not show upon what issue the verdict was rendered—that the only defence the makers made was a failure of consideration. A bill of exceptions taken on the trial of the suit on the note and made a part of the record of that judgment, would not be competent, as the witnesses themselves could be produced and examined. *Ib.*

24. *Action on: Proof of breach.* A constable gave a receipt for the collection of a claim which was placed in his hands, and the party taking the receipt assigned it, with this endorsement on it: "I trade the above note to D. W. for value received, and guaranty payment of the same." *Held*, that this was a guaranty, and that the guarantor's liability could only arise upon a breach of the guaranty—non-payment by the constable; and that this fact must be shown affirmatively by the plaintiff; and this, though the breach could only be shown by proving a negative. *Craig v. Phipps*, 1 C. 240.

25. *Character of guarantor's liability.* On the acceptance of the guaranty, and notice of default the guarantor's liability becomes fixed and absolute, and is an original liability; and hence the failure of the creditor to sue the principal according to notice given under the statute, does not discharge the guarantor; *Montgomery v. Kellogg*, 43 M. 486. See PRINCIPAL AND SURETY, 27, 28.

Guardian ad litem.

See INFANT.

Guardian and Ward.

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I. Appointment of Guardian.

1. Who may be Legal Wards.

1. *Ward must be an orphan.* The Probate Court has no jurisdiction to appoint a guardian for a minor whose father is living. It can only appoint guardians for orphans, or fatherless children; *Stewart v. Morrison*, 9 G. 417.

But this is changed by the constitution of 1865, and under the constitution of 1870, the Chancery Court has jurisdiction to appoint guardians for minors who are not orphans.

2. *Same.* And an appointment of a guardian by the Probate Court, prior to 1865, for a child who had a father living, was void, and all subsequent proceedings were void, including the bond; *Stewart v. Morrison*, *supra*; *Earle v. Crum*, 42 M. 165. But the guardian so illegally appointed, is, nevertheless, liable in chancery, for the property of the ward which has come into his hands; *Earle v. Crum*, *supra*.

2. Who entitled to Guardianship.

3. *Next of kin.* Where no testamentary guardian has been appointed by the father, on his death, the mother has the legal right to the guardianship of the children under fourteen years of age, and after her, the next of kin to the children; which right of the nearest of kin, the Probate Court is bound to recognize, if there be no objections to his qualifications and competency. And if the Probate Court, in the exercise of its discretion as to the appointment of a guardian, reject the next of kin, who is suitable, in favor of a stranger, the High Court will reverse the action; *Spaun v. Collins*, 10 S. & M. 624.

4. *Same.* Under the statute (H. C. 504, §25), which directs that the Probate Court in selecting a guardian, shall give the preference in all cases to the natural guardian or next of kin, if any such apply and tender the proper security, unless such applicant be manifestly unsuitable, the court has a great latitude in deciding upon the qualifications of an applicant; but the discretion is not arbitrary, and uncontrollable; and if the claims of the next of kin, who is qualified, be rejected in favor of a stranger, it will be error; *Allen v. Peete*, 3 C. 29; S. P., *Farrer v. Clark*, 7 C. 195. And if the preponderance of the proof be in favor of the fitness of the natural guardian already appointed, he should not be removed; *Whitney v. Whitney*, 7 S. & M. 740.

6. *The right of next of kin is personal, and is not assignable.* The right of the next of kin is personal, and is a mere right to be appointed, and not a right to select another, or control the court in its appointment; *Spaun v. Collins*, 10 S. & M. 624; *Farrer v. Clark*, 7 C. 195; *Hamilton v. Moore*, 3 G. 205. If the next of kin waive the right, then his recommendation of another is not binding on the court; the next in degree of kindred to the one making the waiver will be entitled; *Spaun v. Collins*, *supra*. And if the mother marry, the right does not go to her husband; but she though a married woman, by her husband's consent, may be appointed; *Farrer v. Clark*, 7 C. 195.

7. *Unfitness of next of kin: Case in judgment.* The court decreed the guardianship to a stranger, in preference to the next of kin, upon proof that the appointee was a man of family, and had a residence; and that the next of kin was unmarried, and was of good habits and morals: *Held*, error; *Allen v. Peete*, 3 C. 29.

8. *Right of orphan to select guardian.* Where no testamentary or other guardian

has been appointed by the father of an orphan, the latter on his arrival at the age of fourteen years, may select his guardian, although the Probate Court had previously appointed a guardian for him; *Sessions v. Kell*, 1 G. 458.

8a. *In what court appointed.* The Probate Court of the county in which the minor resides, has the jurisdiction to appoint a guardian for him; *Herring v. Goodson*, 43 M. 392.

3. Void Appointment of Guardian.

9. *Appointment when the office is filled.* When the power given to appoint to an office has been exercised, any subsequent appointment will be void, unless the incumbent has been legally removed, and the office made vacant; and this rule applies to the appointment of administrators and guardians; *Thomas v. Burrus*, 1 C. 550.

10. *Effect of void appointment.* Where the appointment of a guardian is void for any cause, a bond given by him to execute the duties of the office, is also void. The appointment gave him no power or rights, and imposed on him no duties or responsibilities. And the bond reciting that he is guardian, is no estoppel to him to deny it. The bond being void, cannot operate as an estoppel; *Id.*; S. P., *Stewart v. Morrison*, 9 G. 417; *Earle v. Crum*, 42 M. 165. See *ante*, 2.

II. Accounts of Guardians.

1. Final Accounts.

11. *Made without notice.* The Probate Court is not authorized to pass the final account of a guardian, without giving notice as required by the statute; *Moore v. Cason*, 1 H. 53. See EXECUTOR AND ADMINISTRATOR, sub-division Final Accounts, 51, *et seq.*

12. *Allowance of, must be entered on the minutes.* The endorsement by the probate judge in vacation, on a final account of a guardian of "examined and allowed," is not valid as a decree on final settlement, and is no evidence that the balance struck is correct; *Moore v. Cason*, 1 H. 53. The decrees and orders of the Probate Court in matters of guardianship, must be entered on the minutes of the court, including an order to exceed the income of the ward; *Gilbert v. McEachen*, 9 G. 569 (citing *Burney v. Boyett*, 1 H. 39; *Dickson v. Hoff*, 3 ib. 165; *Russell v. McDougall*, 3 S. & M. 234; *Steen v. Steen*, 3 C. 513). See PROBATE COURT, 181.

12a. *Effect of on guardian's claim against ward.* A guardian, who had made a final settlement, brought suit against the ward for board, clothing, &c. It appeared that on the final settlement the guardian had asked credit for the claim, and that it was rejected on the ground that there was no previous order allowing the guardian to make the expenditure: Held, that the claim was barred by this decision, and the plaintiff could not recover; *McKee v. Whitten*, 3 C. 31.

13. *Final settlement on removal of guardianship to another county.* If a guardian

make a final settlement with the view of removing the guardianship to another county, any cash balances found against him on that settlement should be reported to the court to which the guardianship is removed. But the final settlement is only conclusive and final as to matters embraced in it; it does not prevent the ward from holding, in the court to which the transfer is made, the guardian liable for assets received before the final settlement and not embraced in it; *Crum v. Gerock*, 40 M. 765.

14. *Set aside for fraud.* A decree allowing the final account of a guardian, made on due notice, may be set aside for fraud, by bill in equity, but the fraud must be proven; *Hooker v. Hooker*, 2 G. 448.

As to effect of final account as to guardians, see PROBATE COURT 187a, 190a. EXECUTOR AND ADMINISTRATOR, 68.

2. Annual Accounts.

15. *Duty in respect to annual accounts.* The chancery rule, that an account will not be decreed, unless there be an apparent indebtedness, does not apply to cases of guardians called to account in the Probate Court, it being their duty by statute, to render accounts annually, showing the condition of the estate; *Whitney v. Whitney*, 7 S. & M. 740. And he must report annually a faithful account of all his actions and doings, and the increase and change in the property and assets, and obtain, at each accounting, the sanction of the court for his actions; *Adams v. Westbrook*, 41 M. 385; *McFarlane v. Randle*, 41 M. 411. And the accounting must be specific and not general; a statement that the income and expenditure are about equal, will not do; *Whitney v. Whitney*, 7 S. & M. 740. And if, in rendering his account, he fail to report also the income, he will be liable for interest on so much as is unreported; *Reynolds v. Walker*, 7 C. 250; S. P., *Roach v. Jelks*, 40 M. 754. And a guardian will become personally responsible when he fails to make such report as will enable the court and the parties interested to ascertain and identify what debts and claims belong to the estate; also, where he chooses to charge himself individually with money, or chooses in action, or mingles the same with his individual assets, or manages it, so as to render it impossible for the court to distinguish the estate in his hands from his own; *McFarlane v. Randle*, 41 M. 411.

16. *They are prima facie correct as to ward: Conclusive as to guardian.* The partial or annual accounts of a guardian, made without notice to the ward, are *prima facie* correct as against the ward, but subject to be impeached by him; *Heard v. Daniel*, 4 C. 451. But they are conclusive as to the guardian; *Johnson v. Miller*, 4 G. 553; S. P., *McFarlane v. Randle*, 41 M. 411.

17. *Same: Correction of mistakes.* But the rule making the accounts conclusive as to the guardian, is not applied with undeviating strictness, so as to prevent the correction of mistakes appearing on the face of the record;

McFarlane v. Randle, 41 M. 411 (citing *Johnson v. Miller* 4 G. 553; *Effinger v. Richards*, 6 G. 540; *Crump v. Gerock*, 40 M. 765). And such error may be corrected on final settlement, without resort to a bill of review; *Crump v. Gerock*, *supra*.

18. *Same: Conclusive against guardian as to kind of funds mentioned in the accounts.* The annual accounts of a guardian are conclusive, however, as to the kind of assets in the guardian's hands, whether money or choses in action, or depreciated currency. If the accounts show so much money in his hands, it will be presumed constitutional currency, and not Confederate notes or choses in action; and he will not be permitted to show afterwards that it was not money; *McFarlane v. Randle*, 41 M. 411 (citing *Bailey v. Dilworth*, 10 S. & M. 404); *S. P., Coffin v. Bramlett*, 42 M. 194.

See PROBATE COURT, 187, 190a. EXECUTOR AND ADMINISTRATOR, 68.

19. *Same: Case in judgment.* M. was appointed guardian in 1855, and returned to the court \$1200 as belonging to his ward, which, in his inventory he stated was loaned out on good security. In June, 1855, he made his first annual account, charging himself with this sum and \$3,400 more, as cash, stating, after deducting credits, a "balance on hand of \$3,668." In his second account he charged himself with the "amount on hand" as shown by former settlement, and interest; and he continued returning similar accounts up to 1864, charging himself with interest, except in the accounts of 1863 and 1864. No order was made to loan the money, nor was there anything on record to show that the money was ever loaned. In October, 1863, the guardian reported he had \$700 in money on hand, and could not loan it, and did not desire to use it, and asked to be excused from interest, and that owing to the disturbed state of the country it was unsafe to invest it. In January, 1864, the court granted the prayer of the petitioner. In August, 1865, the guardian presented his eleventh annual account, in which he stated that the balance on his last settlement was for Confederate treasury notes, collected from various parties to whom loans of the ward's money had been made, and he claimed a credit therefor, as for so much lost currency: *Held*, that it was his duty to have reported the collections when made in Confederate States treasury notes, as made in that way; that he could not, after returning, from 1855 to 1865, annually, so much cash in his hands; nor, after Confederate treasury notes had become worthless, show that in the meantime he had, contrary to his returns, invested the whole of the ward's estate in a depreciated currency. That in his petition in October, 1863, there was an admission that the balance in his hands was money; and it is unaccountable, on any other hypothesis, that he and the court should deem it proper to keep on hands the funds of the ward. If they were in Confederate money, it was constantly and rapidly depreciating. And that parol

evidence was inadmissible to contradict the record, which showed that the balance was due in money, which means constitutional currency; *McFarlane v. Randle*, 41 M. 411.

20. *Same: Another instance.* And the foregoing principles were applied so as to prevent a guardian who had for a long series of years returned the estate of his ward as cash, and charged himself with interest on cash balances, from showing by parol that the balance was not in cash due by him, but that he had loaned the money to others, and the balance due by him was in notes of the borrowers; *Adams v. Westbrook*, 41 M. 385.

3. Principles of Guardian's Accountability.

21. *When held to a strict accountability.* The office of guardian is one of trust and confidence, the duties of which are to be performed solely with an eye to the advancement of the ward's interest. A guardian having performed his trust ought to be liberally compensated. If, however, it shall appear that he has abused the confidence reposed in him by the law, and has looked to his own private gain instead of the true interest of his ward, he is entitled to no special favor, and ought to be held to a strict accountability according to the most strict and rigid rule of law; *Frelick v. Turner*, 4 C. 393; *S. P., Gully v. Dunlap*, 2 C. 410.

22. *Liable for loss when they deviate from their duty.* Guardians and other trustees so long as they keep themselves within the line of their duty, and exercise reasonable care and diligence, cannot be made responsible for any loss or depreciation in the fund intrusted to them. If, however, they do not pursue the strict line of their duty, and in consequence thereof a loss ensues, they will be held liable for the loss. Thus, if the trustee deposits the trust funds in his own name in a bank, mingling it with his own deposits, and the bank fails, he is liable, and so if he invest the trust fund in his own name in stocks, and the stocks become worthless, he is liable. Hence, where a guardian invested the money of his ward in Confederate bonds, without authority from the Probate Court, and took the bonds in his own name, he will be responsible; *Coffin v. Bramlett*, 42 M. 194. See *post*, 68, *et seq.*

III. Expenditures of Guardian for Ward.

1. Exceeding Income.

24. *Cannot exceed income without previous order of court.* The guardian cannot, without a previous order of the court, exceed the income of the ward in expenditures for him. The amount of expenditure by a guardian is to be settled by the court, which may, if it sees proper, allow the guardian to exceed the income, and may order a sale of property to meet the excess over the income; but there is nothing in the law authorizing the guardian to create debts for the ward, and make expenditures at his discretion; *Moore v. Cason*, 1 H. 53; *S. P., Scott v. Porter*, 44 M. 364.

25. *Same.* It is the duty of the guardian to procure from the Probate Court an order

fixing in advance the amount of his expenditures for the ward; but if he fail to do so, the Probate Court may, nevertheless, allow him to retain out of the income of his ward the amount so expended; but he cannot retain any part of the *corpus* or principal of the ward's estate, without an order made in advance allowing him to expend principal; *Austin v. Lamar*, 1 C. 189; S. P., *Brown v. Mullins*, 2 C. 204. A subsequent allowance by the court on the guardian's annual account, where the expenditures are for maintenance and education of the ward, is not sufficient; *Gilbert v. McEachen*, 9 G. 469.

26. *Same: Modification of rule.* A guardian has no right to exceed the ward's income in expenditures. It is only in very special cases, which could not be foreseen, that the court ought, under any circumstances, to allow such expenditures in excess of income made without the previous order of the court; *Frelick v. Turner*, 4 C. 393.

27. *Order of allowance must be on the minutes of court.* And such an order, allowing the guardian to exceed the income of his ward, must appear on the minutes of the court, and cannot be established by a written memorandum of the judge made on the inventory, or other paper relating to the guardianship, or by parol; *Gilbert v. McEachen*, 9 G. 469.

27a. *Presumption in favor of the order.* But when expenditures exceeding the income are allowed in the final account of the guardian, and there is nothing in the record to show the contrary, it will be presumed on appeal, that the order to exceed incomes was regularly made; *Scott v. Porter*, 44 M. 364.

2. Improvement of Ward's Estate.

28. *Power to improve on a credit.* The Probate Court has no power to authorize a guardian to erect a building on the land of his ward on a credit, or to bind the land for the cost of the improvement; and where, under an order authorizing the guardian to erect a building suitable to the interest of the ward out of his funds, the guardian erected a building, which after exhausting the money of the ward, left a balance due the mechanic, it was held that the mechanic had no lien for the balance. But it was said by the court, that in deciding against the lien, they made no decision as to the mechanic's right against the guardian, nor as to his right to subject the rents of the ward's land to his debt, to the extent that the rent had been increased by the improvement; *Payne v. Stone*, 7 S. & M. 367.

3. Purchase of Property for Ward.

29. *Sale by guardian to ward.* A father, who was guardian for his son, used the son's money, and afterwards being embarrassed, conveyed to the son a slave, but without authority from the Probate Court, and he did not return an inventory of the slave until after the slave was levied on for the guardian's debt: *Held*, that the father could not make an investment of the son's means without authority from the Probate Court, and

that the slave was liable for the father's debts *Davis v. Harris*, 13 S. & M. 9.

30. *Purchase without order of court.* The guardian has no power to buy a slave for his ward, but if he do so, and the ward after coming of age ratify it, the guardian will be entitled to a credit for the price at the date of the purchase, and be liable for hire from that time; *Brown v. Mullins*, 2 C. 204.

31. *Same.* Without an order of the Probate Court, the guardian has no power to invest the ward's money in land or other property for the use of the ward, but if he do so without such order, the ward has an election when he arrives at majority, whether he will take the property or the money. This old rule of law has not been abolished by the statute which authorizes the Probate Court to grant such an order to invest the ward's money. That statute was intended merely to give the guardian the power to make such investments with the sanction of the court, and thus vest the title to the property purchased, legally in the ward, and destroy the ward's right of election when the property was purchased in pursuance of such order. But it was not intended to invalidate purchases, made by the guardian without the sanction of the court, if the ward, on arrival at full age, should ratify them. Hence, if the guardian without an order of court, invest the ward's money in the purchase of a slave, taking the title in the ward's name, the slave will not be liable for the guardian's debts, if the ward elect to take the slave. The case of *Davis v. Harris*, ante, 29, declared not inconsistent with this: *Gully v. Dunlap*, 2 C. 410.

IV. Dealings between Guardian and Ward.

1. Private Accounting between them.

32. *Is looked on with suspicion.* Courts look upon settlements made by guardians with their wards recently come of full age, with distrust, and will not hold them valid, unless made with the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian; *Sullivan v. Blackwell*, 6 C. 737. See PROBATE COURT, 194.

2. Wills in favor of Guardians, and other Contracts.

33. *Dealings between trustee and cestui que trust watched with jealousy.* The law watches, with the greatest jealousy, transactions and dealings between guardian and ward, attorney and client, and other persons standing to each other in the relation of authority on the one hand, and dependence and confidence on the other, and will not permit them to stand, unless the circumstances demonstrate the fullest deliberation on the part of the ward, client, &c., and the most abundant good faith on the part of the guardian, attorney, or other trustee; *Meek & Thornton v. Perry and Wife*, 7 G. 190.

34. *Same: Guardian and ward.* In transactions between guardian and ward, the law, upon a principle of public policy, and to protect the ward against the effects of over-

weening confidence and self-delusion, and the infirmities of a hasty and precipitate judgment, presumes the existence of undue influence on the part of the guardian, and therefore such dealings are *prima facie* void, and will be so held, unless the guardian show by the clearest proof that he dealt with the ward exactly like a stranger, taking no advantage of his influence over him, or of his superior knowledge in relation to the subject matter of the transaction, and that the ward's act was the result of his own volition, and upon the fullest deliberation; *Ib.*

35. *Same: Wills.* The principles of law which protect the interests of wards in transactions with their guardians, extend to wills made by them in favor of their guardians; and hence, a testament made by a ward in favor of his guardian will be held void, for want of capacity in the testator, unless the legal presumption in favor of undue influence be rebutted (Handy, J., dissented); *Ib.*

V. Rights and Powers of Guardian.

1. His Purchase of the Ward's Property.

36. *Trustee has no power to buy: Sale set aside.* Whenever the trustee sells the trust estate, and becomes himself the purchaser, the sale may be set aside at the option of the *cestui que trust*, as a matter of course, and without regard to the fairness or unfairness of the sale. The trustee will not be permitted to buy the trust estate in any event. And in setting aside the sale, if made under a decree, the court will order the property resold, and if it should not bring a higher price on the second sale, then the original sale will be confirmed; or the court may, in its discretion, set aside the sale entirely, if necessary, and order the purchase money to be refunded to the trustee. And these rules are applicable to purchases made by a guardian of his ward's property; *Scott v. Freeland*, 7 S. & M. 409; *S. P., Jones v. Smith*, 4 G. 215, for which see TRUSTS AND TRUSTEES 71, 72, 73.

37. *Same: Cestui que trust's waiver: Affirmance by delay.* But in such a case the *cestui que trust* must, in a reasonable time after he comes to a knowledge of the sale, or if he be a minor, then in a reasonable time after his disability has been removed, take steps to set aside the sale, or else his assent to, and ratification of, the purchase will be implied. What is an unreasonable delay in setting aside the sale, cannot be accurately laid down; each case will be governed by its own circumstances. But in this case, four years' delay was held to be unreasonable, and to amount to an affirmation of the sale. One of the strong circumstances to show ratification, is the failure to take immediate steps to set aside the sale on the ward's coming of full age; *Ib.*; *S. P., Jones v. Smith, supra.*

38. *Ratification of such purchase by chancery.* A court of chancery would not give its sanction to a purchase of the realty of his ward, made by a guardian under a sale by the guardian, after the lapse of six years from the sale, when it did not appear

that he had paid the ward the purchase money; *Hoel v. Coursey*, 4 C. 511.

2. Guardian's Power to Arbitrate, Compromise, and Bring and Defend Suits.

39. *Guardian may submit to an award.* A guardian may submit to arbitration the interest of his ward in a money demand; and such submission is binding on the guardian, and therefore on the other party. Whether the infant is concluded by an award, not decided; *Goleman v. Turner*, 14 S. & M. 118; *McComb v. Turner*, *ib.* 119.

40. *Power to compromise.* An agreement made by the guardian of an infant by which a suit in equity in favor of the infant, was compromised on beneficial terms to him, and which was adopted by the chancellor in the decree rendered in the cause, and afterwards approved by the Court of Probates, will not be set aside as void at the instance of the infant, without any reason being alleged therefor; *Dunlap v. Petrie*, 6 G. 590.

41. *His power to defend suits against ward.* Previous to the Act of 1846 (H. C. p. 682, § 12), a general guardian was not a proper person to represent his ward in any judicial proceeding against the ward, either in the Probate or any other court; notice of such suit was not required to be served on him, but on the infant; he was, therefore, incompetent to appear in the Probate Court, and waive notice to his ward of a final settlement of an estate in which the ward was interested; and a decree allowing such settlement on such waiver is void; *Wade v. Bridewell*, 9 G. 420.

44. *Power to petition for distribution.* A petition in Probate Court for distribution of an estate in which the ward is interested, may be filed either in the name of the guardian, or in the name of the ward; *Keith v. Jolly*, 4 C. 131.

45. *May employ an attorney.* A guardian may employ an attorney to prosecute or defend suits in which the ward is interested, and is entitled to an allowance for fees paid to such attorney; *Brown v. Mullins*, 2 C. 204.

3. Guardian's Title.

46. *Is invested with legal title to choses in action of ward.* A trustee is clothed with the legal title, whenever it is necessary to enable him to execute a trust created by law; and hence, it being the duty of a guardian to collect all debts due to his ward, he may maintain an action in his own name to enforce the collection of a note payable to his predecessor "as guardian" for the ward; *Cock v. Rucks*, 5 G. 105. *Sed vide post*, 49.

47. *Title after discharge of guardian.* *Prima facie*, the legal title to a bill single, payable to the obligee as guardian of a minor, remains in the obligee, notwithstanding his final discharge as guardian; and hence, such discharge is no obstacle to his maintaining an action thereon, unless it be also shown that he has parted with his title, or that a

payment to him would be no discharge to the obligor; *Chambliss v. Vick*, 5 G. 109.

See EXECUTOR AND ADMINISTRATOR, 141a.

4. Title to Foreign Assets.

48. *Same*. A guardian has no power over the property of his ward beyond the jurisdiction in which he received his appointment; *Grist v. Forehand*, 7 G. 69. See post. 81, 82.

49. *Guardian's title to personalty: Foreign assets*. The reduction into his possession by an administrator, of the movable property of his intestate, in the jurisdiction in which he received his appointment, vests in him the legal title, and he becomes to all intents and purposes the legal owner of it, though only as trustee in that jurisdiction; and his title and ownership thus accrued will be respected in every other country. But the rule is different in relation to a guardian, for the legal title to the property of his ward does not vest in him, but remains in the ward, and he is simply an agent or trustee for its management; and hence, he cannot sue for the recovery of his ward's movable property in another jurisdiction, although he may have reduced it into possession in the jurisdiction in which he received his appointment; *Ib*. See *vide ante*, 46.

5. Guardian's Right to Commissions.

50. *By what principle allowed*. When the conduct of a guardian in the management of the ward's estate is just and fair, the allowance of commissions should be liberal; *Adams v. Westbrook*, 41 M. 385; S. P., *Heard v. Daniel*, 4 U. 451. If, however, he has abused his trust and has looked to his own private gains, instead of his ward's interest, he is entitled to no favor; *Heard v. Daniel*, *supra*.

51. *Promise by ward to pay commissions*. A promise by a ward to pay his guardian "fair commissions" for his services, is a mere promise to pay what may be allowed by the appropriate tribunal according to law; and hence, when there was such a promise and there was no final settlement between the guardian and ward, the Probate Court can alone determine the amount of commissions to be allowed; *Ratliff v. Davis*, 9 G. 107.

VI. Sales by Guardians.

52. *Sales contrary to will*. A sale by a guardian, of his ward's interest in land which he derived under a will, which directed that the land should not be sold until the testator's youngest child became of age, is void, if made before that time. Such a provision binds the guardian as well as the executor; *Shipp v. Wheelless*, 4 G. 646.

53. *Remedy of purchaser where sale is illegal*. A purchaser of land at a guardian's sale, may set up the illegality of the sale, as a defence to an action at law for the purchase money; and if he fail to do so without just cause, he cannot afterward come into equity for relief against the judgment. And if he come into equity for a rescission, he must offer

to restore the possession and account for the rents and profits; *Ib*. And the purchaser of a chattel, at an illegal sale by a guardian, cannot avoid the sale at law without an offer to return the chattel; *Cocke v. Rucks*, 5 G. 105. But if the sale be merely erroneous, the purchaser cannot resist payment of the purchase money; the decree is valid till reversed; *Storm v. Smith*, 43 M. 497.

See EXECUTOR AND ADMINISTRATOR, 339, 340.

54. *Authority to sell ward's land by private act of Legislature*. The Legislature may, by a special and private act, authorize the land of an infant to be sold by a guardian, thereafter to be appointed; *McComb v. Gilkey*, 7 U. 146. And such power may also be granted to a foreign guardian; *Boon v. Bowers*, 1 G. 246; S. P., as to administrators; *Williamson v. Williamson*, 3 S. & M. 744.

55. *Same: Decree of Probate Court*. Where such authority is given by private act, upon terms and conditions to be prescribed by the Probate Court, it is unnecessary for the guardian to give notice to the infant of his application to the Probate Court to fix the terms and conditions, for he derives his power to sell from the private statute, and not from the decree of the court; *Ib*.

56. *Same: Where election as to the land to be sold is given to guardian*. And if such a statute gives an election to the guardian, as to which of the several lots of the infant he shall sell under the power therein granted, such election should be allowed to continue under the order of the Probate Court fixing the terms and conditions of the sale; *Ib*.

57. *Same: Private sale*. And if both the statute and the order of the Probate Court fixing the terms of the sale, be silent as to whether the sale shall be public or private, it is in the discretion of the guardian which he will adopt; *Ib*.

58. *Same: Case in judgment*. And where in such a case, the court prescribed that the sale should not be for less than \$8,000, and the guardian, in making the deed, had his wife, who had a dower interest in the land, to join in the deed, and the deed purported to be made under the private act, and to convey all the interest of the ward, and also of the grantors, for \$8,000, and he took the purchaser's notes for that sum, payable to himself as guardian, it was held proper to submit the question to a jury, whether the ward's interest had been sold for less than \$8,000, and the jury, finding that the ward's interest had not been sold for less than \$8,000, the verdict was held to be warranted by the above facts—the acts of the parties showing a surrender of the wife's dower for the benefit of the ward, who was her child. And it was further held, that the fact that two years afterwards, the guardian claimed, in his inventory, one-third of the purchase money for his wife, did not affect the sale, which had already been made and confirmed; *Ib*.

58a. *When sale of realty reported*. A guardian's sale of realty should be reported

at the term of the court next succeeding the sale. The notice of sale may be regarded as notice to the ward to attend at that term, and make his objections to the sale. A confirmation of the sale on a report made after that term is made without notice and void; *Hoel v. Coursey*, 4 C. 511.

See PROBATE COURT, 55, *et seq.* See also *post*, 58b.

58b. *Statutes: Sale for division and for interest of ward.* Art. 151, p. 463 of the Rev. Code of 1857, provides for a sale of the ward's lands when it is for the interest of the ward that the sale shall be made. It requires the petition to be under oath, and to be presented at least one month before a decree can be made, and that the court shall appoint a day for hearing the petition, and that the co-heirs of the ward, and at least three of the nearest relatives of the ward in the State, shall be summoned.

Art. 153, p. 464 of that code, provides for a sale of the ward's joint and undivided interest in land which has descended or been devised to him and others jointly, when the land cannot be divided conveniently; that the guardian may petition the court in which letters of guardianship were granted, "for an order to sell his ward's share or interest in the land, and the court, after summoning the co-heirs or co-devisees, may proceed to hear such application, and if it should deem it proper, may make a decree of sale of the ward's interest, as in other applications for the sale of real estate by guardians, and the sale and report thereof shall be made in like manner, and subject to all provisions of other sales made by guardians; or the court may order the whole of such real estate to be sold and the proceeds to be divided among and secured to the persons entitled thereto."

58c. *Same: Case in judgment.* A petition (which was not sworn to) was filed by the guardian of a minor who was a co-devisee of land, for a sale thereof, in which it was stated that the land devised was mostly in a plantation, which was getting out of order, and could not be rented and kept up for any fair interest on its value, and that it would be greatly to the ward's interest to have his undivided interest therein sold, and that it would bring a fair price, and that owing to the location of the land, it cannot be divided among the owners without great loss to them, and that it would be for the interest of all the owners, including the ward, that the land should be sold, and the proceeds divided: *Held*, that this petition was a proceeding under art. 153, and not under art. 151 (*ante*, 58b), and that the validity of the proceeding was to be determined by art. 153; *Hanks v. Neal*, 44 M. 212.

58d. *Same.* This petition was filed on the 6th of September, and summons was issued for the co-heirs alone, (none for the ward nor the three nearest relatives) returnable to the succeeding October term, and was served on all the parties. The October term of the court failed, and at the November term a de-

creed was made directing a sale of all the land and a division of the proceeds.

Held, 1st. That by the failure of the October term the cause was continued by operation of law, to the November term, and a decree could then be made.

2d. That it sufficiently appeared from the petition, that the land could not be conveniently divided.

3d. That by art. 153, the petition was not required to be verified by oath, nor a day appointed by the court for the hearing, nor three of the nearest relatives summoned, as required in art. 151, and that portion of art. 153 which requires a conformity to other sales by guardians, applies alone to the decree, sale, and report.

4th. That art. 153 does not require that the ward of the petitioning guardian shall be summoned, but only the co-heirs or co-devisees; *Ib.*

58e. *Same: Notice of the sale.* The notice given by the commissioner of the sale, was not in accordance with the decree, but the sale was, notwithstanding, confirmed: *Held*, that the sale was valid; that the irregularity of the commissioner in making the sale would not affect the rights of a bona fide purchaser, (citing *Miner v. Natchez*, 4 S. & M. 602; *Bland v. Muncaster*, 2 C. 62); *Ib.*

See EXECUTOR AND ADMINISTRATOR, 381, 352, 352a. SHERIFF AND SHERIFF'S SALE, 95, 96.

58f. *Same: Report of sale.* The report of the sale, as recorded, the original being lost, showed a discrepancy in the quantity and numbers of the land sold, by omitting a part, as compared with the decree and the deed to the purchaser, but it stated that the commissioner, being appointed by the court to sell the real estate of the late S. J., (the testator), containing 640 acres (which was the true number), did, after giving notice, sell said land, at \$9 per acre, to H., amounting to \$5,760. The order of confirmation stated that the report of the commissioner appointed to sell the real estate of S. J., described in the decree, was examined and confirmed. *Held*, that these facts sufficiently showed that the 640 acres ordered in the decree to be sold, had been sold, and that the discrepancy in the report was a clerical misprision, and the sale was good; *Ib.*

See CHANCERY, 111.

VII. Guardian's Liabilities and Duties.

1. Liability for Interest.

58g. *Liability for interest on balances in his hands.* The statute (H. C. § 133, p. 506), provides that, "Every account of a guardian shall state his expenditures * * not exceeding the income of the ward, unless allowed by the court; and for no balance of money in his hands shall he be charged interest, unless he consent to take the same at interest; but the court may direct him to place the same at interest, taking bond to the orphan, with security to be approved by the court." The term "balance" here used refers to the whole balance against the guardian, including the

money returned in his inventory as a part of the corpus of the estate, as well as the balance of income, after deducting the expenditures; and the guardian is not liable for interest on such balance mentioned in the statute, unless he consent to take it at interest, or he be ordered to loan it (overruling *Brown v. Mullins*, 2 C. 204; and confirming *Austin v. Lamar*, 1 C. 189; and *Hendricks v. Huddleston*, 5 S. & M. 422); *Reynolds v. Walker*, 7 C. 250; S. P., *Roach v. Jelks*, 40 M. 754; *Crump v. Geroch*, 40 M. 765; *Hendricks v. Huddleston*, *supra*; *Coffin v. Bramlitt*, 42 M. 194; *Johnson v. Miller*, 4 G. 553.

See EXECUTOR AND ADMINISTRATOR, 253, *et seq.*

59. *Same: Liable if he use it or fails to make reports, &c.* But where he has used the money, or loaned it out, or failed to render his annual accounts, showing the condition of the ward's estate, and thereby prevented a profitable disposition of it by order of the court, he is liable for interest. And so if in rendering his accounts he fail to report all the income, he will be liable for interest on the unreported amount; *Reynolds v. Walker*, *supra*; *Roach v. Jelks*, 40 M. 754; S. P., *Johnson v. Miller*, 4 G. 553; *Brown v. Mullins*, 2 C. 204.

60. *Liability for interest where he hires ward's slaves.* If a guardian by permission of the court, hire, for his own use, the slaves of the ward, and return the amount of the hire as cash in his annual accounts, this will not make him liable for interest on the amount so reported; but the rule in relation to that fund will be exactly like the rule in relation to any other cash balance in his hands; *Crump v. Geroch*, 40 M. 765.

61. *Same: Agreement to pay interest: Case in judgment.* And it is not sufficient to prove an agreement of the guardian to pay interest, that in a bill in chancery against another party, the guardian stated he was liable for interest on the fund in his hands belonging to the ward; this was but a statement of his opinion on a matter of law, and not the admission of a fact; *Ib.*

See EVIDENCE, 16. ATTORNEY AT LAW, 57.

62. *Same: Liability on unreported balance.* If a guardian make a final settlement of his accounts in the court in which he was appointed, with the view of removing the guardianship to another county, any cash balance against him on that settlement, must be reported to the court to which the guardianship is removed, and if he fail to do so, he will be liable for interest on the amount; *Ib.*

63. *Liable for interest on good assets lost by his negligence.* A guardian is liable for interest on good securities belonging to the ward, and lost by him through his negligence; and he is also liable for the principal of the securities so lost; *Ib.*

64. *Compound interest.* When a guardian in his annual accounts, charges himself with compound interest on his ward's money remaining in his hands, it is an admission that he is chargeable with interest, and that he has used the money for his individual profit, and if no sufficient reason appear to the con-

trary, he should not be relieved of the charge so made, and held accountable for simple interest only; *Johnson v. Miller*, 4 G. 553.

65. *Liability for interest: Damages.* A guardian is not liable for interest where he has not used the ward's money, nor where he has neglected to procure an order to loan it, having kept it separate and apart from his own; but he may be liable, when the ward's whole property is money, in an action at law on his bond, for damages in such case, for not procuring such an order to be made, so as to make the ward's property produce an income; *Austin v. Lamar*, 1 C. 189. *See vide ante*, 58.

66. *Same.* As to the principal of the ward's estate, which is in money, the guardian is as much bound to loan it out and make it produce an income, as he is bound to hire out the ward's slaves, or cultivate his plantations. The statute (H. C. 506, § 133, *see ante*, 58) refers to a balance of annual income after paying ward's expenses, and not a general balance of all the money, principal and interest, in his hands; *Brown v. Mullins*, 2 C. 204, (overruled by *Reynolds v. Walker*, 7 C. 250, and other subsequent cases. *See ante*, 58).

See EXECUTORS AND ADMINISTRATORS, 253, *et seq.*

2. Guardian's Liability for Costs.

67. *When so liable.* When a guardian's accounts have become complicated and confused by his own fault, he should be taxed with the whole costs of a proceeding instituted to ascertain the true balance in his hands; *Frellick v. Turner*, 4 C. 393.

3. Guardian's Liability for Losses from his Negligence.

68. *Liable for loss of securities.* A guardian is liable for good securities belonging to the ward, and received by him as such, and which have been lost by his negligence. He is also chargeable with interest on the security so lost; *Crump v. Geroch*, 40 M. 765. *See ante*, 21, 22.

69. *Liable for investing in depreciated currency.* A guardian who takes at interest the par funds of his ward, and subsequently loans the same to others, and receives payment of such loans in a currency which, at the time, was greatly depreciated, and was daily diminishing in value; or loans with the right to the borrower to pay in such funds, is liable for the loss thereby occasioned. But if he act in good faith, and with a due regard to the interest of the ward, and receive, in the usual course of business, paper money, the circulating medium at the time, which afterwards depreciated and became worthless, he will not be chargeable with the loss; *Coffin v. Bramlitt*, 42 M. 194.

4. Guardian's Liability for Loaning, or Investing and Depositing Money.

70. *Liable where he loans money without authority.* A guardian assuming to loan out the money of his ward in his hands, without

authority of the Probate Court, takes the risk, and in the event of loss is liable; *Ib.*

71. *Liability for deposit and investment in his own name.* A guardian (or other trustee), who mingles the trust funds with his own, thereby becomes a debtor to the fund. If he deposit the same in bank in his own name, and the fund is lost by the insolvency of the bank, the loss falls on him. And so if he invest trust funds in stocks in his own name, and the stocks become worthless; *Ib.* See *ante*, 21, 22.

VIII. Guardian's Bond, and Remedies Against Guardians.

See EXECUTOR AND ADMINISTRATOR, 95, as to giving of new bond.

1. Form and Conditions of the Bond.

72. *Condition of bond: Breach.* Under the statute of this State (prior to 1857), there were two conditions to the guardian's bond—one to account to the Probate Court, the other "to deliver up the ward's property, agreeable to the order of the court or the directions of law, and in all respects to perform the duties of guardian, according to law:" *Held*, that it was a breach of the last condition for a guardian who had been removed from office, to refuse to deliver up the ward's property to his successor, or to pay what was due in money, without any previous order of the Probate Court directing a delivery and payment, or fixing the amount due; and that a suit against the sureties on the bond could be maintained without procuring such previous order; *Burrus v. Thomas*, 13 S. & M. 452. The condition of the bond under the Act of 1857, Rev. Code, p. 460, art. 143, is substantially the same as the above.

73. *Bond void, when appointment is void.* Where, from any cause, the appointment of a guardian is void, his bond is also void. Such an appointment gives no rights or powers, nor imposes any duties or responsibilities; *Thomas v. Burrus*, 1 C. 550. See *ante*, 9, 10.

2. Actions on the Bond.

74. *Action on, without previous order of Probate Court.* As to this, see *ante*, 72; and *post*, 75.

75. *Same.* It is questionable whether the rule, requiring a previous order of the Probate Court before suit on an administrator's bond even, is universal. If such order be necessary in case of a guardian's bond, an order in these words would be sufficient, "That the bond be declared forfeited, and be put in suit;" *Burrus v. Thomas*, 13 S. & M. 459.

76. *Action on the bond: Averment of appointment of guardian.* As a general rule, it is not necessary, in declaring on a specialty to set out any inducement or statement of the consideration upon which the contract is founded; but the declaration usually proceeds at once to the statement of the execution and legal effect of the specialty. Hence,

in declaring on a guardian's bond, it is not necessary to aver that the principal obligor had been appointed guardian by the proper court; *Lum v. Springer*, 2 C. 479.

77. *Same: Statement of ward's interest and the breach.* And in such declaration where the relator is still a minor, if it be averred that the suit is brought "at the relation of the next friend and guardian of E. F., a minor;" and after setting out breaches prejudicial to the minor, the conclusion be, "By means whereof the said ward hath sustained damage, &c., by reason of which the said writing obligatory became forfeited, and thereby an action hath accrued," &c., it will be sufficient to show that the suit is brought for the benefit of the minor, at the relation of his next friend and guardian; *Ib.*

3. Other Remedies.

78. *Settlement of guardian's account only in Probate Court.* If a guardian, after the termination of his trust, execute a mortgage to his ward for a sum certain, as a security for what may be due by him on a settlement of his account, he cannot, in a suit by the ward in chancery to enforce the collection of the mortgage, have a settlement of his guardianship accounts, so as to use as a set-off to the mortgage, an alleged indebtedness of the ward to him on the accounts; but he must proceed in the Probate Court to have a settlement of the accounts between himself and the ward; *Raliff v. Davis*, 9 G. 107.

79. *Suit in equity against one who is both guardian and administrator.* An administrator was also guardian of several of the minor distributees of the estate, having executed separate guardian bonds for each: *Held*, that it was not competent for the heirs to proceed in equity against him in both capacities; *Wren v. Gayden*, 1 H. 365.

80. *Remedy against foreign guardian.* A foreign guardian removing to this State cannot be compelled to account in the Probate Court; the remedy against him is in chancery; *Robertson v. Banks*, 1 S. & M. 666. See *post*, 83.

80a *Fi. fa. in Probate Court against guardian.* Under the Rev. Code of 1857, the Probate Court is authorized to award an execution against a guardian for any balance found due his ward on final settlement; *Scott v. Porter*, 44 M. 364.

See PROBATE COURT, 152, 196a.

IX. Foreign Guardians.

81. *Rights granted to them here.* The statute (H. & H. 340, § 18) which authorizes a foreign guardian, whose ward has property in this State, to apply to the Probate Court and file a certified copy of his foreign letters of guardianship, and which also provides that upon such application and filing, the guardian giving bond as required, the court shall grant him all the rights exercised by other guardians, confers the power on such guardian, complying with the statute, to prosecute, in this State, an action to assert rights

of his ward, which accrued in the State in which he was originally appointed; *Hines v. The State of North Carolina*, 10 S. & M. 529.

82. *How foreign guardian may sue here.* By statute (Act of 1834, ch. 2, sec. 14, p. 69), a foreign guardian is authorized to maintain suits in the courts of this State, upon his filing in the Court of Probate of the proper county, a certified copy of his letters and his official bond, and upon his entering into bond here to account to the court from which he received his appointment, for all moneys he may receive in this State. And if such foreign guardian has commenced a suit here, without complying with this statute, he may afterwards perfect his right by complying with the statute; *Grist v. Forehand*, 7 G. 69. See *ante*, 48, 49.

83. *Remedy against foreign guardians.* A foreign guardian removing to this State, cannot be compelled to account in Probate Court; the remedy against him is in chancery; *Bell v. Suddeth*, 2 S. & M. 532. See *ante*, 80.

X. Miscellaneous.

84. *Guardian of lunatic: Inventory.* A guardian of a lunatic must return in his inventory a private debt due by him to his ward before his appointment; *Neill v. Neill*, 2 G. 36.

85. *Guardian's inventory evidence against his sureties.* An inventory returned by a guardian showing assets, is *prima facie*, but not conclusive evidence for the ward, in a suit against the guardian's surety; *State v. Stewart*, 7 G. 652.

See EVIDENCE, 75b.

86. *Revocation of letters of guardianship.* A mere stranger cannot move in the Probate Court for the revocation of the letters of a guardian; *Moore v. Cason*, 1 H. 53.

87. *Contracts in name of guardian.* A promissory note signed by a guardian thus: "A., guardian for B.," is the individual contract of A., and may be enforced as such; *Robertson v. Banks*, 1 S. & M. 666.

See EXECUTOR AND ADMINISTRATOR, 103, *et seq.*

88. *Surety's right to be released.* Under the statutes H. C. 658 & 676, the surety of a guardian, executor, or administrator, whenever he feels himself in danger of suffering on that account, may petition the court for a release or counter surety. Whenever such petition is filed, the surety is entitled to have the one relief or the other, and the court cannot refuse it because the court may think he is in no danger, nor because the court may think he is already fully indemnified by a deed in trust; *Foster v. Bisland*, 1 O. 296. But under the Rev. Code of 1857, p. 461, art. 145, which provides that "if the sureties of any guardian should apprehend danger, and desire to be discharged, they may petition the court for that purpose, and the guardian shall be summoned; and if on the hearing the court should be of opinion that the complaint is

well founded, the guardian shall be required to give new securities," &c., the rule is different. This statute does not give the surety a right to be released at his mere whim and caprice, but only when he shall show that he is in danger of suffering; *Coleman v. Lamar*, 40 M. 775. And it was said in this last case, that *Foster v. Bisland*, decided under a similar statute, was not inconsistent with this, and that nothing more was decided in that case than that the fact of a deed in trust having been given to indemnify the surety, will not preclude him from proceeding to be relieved.

See EXECUTOR AND ADMINISTRATOR, 93 to 95.

89. *Marriage of ward.* Under our statute, a minor female ward is entitled upon her marriage to receive her estate; *Wood v. Henderson*, 2 H. 893.

90. *Duty of ward to submit to guardian.* It is the legal duty of a ward to remain with his guardian, and to submit himself to his control; and hence, if he escape from the guardian and live with another, and then return to the house of the guardian in consideration of the promise of the latter that he would not charge the ward for boarding him, the promise of the guardian is void for want of consideration, and he may, nevertheless, rightfully charge the ward for boarding with him; *Keith v. Miles*, 10 G. 442.

91. *Statute of limitations against claim of guardian.* If a guardian, by mistake in law, return his own property as the property of the ward, and so treat it for eight years, his right to correct the mistake and set up claim to the property, will be barred by the statute of limitations; *Magee v. Keegan*, 6 G. 244.

92. *Liability on removal of guardianship to another county.* A guardian removing to another county and there executing a new bond according to the statute (H. C., p. 667, § 3), is liable on that bond for assets received and wasted during his guardianship in the county wherein he was first appointed; *State v. Stewart*, 7 G. 652. See *ante*, 13.

93. *Receiving assets in another State.* If a guardian appointed in this State receive money due his ward in another State, neither he nor his legal representatives can object that he had no authority to do so, in a proceeding to hold him liable therefor; the question of the authority to receive in such a case, can only be raised by the debtors or persons having possession of the assets in the foreign State, or by the ward himself; *Martin v. Stevens*, 1 G. 159.

94. *Power of guardian to give refunding bond.* A guardian may give a refunding bond to procure the distributive share of his ward. He may also file the petition for distribution in his own name; *Gammage v. Noble*, 2 C. 150.

95. *As to service of process on infant and guardian.* see INFANTS, 5, 22.

96. *As to right of guardian to possession of ward's person,* see HABEAS CORPUS, 10, *et seq.* PARENT AND CHILD, 5, 6.

Habeas Corpus.

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I. Generally.

1. *Is a writ of right.* The writ of *habeas corpus* is a writ of right to any person in custody who will make an affidavit that he is illegally detained; *White's Case*, 1 S. & M. 149.

2. *Slave asserting freedom.* It is not a proper remedy, however, by which a negro held as a slave may assert his right to freedom. He must pursue the remedy—petition to the Circuit Court—prescribed in the statute (H. & H. p. 166, § 48); *Thornton v. Demoss*, 5 S. & M. 609; *Sarn v. Fore*, 12 S. & M. 413.

3. *Judge of High Court may issue the writ.* Any judge of the High Court of Errors and Appeals has full jurisdiction to grant and try writs of *habeas corpus*, but the High Court has no power, as a court, to act, except on appeal or writ of error; per Judge Thatcher in *Ex parte Hickey*, 4 S. & M. 751.

4. *Discharge of prisoner for delay in prosecuting.* A party charged, with a crime is not under the 14th section of the Habeas Corpus Act, Poindexter's Code, p. 224, entitled to his discharge, when he has been in custody two terms without being indicted or presented, if there was a failure to hold both of those terms. To entitle the prisoner to a discharge, the State must be in default; *Byrns Case*, 1 H. 163.

5. *Where prisoners are in custody for contempt.* A person convicted and imprisoned for a contempt, in a case where the court making the conviction has jurisdiction to imprison for contempt, cannot be discharged from imprisonment by another judge, when brought before him on *habeas corpus*. The conviction, by the court, of the prisoner for contempt, is final and conclusive, and cannot be inquired into except on writ of error, if (which is doubtful) a writ of error even would lie; *Ex parte Adams*, 3 C. 883. In such a case a writ of error will not lie. See **CONTEMPTS**, 5, 6.

II. To Recover Slaves.

6. *The statute: The writ: When there has been change of possession: Evidence.* The statute authorizes, a writ of *habeas corpus* for the recovery of the possession of slaves taken or detained by force, stratagem, or fraud; but it only authorizes the writ to be issued against the party in possession of the slave at the time of its issuance. A *bona fide* change of possession before the writ issues, will defeat it as against the dispossessor, but a colorable change of possession will not. And the return by the defendant in such a case, showing that he is not in possession or has *bona fide* parted with it, is to be taken as true, unless overturned by the evidence. And the *ex parte* affidavit taken and read to procure the issuance of the writ, cannot be read in evidence on the trial; *Hardy v. Smith*, 3 S. & M. 316.

7. *The statute only applies for taking in this State.* This remedy for the recovery of slaves, where the petitioner has been deprived of the possession of slaves by force, stratagem, or fraud, applies only where the circumstances of taking or detention occurred in this State. It does not extend to a case, arising in another State, where the slaves were afterwards brought into this State; *Nations v. Alvis*, 5 S. & M. 338.

8. *The remedy lies only where the taking and detention is by force, stratagem, and fraud.* The remedy is allowable only where the slave has been taken from the owner by "force, stratagem, or fraud, and unlawfully detained;" and where it appears, on the trial, the slave was not so taken, the judge has no jurisdiction, and the writ must be dismissed. Hence, it will not lie against a sheriff who took the slave under proper process, but refuses to redeliver him, though so ordered by the court, until his fees are paid; *Steel v. Shirley*, 13 S. & M. 196. But the refusal of a party having no color of title to deliver up a slave upon the demand of the true owner, is such a fraud as to entitle the owner to the remedy; *Scudder v. Seals*, W. 154.

And the remedy does not exist where the petition for it shows that the slave "has gone into the possession of the defendant under a pretended contract of hire; that no such contract was ever made by any person having a right to make it, and the said slave is fraudulently and unlawfully detained by defendant;" *Buckingham v. Levi*, 1 C. 590.

9. *Does not lie against the owner in any case.* The possession of a slave by the true owner, though obtained by force or stratagem from a casual and wrongful possessor, will not be disturbed on *habeas corpus*; *Covington v. Arrington*, 3 G. 14^d.

III. By Guardian for Possession of Ward.

10. *Where the writ lies for a guardian.* It seems that on *habeas corpus*, by the guardian, to recover possession of his ward, the court will not interfere, unless it appear that the child is restrained of its liberty; *Foster v. Alston*, 6 H. 406.

11. *By guardian against mother of the ward.* The court will not disturb the mother's possession of her child, at the instance of the testamentary guardian, if it appear that the interest of the child will be best consulted by allowing it to remain with the mother. In this proceeding, the court has a discretion which it will not exercise against the right of the mother, if she be a suitable person to have the care and custody of the child, and it prefer to remain with her; *Ib.*

See **PARENT AND CHILD**, 5, 6.

Half Blood.

See **DESCENT AND DISTRIBUTION**, 11.

Hearsay.

See **EVIDENCE**, 332 to 335.

Heir.

See ANCESTOR AND HEIR.

See DESCENT AND DISTRIBUTION, 11 to 18.

1. *Patent to heirs.* Heirs to whom a patent is issued, in virtue of an inchoate donation by the government to the ancestor, take by descent and not by purchase; *Hackler v. Cabel*, W. 91.

See DESCENT AND DISTRIBUTION, 15.

2. *Bastards as heirs.* See BASTARDY.3. *Half blood as heirs.* See DESCENT AND DISTRIBUTION, 11.

4. *Title of heir: How divested.* Upon the death of an intestate, his land descends to his heirs, and their title cannot be divested, except by their voluntary act, or by regular sale, under a decree of a court of competent jurisdiction; *Root v. McFerrin*, 8 G. 17.

See PROBATE, 46a, *et seq.*

5. *Heirs, title joint and several: Statute of limitations.* The interest of co-heirs in the realty of their ancestor, is joint and several; and hence, in a joint action of ejectment by them, for its recovery, the statute of limitations will be applied to each of the several plaintiffs, in the same manner as if he had sued separately for his share; *Id.*

High Court of Errors and Appeals.

See APPEAL, WRIT OF ERROR, CHANCERY, sub-divisions Appeals, Writ of Error, Bills of Exception.

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I. Jurisdiction.

1. *Constitution.* Art. 4, section 4, of the Constitution of 1832, provides that "The High Court shall have no jurisdiction but such as properly belongs to a court of errors and appeals."

2. *Jurisdiction regulated by law: Has not exclusive appellate jurisdiction.* The constitution, in creating the High Court of Errors and Appeals, declared it should have such jurisdiction as properly belongs to a court of errors and appeals; but it did not define what that jurisdiction was. The object of the constitution was, to vest in the court appellate jurisdiction only; but not to vest in it jurisdiction in all cases of appeals, or a revising power in all cases. In what cases writs of error and appeals would be allowed, was left to be determined by the Legislature; and also in what courts these appeals from, and writs of error to, inferior courts should be tried. Hence, art. 33, p. 419, of the Rev. Code, which provides for appeals from the judgments of the Board of Police to the Circuit Court, and that the judgment of the Circuit Court should be final, is constitutional; and no writ of error or appeal, lies to revise that judgment in this court (citing *Servis v. Beatty*, 3 G. 52; *Briscoe v. Anketell*, 6 C. 361; *Coffman v. The Bank of Kentucky*, 40 M. 29; and overruling on this point, *Yalabusha Co v. Curberry*, 3 S. & M. 547); *Dismukes v. Stokes*, 41 M. 430.

And the same principle was applied in case of appeals from a justice of the peace to the County Court; *Miss. Cent. R. R. Co. v. Kennedy*, 41 M. 551; S. P., *Davis v. Wingfield*, 42 M. 251.

3. *As to habeas corpus.* Any one of the judges of the High Court has jurisdiction to grant the writ of habeas corpus, but the court cannot. It has no power over such a matter, except on writ of error or appeal (before Judge Thacher). *Ex parte Hickey*, 4 S. & M. 751.

4. *No jurisdiction till after final judgment in a case at law.* This court has no jurisdiction of a writ of error till after final judgment in the court below; and the record must

show the judgment; *Rogers v. McDaniels*, 3 H. 72; but if the judgment be final in its character, the writ of error may issue immediately after its rendition, and before the end of the term at which the judgment is rendered; *Byrne, Vance & Co. v. Jefferies*, 9 G. 533. The chancellor by statute may grant an appeal from an interlocutory order; *Hunter v. Carmichael*, 12 S. & M. 726. See *post*, 155.

5. *Jurisdiction after forthcoming bond forfeited.* The court is bound in every case to inquire whether it has jurisdiction. If the record show that a forthcoming bond has been given and forfeited, it has no jurisdiction of a writ of error to revise the original judgment; *Stamps v. Newton*, 3 H. 34; *S. P., Sanders v. McDowell*, 4 H. 9. The writ may issue after the giving and before the forfeiture of the bond; *Davis v. Jordan*, 5 H. 295; yet if the bond be made the subject of a motion and judgment, a writ of error may be granted to revise that judgment, it being a distinct and independent matter; *Puckett v. Graves*, 6 S. & M. 384. And if, after the forfeiture of a forthcoming bond, a writ of error be issued, and no objection be made thereto, and the defendant in error confess error, and the judgment be reversed, this will be a reversal of the judgment on the forthcoming bond; *Hoy v. Couch*, 5 H. 188. The objection that a forthcoming bond has been given and forfeited, should be made by plea before submission of the cause; it will be too late to raise it by petition for a re-argument; *Hatto v. Brooks*, 4 G. 375.

6. *Jurisdiction where the judgment is confessed.* The court has jurisdiction to affirm a judgment rendered by confession. The statute which denies a writ of error in such a case does not make void its issuance, but only gives the defendant in error a defence which he may plead in bar of the writ. The cases of *Stamps v. Newton*, *Saunders v. McDowell*, *Hoy v. Couch*, *Davis v. Jordan*, *Puckett v. Graves* (for which see *ante*, 5), decided to be consistent with this; *Boone v. Poindexter*, 12 S. & M. 640.

7. *No jurisdiction as to contempts.* This court has no jurisdiction to discharge one who is in custody for a contempt of another court; *Lewis v. Miller*, 13 S. & M. 110. Nor to review the judgment of any inferior court convicting a party of contempt; *Watson v. Williams*, 7 G. 331. Nor can a party convicted of, or imprisoned for, a contempt be discharged by another judgment on *habeas corpus*, when the court making the conviction has jurisdiction to do so; *Ex parte Adams*, 3 C. 883.

8. *When case is fictitious.* This court will not entertain a case which appears by the admission of counsel to be fictitious, and made up with a view to have a particular point decided; *Bank of Port Gibson v. Dickson*, 4 S. & M. 689.

9. *When court below doubts.* Whether this court has jurisdiction, as the old Supreme Court did, when the judge below doubted as to the rule of law to be applied; *Quære?* But if it has jurisdiction, it is essential that

the point on which the doubt arose should be clearly stated; *Carraway v. Board of Police of Yazoo County*, 1 H. 23.

10. *To strike attorney from the roll.* This court has power to strike an attorney from the roll for criminal conduct in his profession, and to prohibit him from thereafter practising in the State; *Brown ex parte*, 1 H. 303.

11. *To determine questions of fact.* This court has the power to determine and hear all questions of fact, necessary to the ascertainment and exercise of the proper powers, conferred on it by the constitution; *Byrne, Vance & Co. v. Jefferies*, 9 G. 533.

12. *Bound to inquire into its jurisdiction.* This court in all cases is bound to inquire into its own jurisdiction, and decline to exercise a power not conferred on it by the constitution and laws; *Stamps v. Newton*, 3 H. 34.

13. *Jurisdiction on appeal from interlocutory order: Case in judgment.* Under the statute (H. C. 759), which grants appeals from interlocutory orders of the Chancery Court, among other grounds "where the chancellor shall think the appeal proper, in order to settle the principles of the cause," if the chancellor grant a special appeal from his order, setting aside an interlocutory decree, the High Court may reverse his action. But in such a case, if the court reverse the order of the chancellor, setting aside the interlocutory decree, it can make no order or decree, without the assumption of original jurisdiction, other than to decide upon the propriety of setting aside the decree; *Hunter v. Carmichael*, 12 S. & M. 726.

II. Appeals and Writs of Error.

See APPEALS, WRITS OF ERROR, CHANCERY, sub-division Appeals.

1. General and Miscellaneous.

14. *Sole means of getting a case before High Court.* A writ of error and an appeal, are the sole means of getting a case before the High Court; and if there be no appeal or writ in the record, the cause will be dismissed; *Devane v. Catching*, 2 H. 884.

15. *How writ of error issued and tested.* The clerk of the Circuit Court may issue a writ of error to bring a cause decided in his court to the High Court, but it must be tested in the name of the chief justice of this court; *Trahern v. Shackelford*, 3 H. 73. But if tested in the name of the circuit judge, it will not be quashed, but amended; *Denon v. Camp*, 5 H. 516.

16. *Court can notice nothing transpiring after the judgment appealed from.* This court can notice nothing in a record, which transpired after the final judgment appealed from. Hence, where there was a probate of a will in common form, entirely *ex parte*, the court cannot entertain a writ of error sued out by a party claiming to be a distributee, but who was no party to the judgment. In such a case the distributee should apply to the Probate Court to have his right established, as in case of intestacy, and then sue out his

writ of error; *Morris v. Morris*, 5 C. 370. See *vide* WRIT OF ERROR, 16.

17. *Slaves not entitled to writ of error in cases not capital.* The judgment of the Circuit Court, upon an appeal taken from the decision of two justices of the peace and five slaveholders, convicting a slave or free negro of an offence not capital, is final, and is not subject to revision by this court on writ of error; *Minor's Case*, 7 G. 630.

18. *When made returnable.* All writs of error and appeals, where the decree or judgment of the court below is founded upon or grows out of a cause of action made or incurred prior to the 1st of June, A. D. 1865, must be made returnable to the next succeeding term of the High Court of Errors and Appeals. In all other cases they may be made returnable on the day fixed by law, or the rule of the court for the calling of the docket of the district from which the cause is brought up; *Apperson v. Fant*, 42 M. 252.

19. *What errors examinable, under writ of error.* Errors in a decree dismissing a bill of review, as well as errors in the decree sought to be reviewed, will be examined on one and the same writ of error; *Denson v. Denson*, 4 G. 560. See WRIT OF ERROR, 16.

2. The Bond.

20. *How attacked in High Court.* An appeal, or writ of error bond, can be attacked in this court only for defects appearing on its face. If the bond appear on its face to be executed by one of the obligors, through an agent, the authority of the agent will be presumed; *Carmichael v. West Feliciana R. R. Co.*, 2 H. 517; *Roberts v. Johnson*, 40 M. 500.

21. *Same: Time for assailing the bond.* An objection to the sufficiency of a writ of error, or appeal bond, cannot be urged as a ground for dismissal, on the final hearing of the cause; it should be raised by a motion to dismiss; *Robertson v. Johnson*, *supra*.

22. *The covenants in the bond.* If the appeal bond be defective in not containing a covenant to pay the recovery in the court below; and the costs and the judgment in the High Court, the appeal will be dismissed; *Bowie v. Hagan*, 5 H. 13. See APPEAL, 3, 4, 5, 6, 13, 23, 25, 33.

But where the bond is not a condition precedent to the appeal, but is required only for a supersedeas, a defect in the bond will not affect the appeal; *Deberry v. Holly Springs*, 6 G. 385.

3. Summons and Severance.

23. *In appeals.* Where an appeal from the Probate Court is not prosecuted in the name of all the parties, and the necessary steps are not taken to sever, the appeal will be dismissed on motion; *Duwall v. Cox*, 5 H. 12. The appeal must be in the name of all the parties against whom judgment is rendered. If some will not join in the appeal, one may prosecute his appeal, and proceed by a summons and severance to protect his own rights; *Green v. Planters' Bank*, 3 H.

43; S. P., as to writs of error from Circuit Court; *Whitworth v. Carter*, 41 M. 629; *Hoggatt v. Ferrall*, *ib.* 642; *Henderson v. Wilson*, 4 S. & M. 732; *Preira v. Silva*, 4 S. & M. 735; *Thomas v. Wyatt*, 9 S. & M. 308; *Dorsey v. Merritt*, 6 H. 390. The writ must be in the name of all; and if any refuse to assign error, then the party suing it out may have a summons and severance; and if the writ be sued out in the name of one alone, it cannot be amended, but will be quashed; *Flournoy v. Burke*, 4 H. 337; S. P., *Whitworth v. Carter*, 41 M. 639; *Hoggatt v. Ferrall* *Id.* 642. But an appeal from the Probate Court may be in the name of one alone; *Porter's Heirs v. Porter*, 7 H. 106, which overrules *Duwall v. Cox*, *supra*.

23a. *Same.* This rule requires the sureties in a replevin bond, against whom judgment has been rendered, to join in the writ; *Thomas v. Wyatt*, 9 S. & M. 308.

But the rule does not apply, so as to prevent one of several defendants, whose motion, to have the judgment entered satisfied as to him alone, has been overruled, from suing out a writ of error in his own name, to revise the judgment overruling that motion; *Coffee v. Planters' Bank*, 11 S. & M. 458.

But the rule requiring all to join, does not apply to writs of error made out from the Probate or Chancery Court, for in these courts a reversal of the decree as to one party, is not necessarily a reversal as to another; *Overstreet v. Trainer*, 2 C. 484.

See APPEAL, 22, 23, 27.

4. Second Writ of Error and Appeal.

24. *Not allowable to same judgment.* A second writ of error (or appeal) to revise the same judgment, is not allowable, unless the first were dismissed without fault of the plaintiff in error, or appellant; and for a cause over which he had no control. If it be dismissed because no final judgment appeared in the record, it is not without his fault, since he was entitled to a *certiorari* to amend the record; *Sherman v. Lovejoy*, 1 G. 105. A dismissal for the negligence of appellant in filing the record, is a bar; *Smith v. Union Bank of Tennessee*, 13 S. & M. 240.

But the dismissal of a void appeal is no bar to a writ of error; *Bull v. Harrell*, 7 H. 9; *Harper v. Archer*, 4 S. & M. 99. And in dismissing the void appeal, the High Court will, on application of appellant, grant him a writ of error; *Steele v. Shirley*, 9 S. & M. 382; S. C., 13 *id.* 196.

25. *A second writ: When cause remanded, and a new judgment entered.* This court, when a cause has been once decided and remanded, will, on a subsequent appeal or writ of error, look into and consider the record of this court on the previous writ of error or appeal, although that record be not embraced in the transcript of the record on the second writ of error or appeal; *Puckett v. Graves*, 6 S. & M. 364.

26. *Same: First decision res adjudicata.* The decision of this court in a cause once heard, is final and conclusive on all the points

adjudicated, and the court will not revise and review these matters when the cause comes here again; *McDonald v. Green*, 9 S. & M. 138. And unless new facts are brought up in the second record, the decision must be the same; *S. C.*, 13 S. & M. 445.

See RES ADJUDICATA, 6; *post*, 183, *et seq.*

III. Assignment of Errors.

27. *Effect of death of appellant as to.* Where the appellant dies before the return term, his representatives are entitled to revive, and the cause will not be dismissed for want of assignment of error; *Carmichael v. West Feliciana R. R. Co.*, 2 H. 817.

28. *Assignment before death of party prevents abatement.* Writs of error and appeal, by the common law, did not abate by the death of either party after the assignment of errors; and under our statute abolishing assignments of error (now repealed), the filing of the record must be considered as the assignment of errors, so far as this point is concerned; *Torry v. Robertson*, 2 C. 192.

29. *Effect of not assigning errors in time.* Errors must be assigned within the time prescribed by the rule, or the cause will be dismissed; *Adams v. Munson*, 3 H. 77.

30. *The assignment must be specific.* The assignment must specifically point out the action of the court below complained of; *Adams v. Munson*, 3 H. 77. An assignment in these words: "The court erred as shown by the bill of exceptions," is void for uncertainty and indistinctness, and will not be noticed; *Smith v. Williams*, 7 G. 545.

IV. What may and may not be Assigned for Error.

1. Appellant must have an Interest in the Error Assigned.

31. *Error against co-defendant.* An appellant cannot assign for error matters in the record which affect only a co-defendant in the court below, who has not appealed; *Peyton v. Scott*, 2 H. 870. Yet where a motion was made in the Circuit Court by the sheriff for instructions as to how to appropriate money among several named executions, and from the decision of the court on that motion one party alone appealed, the High Court will, nevertheless, adjudge among all the named executions, as to which is entitled to the money; and if one excluded below be entitled, the money will be so applied, though that party did not appeal; *Heizer v. Fisher*, 13 S. & M. 672.

32. *Appellant must have interest.* So much of the action or judgment of the court below as the plaintiff in error has no interest in, he cannot assign for error. Hence, a guardian who has been properly removed from his trust cannot complain of that part of the decree which appoints a successor, notwithstanding the successor may not be legally entitled to the appointment; *Hamblin v. Moore*, 3 G. 205; *S. P.*, *Griffing v. Pintard*, 3 C. 173.

2. Immaterial Errors and Acts not Prejudicial to Appellant.

33. *No reversal for error not prejudicial.* This court will not reverse a judgment for an error not prejudicial to plaintiff in error; *Montgomery v. Dillingham*, 3 S. & M. 647; *Wright v. Weisinger*, 5 S. & M. 210; *Barringer v. Nesbit*, 1 S. & M. 22; *Davis v. Black*, 5 S. & M. 226; *Griffing v. Pintard*, 3 C. 173; *Lewis v. Black*, 5 C. 425; *Dozier v. Ellis*, 6 C. 730; *Ferriday v. Selser*, 4 H. 506; *Pritchard v. Myers*, 3 S. & M. 42; *McNulty v. Lewis*, 3 S. & M. 527; *Morgan v. Morgan*, 2 G. 546; *Dennis v. McLaurin*, 1b. 606; *Welborn v. Spears*, 3 G. 138; *Conner v. Swain*, 3 G. 245; *Dilworth v. Mayfield*, 7 G. 40; *Rocco's Case*, 8 G. 357; *Crane v. French*, 9 G. 503; *Miller v. Mayfield*, 8 G. 688; *Smith v. Nolan*, 2 H. 735; *Hewett v. Cobb*, 40 M. 61.

34. *Same: Instances: Rulings of Court.* An erroneous ruling of the court not influencing the result is not assignable for error; *Ferriday v. Selser*, 4 H. 506; *Welborn v. Spears*, 3 G. 138. Nor will the judgment be reversed for an erroneous charge, if it be manifest that the result is right; *Dozier v. Ellis*, 6 C. 730. Nor for the refusal to give a correct charge, when, by other charges, the law applicable to the case has been fully explained to the jury; *Dennis v. McLaurin*, 2 G. 606.

35. *Same: Admission and rejection of evidence.* A judgment will not be reversed for the admission of unimportant and irrelevant evidence, which could have no influence on the verdict; *Pritchard v. Myers*, 3 S. & M. 42. Nor for the admission of illegal evidence to establish a point otherwise sufficiently established by competent evidence; *Barringer v. Nesbit*, 1 S. & M. 22; *Davis v. Black*, 5 S. & M. 226.

36. *Same: Erroneous decisions on the pleadings.* So, immaterial errors in deciding demurrers, are no grounds for reversal; thus, where a demurrer was sustained to several pleas, and, thereupon, it was agreed between plaintiff and defendant, that under another plea filed the defendant should have the right to introduce every legal defence as fully as if specially pleaded; it was held this court would not reverse for an error in sustaining the demurrer to the pleas, since the defendant had every advantage under the agreement which he could have had under the special pleas; *Montgomery v. Dillingham*, 3 S. & M. 647. And so if a good plea be held bad on demurrer, and the defendant could and did make the same defence under another plea, there will be no reversal; *Lewis v. Black*, 5 C. 425. And so if the court overrule a demurrer to a special plea setting up a good defence, but which is a bad plea for amounting to the general issue only, it will be no cause for reversal, since the special plea was a benefit instead of an injury to plaintiff in giving him notice of the defence; *Dennis v. McLaurin*, 2 G. 606. Nor is it error prejudicial to defendant that a demurrer has been sustained to his special plea setting up a defence which was available under the general issue, that plea

having also been filed; *Conner v. Swain*, 3 G. 245. Nor will this court reverse for an error in overruling a demurrer to a plea, if the plea be withdrawn before the trial—the withdrawal accomplishes for plaintiff all that sustaining the demurrer could have done; *Rocco's Case*, 8 G. 357. And so if a plea which is technically good be adjudged bad, and the defendant under leave plead a new plea, setting up the same defence, on which issue is joined, the error in disallowing the first plea is immaterial; *Crane v. French*, 9 G. 503.

37. *Same: Prejudice presumed.* But where error in law manifestly appears, it will be presumed, unless the contrary also appears, that it was to the prejudice of the party against whom the error was committed, and therefore ground for reversing the judgment. Hence, if in a decree directing distribution of the personality of an intestate, property which had been advanced to a distributee and brought by him into hotch-pot, was directed to be valued according to its value at the date of the decree, instead of at the date of the advancement, it will be presumed that the error was prejudicial to the distributee, and that property was valued higher at the date of distribution than it was worth when it was advanced; *Jackson v. Jackson*, 6 C. 674. But this court will not reverse merely because an incompetent witness was permitted to testify. His evidence must be set out, and it must appear that it was prejudicial to plaintiff in error; *Hoy v. Couch*, 5 H. 188.

38. *Same.* The improper overruling of a demurrer to a pleading is error, and for which a final judgment rendered against the demurrant on verdict will be set aside, unless the record show positively and clearly that the verdict and final judgment are right; *Miller v. Mayfield*, 8 G. 688.

39. *Irregularity in failing to dispose of demurrer.* On the ground that the error was not prejudicial, it was held that when the defendant pleaded the general issue and a bad special plea, to which plaintiff demurred, and a trial was had on the merits, without any disposition being made of the demurrer, the irregularity was no ground for reversal; *Proskey v. West*, 8 S. & M. 711. But in *Vance v. Isbel*, 13 S. & M. 371, this case was expressly overruled; and in accord with *Vance v. Isbel* are *Walkin v. Walker*, 6 H. 500; *Marlow v. Hamer*, ib. 189; *Rowley v. Cummings*, 1 S. & M. 340; *Harper v. Bondurant*, 7 ib. 397.

40. *Clerical error.* A clerical error is no ground for reversal; *Smith v. Nolen*, 2 H. 735.

3. Matters of Discretion.

See CONTINUANCE, 4.

41. *No interference with discretion of court below: Instances.* The refusal to grant a continuance is not such error as will authorize a reversal of the judgment; *Babcock v. Scott*, 1 H. 100. Nor will the refusal of the court below to allow an amendment of the sheriff's return, that being a matter of

discretion; *Planters' Bk v. Walker*, 3 S. & M. 409. Nor will the High Court disturb the action of the Probate Court in the exercise of its discretion in the allowance of commissions to an administrator, unless it appear to be manifestly abused; *Satterwhite v. Littlefield*, 13 S. & M. 302; *Powell v. Burrus*, 6 G. 605; *S. P., Pattison v. Josselyn*, 43 M. 373.

See BILL OF DISCOVERY, 5.

42. *Same: Confirmation of sale by Probate Court.* This court will not interfere with the exercise of the discretion vested by law in Probate Court, to refuse to confirm a sale which is regular, unless there be a special exception taken to the action of the court, setting out all the circumstances that were before the court; *Heard v. Whitehead*, 41 M. 404.

43. *Same: Admission of res gestæ.* Questions in relation to the admissibility of declarations as a part of the *res gestæ*, are to a great extent left to the discretion of the court of the first instance; and this court, in reviewing the decisions, will defer much to the discretion of the court making them; *Meek v. Perry*, 7 G. 190.

4. Miscellaneous.

44. *Judgment by default.* Where judgment by default has been entered against an endorser, he cannot take advantage by writ of error of a want of notice appearing on the face of the declaration; *Winn v. Levy*, 2 H. 902.

45. *Error caused by appellant's fault.* The plaintiff in error filed in the court below a bad plea, to which a replication was filed, which presented an immaterial issue, and he demurred to the replication; and the demurrer, instead of being extended back to the plea, was overruled, and then plaintiff in error took issue on the replication. On the trial of this issue illegal evidence was admitted, and there were verdict and judgment on this and other issues against plaintiff in error.

Held, that a replender would not be awarded at the instance of the party committing the first fault in the pleading, and that this court would not inquire into the legality of the evidence offered to sustain an immaterial issue, and that the error, if any, could not now be remedied; *Reed v. Cage*, 4 H. 253.

46. *Error not contested.* About a year after letters of administration were granted on an estate, a will was produced and probated, and the propounders asked for letters of administration *c. t. a.*, stating that the executor was a non-resident, and the letters were granted; *Held*, that it not appearing that the executor had applied for letters testamentary in sixty days, or that he contested the appointment of the administrators *c. t. a.*, there was no error for which the court could reverse; *Cox v. Cox*, 8 S. & M. 292.

47. *Error in demurrer to plea: No good ground for reversing judgment on replication.* Where a plaintiff, upon the sustaining of a demurrer to his replication, to a good and

valid plea, which is an answer to the whole declaration, declines to reply further, whereby judgment final is rendered against him, this court will not reverse the final judgment, because the court below improperly overruled plaintiff's demurrer to another plea of the defendant; *Taylor v. Davis*, 9 G. 493.

48. *Error cured by subsequent statute.* A judgment will not be reversed for an error, where a statute has been passed, since the action of the court below, which would obviate that error on another trial; *Lyons v. Jackson*, 1 H. 474.

V. Presumption in favor of Action of Court below.

1. The Action of the Court below Generally Presumed Correct.

49. *The rule.* The action of the court below is presumed correct, unless error is made manifest by the record; *Byrd's Case*, 1 H. 162. This rule is of universal application with reference to courts of general jurisdiction, and recognized in every other court; and there can be no reversal unless the record show error affirmatively; *Grant v. Planters' Bank*, 4 H. 326; *Harris v. Newman*, 5 H. 634; *Briggs v. Clarke*, 7 H. 457; *Abbott v. Hackman*, 2 S. & M. 510; *Ross v. Mims*, 7 S. & M. 121; *Green v. Creighton*, Ib. 197; *Long v. Shackelford*, 3 C. 559; *Steadman v. Holman*, 4 G. 550; *Pass v. McRea*, 7 G. 143; *Gale v. Lancaster*, 44 M. 413.

50. *Same: Instances.* If the ground on which the court below acted in quashing an attachment, be not set out in the record, the judgment will be presumed correct, though the attachment appear regular on its face; *Cobb v. O'Neal*, 1 H. 581. And if the action of the court below be based on evidence, it will be presumed correct, unless the evidence be reported in the record; *Byrd's Case*, 1 H. 163; *Doty v. Lucas*, 43 M. 337. And so an order in chancery, allowing new parties, is presumed correct, unless the record shows the contrary; *Puss v. McRea*, 7 G. 143. And so if the court below hold that a judgment against husband and wife is invalid as to the wife, and the ground of the decision do not appear, it will be presumed correct; *Steadman v. Holman*, 4 G. 550. And so if a bill of exceptions, setting out the evidence in a case at law between the same complainant and defendant, and about the same subject matter, be contained in a record from the Chancery Court, and the decree of the chancellor recite that the material allegations of the bill are true, and there be no other evidence in the record the court will presume that the evidence contained in the bill of exceptions, was read to the court on the trial without objection; *Long v. Shackelford*, 3 C. 559.

51. *The rule applied to probate courts.* The proceedings of the Probate Court, including the transactions of commissioners of insolvency, are presumed correct until the contrary is shown; *Smith v. Berry*, 1 S. & M. 321; S. P., *Effinger v. Richards*, 6 G. 540.

See post, 52, 58; S. P., *Wells v. Smith*, 44 M. 296; *Scott v. Porter*, Ib. 265.

52. *Same: Case in judgment.* The evidence on which the Probate Court acts in sustaining or overruling exceptions to an administrator's account, should be reported to this court by bill of exceptions; otherwise the action of the court will be presumed correct; except only that this court will reject such items as appear on their face to be manifestly illegal, and which could not be sustained by any proof whatever; *Smith v. Hurd*, 8 S. & M. 682.

2. The Duty of Appellant or Plaintiff in Error to show Error.

53. *The rule.* The appellant or plaintiff in error must show clearly and affirmatively that there is error in the record, or the judgment will be affirmed; *Fox v. Matthews*, 4 G. 433. He must put his finger on the error, as every presumption is to be indulged in favor of the judgment; *Green v. Creighton*, 7 S. & M. 197; S. P., *Cox v. Cox*, 8 S. & M. 292; *Balfour v. Mitchell*, 12 S. & M. 629; *Ferriday v. Selser*, 4 H. 506.

54. *Same: Instances.* Therefore, where the evidence was exactly equiponderant, and the chancellor decided in favor of the affirmant, this court will not reverse, not being able to say that the chancellor was clearly wrong; *Fox v. Matthews*, 4 G. 433. And so when the bill of exceptions does not state the evidence fully, the court cannot determine that the action of the court was wrong; *Balfour v. Mitchell*, 12 S. & M. 629.

3. Presumption where the Record is Defective.

55. *Defect in setting out the pleadings.* Where the record is so defective that the true state of the pleadings cannot be ascertained, the judgment will be presumed correct; *Leath v. Wright*, 2 H. 774.

57. *Incomplete and imperfect in respect to the proof.* The presumption in favor of the correctness of the judgment of the court below will be indulged, until the contrary is shown by the record; and the bill of exceptions must state the case fully enough to enable the High Court to determine whether there was error; for where the facts are not stated fully, the action of the court below will be sustained, if it would be correct on any grounds; *Balfour v. Mitchell*, 12 S. & M. 629. Thus, where there was no proof in the record to show whether a right accrued to the wife before or after coverture, a decree of the Probate Court, based on either theory, will be presumed correct; *Henderson v. Guyot*, 6 S. & M. 209. no objection can be urged against the action of the court below, based on evidence, unless there be a bill of exceptions setting out the evidence; *Anderson v. Williams*, 2 C. 684. And if the bill of exceptions does not purport to set out all the evidence, every fact necessary to sustain the judgment will be presumed to have been proven, unless the record show the contrary; *Stevens v. Mangum*, 5 C. 481.

And so if any action of the court below

be assigned as error, because it was taken at an improper time, the bill of exceptions should not leave it in doubt at what time the action was taken; if it do, the presumption will be that there was no error; *Robinson v. Francis*, 7 H. 458.

58. *Same: Instances.* The judgment of the Probate Court rejecting the claim to letters of administration of one entitled to a legal preference, is presumed correct, in the absence of the proof on which the court acted; *Lee v. Bennett*, 2 G. 119. And so the decree of the Probate Court, rendered on a proceeding for the distribution of an intestate's estate, charging one of the distributees with an advancement, alleged by the petition to have been received by him, and not positively denied by the answer, will be presumed correct, when the evidence on which the court acted is not contained in the record; *Olive v. Walton*, 4 G. 103. See *ante*, 51, 52.

And so if, in an action on the State treasurer's bond, there be a general verdict for so much money for the State, and the bill of exceptions do not show of what special kind of funds the verdict is composed, the High Court will not inquire into that matter, so as to determine whether there be a fund embraced in the verdict, for which the sureties were not liable; *Graves v. Tucker*, 10 S. & M. 9.

59. *Exceptions to evidence: Necessity for setting it out.* Evidence excepted to must be set out in the bill of exceptions, else this court cannot know whether the decision is correct or not; and in the absence of a showing to the contrary, the action of the court will be presumed correct; *Maulding v. Rigby*, 4 H. 222. And where the complaint is that illegal evidence was admitted, it must be set out, or else the admission will be presumed correct; *Ferriday v. Selser*, 4 H. 506. And so if evidence be rejected, it must be set out, so that its materiality may be known; *Ib.* And where the exception is to the admissibility of evidence, which might be competent in connection with other evidence, the action of the court below will be presumed correct, unless all the evidence be embraced in the bill of exceptions, and it then appears to be incompetent; *State v. Farish*, 1 C. 483; *S. P., Organ's Case*, 4 C. 78. See *post*, 94a, 94b, 94c.

60. *Presumptions: Where evidence not set out: Instances.* Where the bill of exceptions does not purport to set out all the evidence, the execution of a written document, admitted in evidence by the court below, will be presumed to have been established, unless the contrary appears from the record; *Doe v. Bernard*, 7 S. & M. 319.

61. *Same.* Where the bill of exceptions states that evidence was introduced on the trial, on a particular point, without, however, setting it out, so far as relates to that evidence the judgment of the court below will be presumed correct; *Townsend v. Blewett*, 3 H. 303. Whilst, however, the judgment is presumed correct where the evidence is not set out, yet where the evidence is set out

the evidence must justify the judgment; *Planters' Bank v. Spencer*, 3 S. & M. 305.

62. *When no presumption.* Where exceptions were taken and reserved only to the competency of a deposition, the party introducing it should see that the proof of notice on which it was taken, is inserted in the bill of exceptions. The High Court will not presume that notice was proven or dispensed with in the court below; *Pickett v. Ford*, 4 H. 246.

VI. Waiver of Errors, and Omission to Complain of them.

1. Failure to Complain of Error in High Court.

63. *Effect of such failure.* A decree erroneous in part, will not be reversed on that account, unless complaint be made of it by the appellant; *Newell v. Newell*, 9 S. & M. 56.

64. *Failure to assail law for unconstitutionality.* The High Court will not decide a law unconstitutional, where its invalidity has not been insisted on in the argument of counsel here, nor objected to in the court below; but will decide the cause as if the law were valid, without being concluded thereby as a precedent; *Walker v. Hasser*, 41 M. 91. See *post*, 67.

2. Waiver by Failure to Object in Court below.

65. *The failure is a waiver.* The High Court will not correct an error committed against a party to which he made no objection; *Satterwhite v. Littlefield*, 13 S. & M. 302. And so where the defendant goes to trial without objecting that the plaintiff had not filed a replication to his plea, he cannot make the objection in the High Court; *Binns v. Stokes*, 5 C. 239. And so if both parties be present at the hearing of a motion to dissolve an injunction, and no objection is made to the sufficiency of the notice, neither can afterwards object on that account; *Penrice v. Wallis*, 8 G. 172.

See *EXECUTOR AND ADMINISTRATOR*, 334a.

66. *Same: Evidence.* As a general rule, objections to evidence not made in the court below, will not be noticed in the High Court, but will be considered as waived. Hence, where the husband's submission to arbitration, of the wife's right, was not objected to in the court below, on the ground of his want of authority to bind the wife, and it did not affirmatively appear from the record when the wife's right accrued, or whether she was living or dead at the time, this court will not declare the submission void, for it may have been that the right accrued before the passage of the act securing to the wife a separate estate in the subject matter of the submission, and that the husband's right had become perfect by his acts of dominion, or that he had authority from the wife, or that she was dead; *McComb v. Turner*, 14 S. & M. 119. See *post*, 82, *et seq.*

67. *When failure is no waiver: Case in judgment.* Where on sustaining a demurrer to a plea, there is no judgment of respondent

ousler, and a trial follows on the issues presented by the other pleas, this court will notice the error though not insisted on, if it appear that the merits of the case were not presented on the trial in the court below, and will order a judgment of *respondet ousler*; *Lee v. Dozier*, 40 M. 477. See *ante*, 63, 64.

VII. New Points, not raised in the Court below.

1. The Action of the Court on New Points Generally.

68. *New points not noticed.* Objections not raised in the court below, will be reluctantly noticed here; and this rule was applied where an objection was made here to the certificate of a deed read in evidence without objection; *Hundley v. Buckner*, 6 S. & M. 70; and so where, the objection of champerty was made here to a deed, the objection in the court below being that there was no proof of its execution; *Sessions v. Reynolds*, 7 S. & M. 130; and it was also applied, where both parties in the court below showed by their instructions that they took the same view of what the evidence established, this court holding that that view must be considered as the correct one; *Coulter v. Robertson*, 14 S. & M. 18.

69. *New points will not be noticed: Instances.* No question can be adjudicated here which was not the subject of decision in the court below; *Byrd's Case*, 1 H. 163. Thus, where in a contest for dower, the marriage was not disputed in the court below, it will be held as admitted; and so, if a deed be read in evidence, without objection, its authenticity is admitted; *Randolph v. Doss*, 3 H. 205; S. P., *Woldridge v. Wilkins*, 3 H. 360; and so the regularity of a change of value, is admitted by a failure to object on that account in the court below; *Prussell v. Knowles*, 4 H. 90.

70. *Same: Other instances.* It is a general rule, subject to few exceptions, that a party shall not be permitted to assign for error here, matter not insisted on in the court below, and an adherence to this rule is essential to maintain the true purposes of an appellate jurisdiction, and to prevent injustice and oppression; *Prussell v. Knowles*, 4 H. 90. Hence, it cannot be objected here for the first time, that an answer in chancery was not properly sworn to, nor filed in proper time; *Yeizer v. Burke*, 3 S. & M. 439; nor that there was no proof that the defendant in ejectment was in possession; *Dixon v. Porter*, 1 C. 84; nor that a deed was not recorded in the proper county; *McCraven v. McGuire*, 1 C. 100; nor that a replication was not filed; *Binns v. Stokes*, 5 C. 239; nor that the jury had separated in a capital case; *Dyson's Case*, 4 C. 362; nor can points not raised in the pleadings in a chancery case, be adjudicated here; *Ferguson v. Applewhite*, 10 S. & M. 304.

71. *Same: Other instances.* And if it were a conceded point on the trial, that the

plaintiff was entitled to recover, if title to the property could be shown in his mother, the defendant cannot object here that plaintiff has not shown that he was entitled to his mother's right; *Parr v. Gibbons*, 5 C. 375. And so a creditor of an insolvent estate, whose claim was rejected, and who appeared and contested the exceptions to it, cannot object here for the first time, that the notice given by the insolvent commissioners was irregular; *Robertson v. Agricultural Bank*, 6 C. 237. And so a judgment, otherwise erroneous, in favor of a defendant in ejectment, will not be affirmed because the plaintiff's title is apparently barred by the statute of limitations, if it appear from the record that the defence in the court below was based entirely upon other matters, and that the statute of limitations was not insisted on, there; *Learned v. Matthews*, 40 M. 210.

72. *Same: Other instances.* Nor will an objection be entertained, when raised here for the first time, that in a petition for distribution, there was no tender of a refunding bond; *Hargroves v. Thompson*, 2 G. 211; nor that a verbal sale of slaves made in Louisiana is invalid, the sale being contested on other grounds in the court below; *Fox v. Matthews*, 4 G. 433; nor that the plaintiff has no legal title to the note sued on by him, because his name appears on the back as endorser; *Bowles v. Wright*, 5 G. 409; nor that an instrument attacked as a deed in the court below, on the ground of the insanity of the maker, is in fact a will and not a deed; *Exum v. Canty*, 5 G. 533; nor will objections to charges to the jury, raised here for the first time, be noticed; *Hatch v. Roberts*, 41 M. 92; *Price's Case*, 7 G. 531; S. P., *Barrow v. Burbridge*, 41 M. 622; *Crowder v. Shackelford*, 6 G. 321; *N. O. J. & G. N. R. Co. v. Moye*, 10 G. 374.

73. *Same: New causes of demurrer.* When causes of demurrer are specially assigned in the court below, no ground of demurrer not so assigned will be noticed in this court, unless the objection be vital to the legal merits of the suit, and be also in relation to such matters as are incapable of being cured by amendment; *Matthews v. Sontheimer*, 10 G. 174. They will not be noticed unless they refer to jurisdiction; *Prewett v. Coopwood*, 1 G. 369.

74. *Same: Case in judgment.* A petition in the Probate Court for an issue *devisavit vel non*, which incidentally refers to the will "as admitted to probate" and "to the record of the probate of the will," and exhibits a copy of the will duly certified by the clerk of the Probate Court, wherein the will was duly provable, in which he states that the copy is correct "as the same remains on file and of record in his office," though inartificial in its averments in relation to the probate of the will, and for that reason bad on special demurrer, will, nevertheless, be held sufficient in this court, if the objection be made here for the first time; *Matthews v. Sontheimer*, 10 G. 174.

75. *Same: Competency of witness.* The

competency of a witness cannot be objected to for the first time in this court; *Ferguson v. Oliver*, 8 S. & M. 332; *Ned & Taylor's Case*, 4 G. 364.

76. *Same: New trial.* This court, in reviewing the action of the court below, refusing a motion for a new trial, will notice no other grounds than those specified in the motion; *Barney v. Scherling*, 40 M. 320; *State v. Farish*, 1 C. 483.

76a. *New point not raised by record.* This court will not decide a question not raised by the record, upon the suggestion, that upon a new trial the question will be a main point in issue; *Matlock v. Livingston*, 9 S. & M. 489.

As to new points on evidence, see 82, *post*, *et seq.*

77. *The rule further explained.* The High Court, in every instance, where it can possibly be done, should confine its action to a review of the case as it was tried in the court below, and should never tolerate objections made here for the first time, if they be such as could have been waived by the agreement of parties, either express or implied, from their conduct on the trial, or otherwise; *Binns v. Stokes*, 5 C. 239. And the only exceptions to the rule which this court recognizes are cases where the record shows that the court below was not properly constituted, or that it had not jurisdiction of the subject matter or the person, or that some judicial act does not appear to be done, which is so absolutely essential and indispensable to the validity of the proceedings, that the law required it to be shown to have been performed; *Dyson's Case*, 4 C. 362.

78. *The court notices, but does not act on a new point: Case in judgment.* The court in this case, in reviewing a judgment rendered against the seller of a slave for a breach of warranty of soundness, noticed that the slave had been introduced into the State and sold contrary to law, though the point was not made in the argument, and said that was conclusive against the verdict, but reversing the judgment on other grounds, remarked that as the point was not made in the court below, possibly the plaintiff might remove the objection by other proof; *James v. Herring*, 12 S. & M. 336.

79. *Modification of the rule on new points.* The rule which prevents the High Court from deciding on new points or questions not raised in the court below, does not extend to preventing the court from affirming a decision of the court below properly excluding irrelevant evidence, merely because the court gave the wrong reason for the exclusion; *Torry v. Fisk*, 10 S. & M. 590. Nor does it prevent the court from noticing objections on the ground of want of jurisdiction of the court below; *Prewitt v. Coopwood*, 1 G. 369; *Dyson's Case*, 4 C. 362. See *ante*, 67. And so if the objection be so material and fatal that a valid judgment of affirmance cannot be rendered, it will be noticed though raised here for the first time, as where the lease in a declaration in ejectment has expired before

judgment rendered in the court below; *Lindsey v. Henderson*, 5 C. 502.

79a. *Same.* And it is also incumbent on every party bringing a suit, to make out in his complaint a sufficient ground, according to the rules of law or equity, for the relief he seeks, or for what is awarded to him by the judgment, and this duty rests upon him before the defendant is called upon to make any defence, and continues to rest on him, though the defendant make no defence. And hence, if the decree or judgment rests solely on the plaintiff's own showing and that fully appears of record, and is taken as admitted by the defendant, still it cannot be maintained unless the facts so shown by the plaintiff, and admitted by the defendant, are sufficient to sanction the relief granted, since the failure of the defendant to make a defence, cannot give the plaintiff a right which according to his own showing he was not entitled to under the rules of law. Therefore, a decree on *pro confesso* will be reversed in the High Court, and the bill dismissed, if the bill be clearly insufficient to entitle the complainant to relief; *West Feliciana R. R. Co. v. Stockett*, 5 C. 739.

2. The Court has no Jurisdiction over new Points.

80. *To decide new points is to assume original jurisdiction: Instances.* As a general rule, questions cannot be raised in the High Court which were not raised in the court below. To originate and decide questions here, would be to assume original jurisdiction. The office of this court is to revise the action of the court below, and not to originate new questions here, not acted on there; *Doe v. Natchez Insurance Co.*, 8 S. & M. 197; *Com'l Bk of Manchester v. Martin*, 9 S. & M. 613. Hence, in the first case it was held, that where objections are made to the introduction of evidence in the court below, it is important whether they be overruled or sustained; that the objections shall be specific, pointing out the grounds upon which they are made so that this court may decide upon the identical question presented in the court below, and this rule, it was said, would not be relaxed except, perhaps, where the evidence objected to was entirely record evidence. And in the latter case it was held, that where a record of the proceedings of the Probate Court, ordering a sale of land, was admitted in the court below without objection, this court will not adjudicate upon the validity of the sale as shown by the record, no point having been made on that in the court below; see *post*, 120, 84.

81. *Same.* This court has no jurisdiction to entertain a motion made in the court below, but to which the attention of the judge was not called, and on which he pronounced no decision. New questions cannot be raised here on which the court below did not act; *Grant v. Planters' Bk*, 4 H. 326.

3. Objections to Evidence not raised in the Court below.

82. *Objections to its competency.* An objec-

tion to the competency of evidence not raised in the court below, will not be noticed here; *Neely v. Planters' Bk* 4 S. M. 113. Thus, where evidence impeaching a sheriff's return was permitted, in a collateral inquiry, to go to the jury without objection, it cannot be objected to as incompetent in this court; *Doe v. Ingersoll*, 11 S. & M. 249. So an objection to a commissioner to take a deposition, cannot be raised here for the first time; *Coopwood v. Foster*, 12 S. & M. 718. And if a judgment be read in evidence in the court below, without objection, it cannot be objected here, that it was rendered without notice; *House v. Fultz*, 13 S. & M. 39. See *ante*. 66.

83. *No objection noticed.* The High Court will not notice any objection to evidence, not raised in the court below; *Chew v. Read*, 11 S. & M. 182.

84. *Objections to evidence not noticed unless specific.* Objections to evidence, not specifically pointed out in the court below, are considered as waived, and will not be noticed here. Hence, where, upon a general objection, judgment and execution under which land was sold, and the sheriff's deed, were excluded, it was held that the action of the court below could not be sustained, if otherwise wrong, upon the ground that a copy of the appraisement made under the valuation law had not been delivered to the defendant in execution, that objection not having been made in the court below; *Doe v. Natchez Ins. Co.*, 8 S. & M. 197. See *ante*, 80.

85. *Same: Case in judgment.* And so, if a deed be objected to in the court below, because the acknowledgment was defective, and if that objection be improperly sustained, the exclusion of the deed from evidence cannot be justified in this court, upon the ground that its execution was not properly proven, owing to the failure of the probate clerk to sign his name to the certificate of the filing and recording of the deed; *Alexander v. Eastland*, 8 G. 554.

86. *Same: Case in judgment.* When a party objected in the court below to the admission of a record of the Probate Court, decreeing a sale of the land of a decedent, and of the deed made in pursuance thereof, upon the ground, 1st. That due notice had not been given to the heirs. 2d. That the decree did not sufficiently describe the land, he will not be permitted, in this court, to allege a further objection, that it did not appear that the sale was ever confirmed; *Monk v. Horne*, 9 G. 100. See *post*, 120.

VIII. New Trials Granted and Refused by High Court.

1. Where Illegal Evidence is Admitted.

87. *New trial granted.* Whenever the record contains conflicting evidence, and on the trial material, important, and relevant evidence, which may have influenced the jury in forming their verdict, has been improperly

admitted, a new trial should be granted unless the court be clearly satisfied, that the preponderance of the remaining evidence is so strong in favor of the verdict that the court would have granted a new trial if, on the same evidence, the verdict had been different; *Ragan v. Cargill*, 2 C. 540.

And a second new trial will be granted to the same party, by this court, when a material part of the evidence to sustain the verdict is illegal and incompetent; *Kirkland v. Carr*, 6 G. 584.

See NEW TRIAL, 7 to 11.

88. *When not granted for illegal evidence.* A new trial will not be granted for the admission of illegal evidence to sustain an account, if there be other and competent evidence uncontradicted to prove the correctness of the account; *Leach v. Stanton*, 2 H. 908; nor, to prove a fact sufficiently proven by legal evidence, there being no contradiction in the evidence on that point; *Graves v. Miss. & Ala. R. R. Co.*, 6 H. 548; *Davis v. Black*, 5 S. & M. 226. Nor will it be granted in such a case, if it appear that justice has been done, and there is little prospect of a different result on another trial. But in a doubtful case, the rule would be different; *Barringer v. Nesbit*, 1 S. & M. 22; *McMullen v. Mayo*, 8 S. & M. 298. Nor will a new trial be granted for the admission of impertinent and irrelevant evidence, which could have had no influence on the verdict; *Pritchard v. Myers*, 3 S. & M. 42. Nor will a new trial be granted for the admission of illegal evidence, if it be merely cumulative; and if it be clear that if it had not been admitted, the result would have been the same, and that its rejection on another trial would not change the result; *Rough v. Agricultural Bank*, 12 S. & M. 161. Nor will a decree be reversed for the admission of an incompetent witness, if his testimony be against the party introducing him, and if the decree be sustained by the other evidence; *Quinn v. Moss*, 12 S. & M. 365.

89. *Same: All the evidence must be set out.* When the bill of exceptions is taken to the action of the court below on overruling a motion for a new trial, this court will not reverse the judgment for an error in the admission of improper testimony, unless all the evidence in the cause be set out in the record; *Phipps v. Morton*, 4 G. 211. Nor will it be granted in any case for the admission of evidence, unless all the evidence be set out, if by the introduction of other evidence the admitted evidence might have been made legal; *Prussel v. Knowles*, 4 H. 90. Nor will the judgment be set aside for the admission of an incompetent witness, unless his testimony be set out, and be shown to be prejudicial to the plaintiff in error; *Hoy v. Couch*, 5 H. 188.

See NEW TRIAL, 7 to 11.

2. Where the Question is on the Evidence alone.

90. *Preponderant evidence.* This court will not grant a new trial merely because the evidence preponderates against the verdict, if

there be proof legally conducing to the verdict; *Dickson v. Parker*, 3 H. 219; unless it be clearly against the evidence, or the palpable preponderance of evidence; *Bowers v. Johnson*, 10 S. & M. 169; *Elzy v. Stone*, 5 S. & M. 21; *Fisher v. Leach*, 10 S. & M. 313; *Harris v. Halliday*, 4 H. 338. But if the jury find against the great preponderance of evidence, a new trial will be granted; *Sims v. McIntyre*, 8 S. & M. 324; *McQueen v. Bostwick*, 12 S. & M. 604. And where there is conflicting evidence, and no instructions asked, the preponderance of evidence against the verdict must be great; *Mann v. Manning*, 12 S. & M. 615. And a new trial will not be granted by the court merely because the verdict is against the preponderance of the evidence, and a contrary verdict would have been more satisfactory, there being positive evidence upholding it; *Lea v. Guice*, 13 S. & M. 656. The question in such a case is not is the verdict clearly right, but is it manifestly wrong; *Waul v. Kirkman*, 13 S. & M. 599; *Prewett v. Coopwood*, 1 G. 369; *Drake v. Surget*, 7 G. 458. And the test is, is there sufficient evidence fairly to support the verdict; *Guion v. Doherty*, 43 M. 538. It will not be granted in a case of conflicting evidence, where the mind cannot repose with entire confidence and certainty upon a conclusion in favor of either party; *Watson v. Dickens*, 12 S. & M. 618. See *post*, 92, 105.

See NEW TRIAL, 22.

91. *Same: Circumstantial evidence.* Where the defence to a bill single is the presumption of payment, arising from lapse of time and other circumstances, it is so peculiarly within the province of the jury to determine it, that a very extreme case of erroneous finding must be shown to warrant its being set aside; *Mann v. Manning*, 12 S. & M. 615. And when the evidence is entirely circumstantial, the evidence will not be set aside unless manifestly wrong; *Holton v. Adcock*, 5 C. 758.

See NEW TRIAL, 28.

92. *Same: Conflicting evidence: Credibility of witnesses.* The jury are the judges of the credibility of the witnesses, and their verdict will not be disturbed on the ground of alleged error in this respect; *Lea v. Guice*, 13 S. & M. 656; *Rigg's Case*, 1 G. 635; *Holten v. Bloxum*, 6 G. 381; *Standly v. Miles*, 7 G. 434. But where the plaintiff's evidence, unexplained, would entitle him to a verdict, and the defendant's evidence, which is not at all contradictory to plaintiff's evidence, but only goes farther, and shows facts not disclosed by plaintiff's evidence, which fails to show that plaintiff has no right, and the jury find for plaintiff, a new trial will be granted; for it is not a case where the jury has decided on conflicting evidence, but it is a finding against the evidence; *Young v. Wilson*, 2 C. 694. And the High Court will grant a new trial even where there is a conflict in the evidence on the main point in issue, if there be circumstances in the evidence clearly

proven which show that the verdict is wrong; *Wilson v. Horne*, 8 G. 477. See *ante*, 90.

See NEW TRIAL, 24, 25, 29.

93. *Same: Verdict against the evidence.* The High Court will not grant a new trial, upon the ground that the evidence does not sustain the verdict, except in a clear case; but where instructions were given in the court below, and the jury have clearly mistaken the law, a new trial will be granted; *Leflore v. Justice*, 1 S. & M. 381. And so if the jury upon questions of fact submitted to them find a verdict which is contrary to law and evidence, the court will grant a new trial; *Tunstall v. Walker*, 2 S. & M. 638. But it will be granted where the evidence considered with reference to the issue submitted to the jury does not sustain the verdict; *Otey v. McAfee*, 9 G. 348.

93a. *Where verdict for damages set aside.* The High Court will not disturb a verdict for damages in an action *ex delicto*, where it is not apparent that the jury misapplied the law, nor misunderstood the facts, nor had been influenced by their prejudices or passions; *N. O. J. & G. N. R. R. Co. v. Statham*, 42 M. 608; *S. P., N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660. Nor will it set aside the inquest of a jury, assessing damages accruing to the owner, by reason of the location of a railroad through it, after it has been fully examined in, and sanctioned by, the Circuit Court, if it appear only doubtful that the damages assessed are excessive; *N. O. J. & G. N. R. R. Co. v. McBride*, 9 G. 32. Nor will this court disturb a verdict on that ground (in an action sounding in damages), when it is not apparent that the jury misapplied the law, or misunderstood the facts, or had been influenced by their prejudices or passions; *N. O. J. & G. N. R. R. Co. v. Statham*, 42 M. 608.

See NEW TRIAL, 32 to 35. DAMAGES, 22.

93b. *Presumption in favor of verdict.* To authorize the High Court to set aside a verdict which the court below refused to disturb, the error must be clear; every presumption is to be indulged in favor of the verdict; *Peck v. Thompson*, 1 C. 367.

3. For Excluding Evidence.

94. *Excluding irrelevant and cumulative evidence.* This court will not reverse for the exclusion of evidence, if its relevancy be not shown by the bill of exceptions; nor for the rejection of cumulative evidence, if it could not strengthen the evidence already introduced; *Townsend v. Blewett*, 5 H. 503.

See NEW TRIAL, 12, 13, 14.

94a. *Bill of exceptions must show the competency of the evidence.* Where the court below rejects evidence offered to prove a fact, which by law can only be established in a particular way, the record must show affirmatively that the evidence offered was competent to establish the fact in that way. When, therefore, the record recited that the defendant offered to prove that the certificate of acknowledgment of a foreign officer was not in due form, without stating how, or by what

proof this fact was to be shown; it was held, that the record did not show that the court below erred, although it was competent to show by legal proof the fact proposed to be established; *Sessions v. Reynolds*, 7 S. & M. 130.

4. Where all the Evidence must be set out in the Bill of Exceptions.

94b. *Where evidence admitted might be made competent.* A new trial will not be granted for the admission of evidence before the jury, when the record does not set out all the evidence in the case, if by the introduction of other evidence, the admitted evidence might have been made legal; *Prussel v. Knowles*, 4 H. 90.

94c. *Where verdict is excessive.* This court will not set aside a verdict on the ground that it is excessive, unless all the evidence be embraced in the bill of exceptions; *Webster v. Tiernan*, 4 H. 352.

94d. *The evidence must be embraced in all cases where the exception is to overruling motion for new trial.* Where the bill of exceptions is taken to the action of the court below in overruling a motion for a new trial, this court will not reverse the judgment for an alleged error in the admission of evidence, unless all the evidence be set out in the record; *Phipps v. Morton*, 4 G. 211; *Kelly v. Brown*, 3 G. 202.

5. The Exceptions Necessary.

94e. *The judgment must be excepted to.* This court cannot grant a new trial, unless the judgment of the court below, overruling the motion for a new trial, be excepted to; *Scott's Case*, 2 G. 473. And a legal verdict, erroneous only as to the amount, will not be disturbed in this court, unless there was a motion for a new trial in the court below, and a bill of exceptions taken embodying the evidence; *Kelly v. Brown*, 3 G. 202; *Phipps v. Nye*, 5 G. 330; *Walker v. Jones*, 44 M. 623.

94f. *Exception to the above rule.* But where the verdict manifestly exceeds the amount claimed in the declaration, it will be set aside, and a *venire de novo* awarded, though no motion was made in the court below for a new trial, and no bill of exception was taken; *Lester v. Barnett*, 4 G. 584.

6. Erroneous Charges to the Jury.

95. *Court may consider instructions though all the evidence be not reported.* Unless all the evidence be embraced in the bill of exceptions, this court cannot grant a new trial on the ground that the verdict is against the evidence, but may consider the propriety of the verdict upon the questions of law ruled by the court during the progress of the trial; *McRaven v. McGuire*, 9 S. & M. 34.

96. *Where verdict right and instructions wrong.* Where the jury have found a verdict in accordance with law, this court will not reverse the verdict on account of erroneous instructions given to the jury, if the bill of exceptions be taken only to the judgment of

the court below on the motion for a new trial; *Baynton v. Finnall*, 4 S. & M. 193.

97. *Same.* A new trial will not be granted for an erroneous charge where the verdict is manifestly right and it is apparent that justice has been done; *Perry v. Clark*, 5 H. 495; *S. P., Cartwright v. Carpenter*, 7 H. 328; nor where it is apparent from the whole record that the verdict is right on the facts of the case; *Baskins v. Winston*, 2 C. 431; *Dozier v. Ellis*, 6 C. 730; *Pritchard v. Myers*, 11 S. & M. 169; *Hill v. Calvin*, 4 H. 231; *Wiggins v. McGimpsey*, 13 S. & M. 532; *Simpson v. Bowden*, 1 C. 524; *Magee v. Harrington*, 13 S. & M. 403; *Brantley v. Carter*, 4 C. 482; *Fore v. Williams*, 6 G. 533; *Cameron v. Watson*, 40 M. 191; nor will a new trial be granted for the second time, where the evidence was conflicting, merely because some of the instructions were vague and incomprehensible; *Turner v. Bird*, 44 M. 449. See INSTRUCTIONS, 45, 46. NEW TRIAL, 17.

98. *Same.* The High Court will not reverse a judgment for an error in the court below in giving a charge on the weight of testimony, or in assuming in a charge, that a fact is proven, if the fact about which the court so erroneously charged be so clearly established, that there is no room for doubt about it; *Wesley's Case*, 8 G. 327. Nor will it reverse for a refusal of the court to charge, "If there be a reasonable doubt of defendant's guilt, he ought to be acquitted," if the evidence of his guilt be so clear that there can be no doubt about it; *McGuire's Case*, 8 G. 369.

99. *Same: Evidence must be reported.* The substantial question presented on a writ of error is, whether the judgment of the court below is correct or not, upon the facts contained in the record. The ruling of the court may be erroneous and yet the judgment be correct. Hence, where a case is tried upon an issue of fact, and no evidence reported to the court, the judgment will not be reversed on the ground that the instructions given are not correct as abstract principles of law, and especially will not this be done, if under any conceivable state of facts the instructions would be proper; *Guinn v. Williams*, 5 C. 324; *S. P., Davis v. Brown*, 5 C. 265.

99a. *Exceptions necessary to instructions.* See post, 113.

7. Exceptions to Granting a New Trial and Remedy.

100. *Remedy for improper grant of new trial.* If a new trial be improperly granted, a bill of exceptions may be taken thereto, and this court will, on writ of error after final judgment, establish the verdict so set erroneously aside; *Prewett v. Coopwood*, 1 G. 369; *Moore v. Ayers*, 5 S. & M. 310; *Wood v. American Life Ins. Co.*, 7 H. 609.

101. *When first verdict established.* If a bill of exceptions be taken to the granting of a new trial, and afterwards a judgment be rendered for the party applying for the new

trial, and thereupon the other party sue out a writ of error, this court will first determine upon the propriety of granting the new trial; and this will be done solely on the bill of exceptions taken to the granting of it; and if in the case as it is thus made, the order granting the new trial is erroneous, the first verdict will be established, notwithstanding any fact which may appear on the last trial showing that the first verdict was wrong; *Frizell v. White*, 5 C. 198. See *post*, 103.

Yet in general, this court would feel reluctance in establishing the first verdict, when, on a second trial, the jury had found differently on the same evidence, otherwise, when the second verdict is clearly on illegal evidence and wrong; *Wood v. Am. Life Ins. Co.*, 7 H. 609.

102. *Same: What evidence the court considers.* Where the plaintiff in error seeks to establish in this court a verdict which in the court below had been rendered in his favor and then set aside, he must show that it was correct on the evidence actually submitted to the jury; as this court, in determining upon the propriety of the judgment of the court below in setting aside the verdict, will not consider any evidence offered by the plaintiff in error in the trial, and erroneously excluded from the jury by the court; *Tegarden v. Carpenter*, 7 G. 404.

103. *Rule in granting or refusing: Discretion.* The granting of a new trial rests in a great measure in the sound discretion of the court below. If a new trial be refused, a strong case must be made to justify this court in saying it was error. And so, if it be granted, it must be made manifest that it was improperly granted. And, indeed, greater indulgence is allowed to the granting than the refusal of a new trial, since the granting is not a final judgment, but the parties have another opportunity of establishing their rights; and if, on the new trial, the verdict should be clearly right for the applicant, this confirms the action of the court in granting it; *Dorr v. Watson*, 6 C. 383. See *ante*, 101.

104. *Bill of exceptions to third new trial.* A bill of exceptions taken to the action of the court below in overruling or granting a motion for a new trial, is intended to present the single question, whether the action of the court below, in that respect, was correct or not. The bill of exceptions can present no question, except such as the court below could consider on that motion. Hence, if the bill of exceptions be taken to the action of the court below in refusing a third new trial, the High Court cannot look to it for any purpose, even for errors of the court in giving or refusing instructions. These should have been excepted to on the trial by special bill of exceptions; and then, if erroneous, the court might grant a *venire de novo*, notwithstanding two new trials had already been granted; *Ray v. McCary*, 4 C. 404. See *post*, 167; *S. P., Thornton v. West Feliciana R. R. Co.*, 7 C. 143.

8. Two New Trials and the Granting of a Third.

105. Where there has been two mistrials and then a verdict, this court will very reluctantly interfere; and if it appear that there is not a probability of a change in the result on another trial, a new trial will not be granted, though the preponderance of the evidence is against the verdict; *Philbrick v. Holloway*, 6 H. 91.

106. *Effect of two concurring verdicts.* Two concurring verdicts may operate as a persuasive reason for not granting a third new trial, but they are not an absolute bar to the granting of another new trial. Whether the court can grant more than two new trials under the statute; *Quære? Stamps v. Bush*, 7 H. 255.

107. *The power to grant more than two new trials.* The statute (H. & C. 876) declares that no more than two new trials shall be granted to the same party in the same case. Hence, if a motion be made for a third new trial, the court will have no jurisdiction to hear it; but this does not prevent the court from setting aside the verdict, and awarding a *venire de novo* for errors of law committed by the court during the trial, as often as that may occur; *Ray v. McCary*, 4 C. 404. See *ante*, 104; *S. P., Thornton v. West Feliciana R. R. Co.*, 7 C. 143; *Field v. Weir*, 6 C. 56.

108. *Effect of second verdict.* On a complicated state of facts, a second verdict is entitled to great weight and should stand, unless manifestly against law; but when the facts are undisputed, and the error in the verdict is a mistake of the jury in applying the law to the facts, it is the province of the court to correct it; *Stamps v. Bush*, 7 H. 255. And so, if a material part of the evidence be illegal, the court will grant a second new trial; *Kirkland v. Carr*, 6 G. 584.

See NEW TRIALS, 48, *et seq.*

9. Miscellaneous Decisions on New Trials.

109. *The question for the court in granting a new trial.* Where a new trial has been refused in the court below, and the question arises in the High Court as to whether the verdict is sustained by the evidence, the point of inquiry will be, not, whether the verdict is clearly right, but is it manifestly wrong; and if not manifestly wrong, the verdict will not be disturbed; *Waul v. Kirkman*, 13 S. & M. 599; *Prewett v. Coopwood*, 1 G. 369.

110. *Position and duty of High Court as to new trials.* The statute allowing bills of exception to be taken to the judgment of the Circuit Court, on motions for new trials, places the High Court in the same position as that of the court below, in determining upon the propriety of a new trial. This court can consider points and objections alone, which the Circuit Court could have considered, and no others. And the statute was not intended at all to abrogate the rule, requiring exceptions to the admission of evidence to be taken and noted at the time and during the progress of the trial; *Philips v. Lane*, 4 H. 122

(see *post*, 118). The statute puts this court in the place of this court below, and requires it to do what that court should have done; and if the verdict be contrary to law as shown by the evidence in the bill of exceptions, the court will set it aside; *Reaves v. Dennis*, 6 S. & M. 89.

111. *Same*. Where a case is brought to this court upon bill of exceptions, taken to overruling a motion for a new trial, and embodying the whole evidence, this brings up the whole case, facts and law, and it is the duty of the court to decide according to the case so made, and afford the proper remedy, although no advantage was taken by demurrer of defects in the declaration. Hence, where in an action on a note, made by a married woman, it was averred in the declaration, that it "was given in and about the exclusive business of the defendant," which allegation shows no cause of action against her, and the plea was payment, and no proof offered to show payment of the note, and the verdict was against the defendant on her plea of payment; and then the after motion for a new trial overruled, she brought the case here, it was held, that notwithstanding there was no evidence to sustain, the issue as she made it, yet as the whole case showed that the verdict against her was wrong, a new trial should be granted; *Robertson v. Bruner*, 2 C. 242.

112. *Grounds for new trial must be assigned in the motion*. The statute requires the reasons for a motion for a new trial to be set out in the motion; and on the hearing of this motion, both in the court below and in this court, the applicant can rely on no other ground than those specified in the motion; *Barney v. Scherling*, 40 M. 320.

113. *Same: Exceptions to charges by motion for new trial*. Instructions when marked "given," or "refused," are, by statute, a part of the record; but this does not change the rule requiring exceptions to be taken to them in the court below. This may be done in two ways: 1st, By bill of exceptions taken during the progress of the trial; 2d, By assigning the error, in giving or refusing them, as a ground for a new trial in the court below, and taking a bill of exceptions to the action of the court on that motion. Both or either of these modes may be pursued in the same case. But if no exceptions were taken during the trial, then the only question is the propriety of the judgment on the motion for a new trial; and this court can consider no ground for a new trial not assigned in the court below. Hence, in that case, if the motion do not assign as ground for a new trial error as to the instructions, they cannot be considered in this court; *Id*.

113a. *Review of report of referees in Probate Court*. This court will review the action of referees to whom a claim against an insolvent estate has been referred, and if their decision be based on inconclusive and unsatisfactory evidence, their report will be recommended; *Reed v. Wiley*, 5 S. & M. 394.

113b. *Review of allowance set aside to widow*. This court will not set aside an

allowance made to a widow for a year's support, merely because the members of the court would probably have allowed a less sum if they had been on the commission, especially when there has been two reports from the commissioners and the Probate Court has allowed the smallest sum reported by them; *McReary v. Robinson*, 12 S. & M. 318.

114. *Reversing finding of chancellor*. A decree of a chancellor will not be reversed in this court on the facts solely, unless the preponderance of evidence against it be very great. The decree will not be set aside merely because it is doubtful whether it be right or not; *Dillard v. Wright*, 11 S. & M. 455. If the evidence be exactly equiponderant, the decree will not be set aside, though it be in favor of the affirmant; *Fox v. Matthews*, 4 G. 433; nor will this court set aside the report of a commissioner in chancery, confirmed by the chancellor, assessing the hire of slaves, merely because four witnesses against three prove the assessment too high. There should be a clear preponderance against the report to warrant this court in setting it aside; *Trotter v. White*, 4 C. 88.

115. *Same*. Where the evidence was conflicting and a material part of it was given by personal examination in open court before the chancellor, and the veracity of some of the witnesses directly questioned by the testimony of other witnesses examined to that point, this court will not pronounce the decision of the chancellor, upon its weight, erroneous, unless the error be very clearly shown by a consideration of all the evidence; *Keaton v. Miller*, 9 G. 630.

116. *For excessive damages in actions ex delicto*, see *ante*, 93a. DAMAGES, 22.

IX. Bills of Exceptions.

See BILLS OF EXCEPTIONS. EVIDENCE, 329 to 331.

1. When Exceptions should be taken.

116a. *Must be taken when the ruling is made*. Exceptions must be taken at the time of the ruling; and if on a jury trial, before the jury retire from the bar; *Wilson v. Owens*, 1 H. 126. And the statute allowing bills of exception to be taken to the judgment of the Circuit Court overruling a motion for a new trial, was not intended to abrogate the rule requiring exceptions to the admission of evidence to be taken and noted at the time they are made and during the trial; *Philips v. Lane*, 4 H. 122. Whenever, however, the instructions are marked "given," or "refused," they may be objected to by assigning the action of the court in giving or refusing them as a ground for a new trial; *Barney v. Scherling*, 40 M. 320. See *ante*, 112, 113, and *post*, 115.

2. How Exceptions should be taken.

117. *Exception to evidence: Setting out the evidence*. When the testimony on a particular point is excepted to in the court below, and that evidence and no other is set out in the bill of exceptions, this court will consider

the bare point excepted to. In this case a witness was permitted to testify and he was objected to on the ground of interest, and his testimony alone set out in the bill of exceptions, and the court holding the witness interested, granted a new trial; *Scott v. Watkins et al.*, 2 S. & M. 233. And in excepting to the ruling of the court below rejecting a witness as incompetent, it is not necessary to set out the facts proposed to be proven by him. It is otherwise, however, when the evidence is rejected for irrelevancy; *Fairley v. Fairley*, 5 G. 18. See *ante*, 89.

118. *Exceptions to evidence may be on bill of exceptions, taken on motion for new trial.* If the bill of exceptions taken to the decision of the Circuit Court, on a motion for a new trial, recite that exceptions were taken at the time, to the rulings of the court, upon the admission of evidence, it is sufficient to authorize this court to review the rulings thus excepted to; *Holman v. Murdock*, 5 G. 275; see *ante*, 110, 116.

119. *Exceptions to instructions may be taken on motion for new trial.* See *ante*, 112, 113, 116.

120. *Exceptions to evidence must be specific.* Objections to the admission of evidence, should specifically point out the ground on which they are based, so that if capable of being removed by other proof, it may be introduced; *Doe v. Natchez Ins. Co.*, 8 S. & M. 197; *Routh v. Agricultural Bank*, 12 S. & M. 161; *Morris v. Henderson*, 8 G. 492; *Monk v. Horne*, 9 G. 101. See *ante*, 80, 84, 85, 86.

3. Necessity for Exceptions and Bills of Exceptions.

121. *Bill of exceptions only medium to show facts to High Court.* When a cause has been tried in the Circuit Court upon an issue of fact, the High Court can know nothing of the facts except through the medium of a bill of exceptions, or by agreement of the parties; *Gwinn v. Williams*, 5 C. 324. Hence, a certificate of the clerk, where a judgment by default, or *nil dicit*, was taken, setting out a copy of the note on file, and showing it to be different from the one described in the declaration, will not be noticed; *Barfield v. Impson*, 1 S. & M. 326; nor can the court know, whether, when such judgment was entered, the note was on file or not, except through a bill of exceptions; *Vickery v. Rester*, 4 H. 293. But now, by Rev. Code of 1857, p. 492, art. 90, the instrument sued on, or a copy, is required to be filed with the declaration, and is made a part of the record; *Marshall v. Hamilton*, 41 M. 229.

122. *Same: In Probate Court.* The statute requires the testimony in a trial in the Probate Court, when an appeal is taken, to be reduced to writing, and it ought to be certified by the judge. This court will not notice the testimony of witnesses reduced to writing after the trial (though it was agreed that the appellant should have until the next term to reduce the evidence to writing), when

its correctness is certified by the clerk alone; *Ross v. Mims*, 7 S. & M. 121.

123. *When bill of exceptions dispensed with.* If the judgment itself show an erroneous ground in a matter of fact, upon which the court acted, it will be reversed, though there be no bill of exceptions; *Shields v. Graves*, 6 H. 262. And so if on the face of the judgment itself, the facts upon which it was rendered, sufficiently appear to show the judgment to be erroneous, this court will reverse it, though no bill of exceptions be taken; *Com'l Bk of Manchester v. Coroner of Yazoo Co.*, 6 H. 530. But the copy in the record of a bill of exchange and protest, on which suit is brought, does not show the facts on which the verdict was rendered, so as to authorize a reversal, on the ground that considering such copy, the suit was brought before the bill fell due; *Wilkinson v. Cook*, 44 M. 367.

124. *Necessity for exceptions to instructions.* Unless the instructions (in a criminal case) given by the Circuit Court be excepted to in that court, this court will not notice any alleged error in them, in connection with the propriety of the verdict, or of the judgment overruling a motion for a new trial; *Scott's Case*, 2 G. 473; S. P., *Price's Case*, 7 G. 531.

125. *Necessity for exceptions to judgment overruling motion for a new trial.* See *ante*, 94e, 94f.

126. *Necessity for excepting to account in chancery.* If a decree for an account in chancery be correct as respects the principle of stating it, objections to it will not be noticed here, unless exceptions were filed to it in the court below; *Williamson v. Downs*, 5 G. 402.

127. *Necessity for exceptions to the allowance of amendments.* This court will not reverse the action of the Chancery Court allowing amendments, unless it was excepted to at the time; *Pass v. McRae*, 7 G. 143; nor will it notice an objection made in the court below to the admission of a new party to a motion against a sheriff for a failure to pay over money collected, unless it be excepted to; *Pugh v. Boyd*, 9 G. 326.

4. What must be in Bill of Exceptions.

128. *What bill of exceptions must contain.* Written as well as oral evidence will not be reviewed in this court unless incorporated in a bill of exceptions; *Rogers v. McDaniel*, 3 H. 172. Written evidence copied in the transcript of the record sent to this court will not be noticed; *Officers of Court v. Bank of Port Gibson*, 4 S. & M. 431. And so an affidavit for a change of venue is matter in pais, and will not be noticed unless incorporated in a bill of exceptions; *Grant v. Planters' Bank*, 4 H. 326.

See BILL OF EXCEPTIONS, 6, 7, 8, 9, 10, 11.

129. *What and how much evidence must be in bill of exceptions.* See *ante*, 99, 94d, 94b, 94a, 57, 58.

5. What may be Certified in Bill of Exceptions.

129a. *What may not be certified in bill of*

exceptions. The office of a bill of exceptions is to make that a part of the record, which would otherwise be no part of it. Hence, what is a part of the record cannot be certified to this court in a bill of exceptions. Thus a judgment of the court below, overruling a motion for a new trial, cannot be certified in a bill of exceptions; *Barrington v. Miss. Cent. R. R. Co.*, 3 G. 370. And so of a motion for a new trial; and both the motion and the judgment on it, must be certified to this court, otherwise than in a bill of exceptions, or else this court will not notice them; *N. O. J. & G. N. R. R. Co. v. Albritton*, 9 G. 242.

See **BILLS OF EXCEPTIONS, 1.**

6. Miscellaneous.

129b. *Bill of exceptions must be signed.* This court will not notice a paper copied in the record as a bill of exceptions, unless it be signed by the judge; *Graves v. Monet*, 6 S. & M. 384.

X. Judgment of the Court; Its Form, Nature and Requisites.

1. Judgment on Reversal; When Judgment here.

130. *When judgment is wrong but the verdict is right.* If the judgment of the court below be wrong but the verdict be right, this court will reverse the judgment and enter the proper judgment here on the verdict; *Thomas v. Estes*, 2 S. & M. 439; *Hill v. Robeson*, 1b. 541; *Barron v. Wade*, 7 S. & M. 49; *Muldrow v. Davis*, 12 S. & M. 655.

131. *Judgment here on verdict illegally set aside.* Judgment will be entered here on a verdict properly rendered in the court below, but illegally and without authority set aside by the circuit judge in vacation, and after his term of office had expired; *Coopwood v. Prewett*, 1 G. 206. See *ante*, 101, *et seq.*

132. *Judgment on sustaining or overruling demurrer.* Where a good special plea in bar is pleaded, to which there is a demurrer which is undisposed of, and there is a verdict and judgment for the plaintiff on the general issue, on a writ of error to that judgment, this court will reverse it and enter the proper judgment here, viz.: judgment of *nil capias* for defendant on his special plea. For the special plea being a good bar to the action, if the demurrer had been overruled formally by the court, that was the judgment which should have been entered by the court, and as the plaintiff was allowed to go to trial on the general issue without any disposition having been made of the demurrer, he had the same advantage as if the demurrer had been sustained in the court below. Nor will this court in such a case remand the cause to enable the plaintiff to avail himself of the privilege of withdrawing the demurrer and pleading before any judgment of the court rendered on the demurrer; *Bailey v. Gaskins*, 6 H. 519. But this is overruled by *Gwin v. McCarroll*, 1 S. & M. 351; where it was held,

that, by the statute, the Circuit Court is authorized, in its discretion, after the plaintiff's demurrer to defendant's plea or rejoinder has been overruled, either to enter judgment final for defendant or allow the plaintiff to withdraw his demurrer and file a replication or sur rejoinder; and this court in reversing a judgment sustaining such a demurrer, and entering a judgment overruling it, will remand the cause without entering judgment final, so as to give the plaintiff an opportunity to apply to the court below for leave to withdraw his demurrer and plead over; *Gwin v. McCarroll*, *supra*. And under the act of 1840 (Session Laws, p. 132), where judgment final is rendered upon sustaining a demurrer to a pleading, the party declining to ask leave to amend, this court, upon holding the demurrer to be good, will not remand the cause to allow the pleading to be amended, when it appears from the whole pleadings that the defective pleading cannot be amended in substance according to the facts of the case; *Agnew v. McElroy*, 10 S. & M. 552. See *post*, 135.

133. *Effect of judgment here.* When the High Court, upon the reversal of a judgment, enters the judgment here, which ought to have been entered in the court below, the judgment here is *nunc pro tunc*; and nothing occurring since the rendition of the judgment, and not disclosed in the record, will be noticed or considered as a reason why the judgment should not be entered; *Dean v. State*, 2 S. & M. 200.

134. *Judgment where excess is remitted.* If the judgment be excessive in being for a greater amount than claimed in the declaration, the defect may be cured by a remittitur entered in this court; *Hurd v. Germany*, 7 H. 675; or, if it be for more than is due, a remittitur may be entered and judgment entered here for the true amount; *Newman v. Mackin*, 13 S. & M. 383; *Anderson v. Tarp-ley*, 6 S. & M. 507; *Buck v. Little*, 2 C. 463; *Breck v. Smith*, 44 M. 690. And judgment was entered for damages as in case of affirmance in such a case, in *Green v. Robinson*, 3 H. 104. But the court will not notice an alleged excess, unless a calculation showing it be presented according to the rule of court; *Hathcock v. Owen*, 44 M. 799. See *post*, 142.

134a. *Judgment of court below amended.* This court will amend informal judgments of the court below, by supplying clerical omissions and entering up the proper judgments; *Buckingham v. Nelson*, 42 M. 417.

2. When Remanded on Reversal.

135. *Judgment where demurrer is overruled.* When the court below overrules a demurrer to a plea and enters final judgment thereon for defendant, without awarding *respondent oster*, and the plaintiff sues out a writ of error, and the plea is adjudged good in the High Court, the cause will be remanded to give the plaintiff an opportunity of replying; *Randolph v. Singleton*, 12 S. & M. 439. See *ante*, 132.

And so if a demurrer to a plea be sustained

and on judgment of *respondent* rendered by the court without application therefor by defendant, he pleaded again, this is not a waiver of the demurrer, and this court will, on writ of error, decide on the validity of the plea, and, if it be good, will overrule the demurrer to it and remand the cause; *Ellis v. Martin*, 2 S. & M. 187; S. P., *Willis v. Ives*, 1 S. & M. 307.

136. *Judgment: When trial was had without replication to a plea.* When the defendant in the court below is forced to a trial without any replication being filed to an affirmative plea, it will be error; if he had asked for judgment on the plea for want of a replication, and on its refusal had excepted, it would then have been a matter of inquiry in this court whether it would render judgment on the plea, or remand the cause; but on failure to take such exception, this court will only reverse the judgment and remand the cause; *Smith v. Elder*, 14 S. & M. 100.

137. *Remanded on sustaining demurrer.* Where this court reverses the judgment of the Circuit Court overruling the plaintiff's demurrer to a plea, judgment final will not be entered here against the defendant, but the cause will be remanded so as to allow the defendant to amend; *Trotter v. Parker*, 9 G. 473; S. P., *Randolph v. Singleton*, 12 S. & M. 439. See *ante*, 135.

138. *Decree in chancery remanded for new proof.* A final decree of the Chancery Court, based on a will probated in a sister State, was reversed because the will was not properly authenticated; but the cause was remanded, that the plaintiff might have an opportunity of producing a copy properly authenticated; *Stewart v. Swanzy*, 12 S. & M. 684. And this was done a second time in the same case; S. C., 1 C. 302.

See *post*, 144.

3. Miscellaneous Decisions on Judgments in High Court.

139. *Judgment reversed as to one, and affirmed as to another.* On writ of error prosecuted by the maker and endorser a promissory note or bill of exchange, to revise a judgment against them, that judgment may be reversed as to one, and affirmed as to the other; *Holman v. Murdock*, 5 G. 275; *Wilkinson v. Cook*, 44 M. 367. See *post*, 199. See JUDGMENT, 74.

140. *Judgment on affirmance: Effect.* The judgment rendered by this court upon the affirmance of the judgment below, against the plaintiff in error or appellant, and his sureties, does not merge, extinguish or satisfy the original judgment thus affirmed, but ratifies and confirms it; and it does not, therefore, extinguish the lien of the original judgment, which continues in full force from its date; *Planters' Bank v. Calvit*, 3 S. & M. 143; *Kilpatrick v. Dye's Heirs*, 4 S. & M. 289.

141. *Judgment against sureties of appellant on dismissal.* Where an execution was issued on a bond given by the purchaser, at a commissioner's sale in chancery, and was su-

perseded, and afterwards the supersedeas was dismissed here, by an affirmance of the decree dismissing the supersedeas, a judgment in this court will be entered against the principal and sureties in the appeal bond, for the amount of the debt superseded, and interest and costs; *Conger v. Robinson*, 4 S. & M. 210.

142. *When judgment may be entered on appeal bond.* This court has no power to enter a judgment against the sureties on a writ of error or appeal bond, except only when the judgment is affirmed, or the appeal or writ of error dismissed. Where the judgment of the court below is reversed, and this court proceeds to enter the proper judgment here, it cannot enter judgment against the sureties on the appeal or writ of error bond, and if it do, the judgment will be void; *Kibble v. Butler*, 5 C. 586. See *ante*, 134.

143. *Effect of affirming a void judgment.*

The affirmance of a void judgment, on account of a defect in the transcript of the record from the court below, gives it no validity; *Pender v. Felts*, 2 S. & M. 535. And the rule is the same, when the invalidity of the judgment was not disclosed, owing to a fraudulent alteration in the record of the court below; *Wilson v. Montgomery*, 14 S. & M. 205.

144. *The proper judgment where the judges differ.* Where one of the judges of the High Court is interested, and the other two differ as to whether there is error or not in the record, the judgment will be affirmed; but if both agree that there is error, and one thinks the High Court should enter a corrected judgment, and the other thinks the cause should be remanded, the case must of necessity be remanded; *McNutt v. Lancaster*, 9 S. & M. 570. And where all three of the judges sit in the case, and one is of opinion there is no error on the record, and that the judgment ought to be affirmed, and the other two are of opinion that a new trial ought to be granted, though on different grounds, the judgment must be reversed; *Browning's Case*, 4 G. 47.

145. *Judgment nunc pro tunc.* If a party die after the cause is argued and submitted, and taken under advisement, and before a decision is made at a subsequent term, judgment will then be entered *nunc pro tunc*, as of the term at which the submission was made, and that judgment may then be revived in favor of, or against the legal representatives of the deceased party; *Tunstall v. Walker*, 2 S. & M. 638.

146. *Power of the court over its own judgments.* The judgments of the High Court are under the control of the court, during the term at which they are rendered; and the undelivered opinion of one of the judges, may be recalled upon his being satisfied of its being erroneous, without any petition for re-argument; *McRaven v. McGuire*, 9 S. & M. 34.

147. *Power of chancellor over cause remanded.* A decree of this court remanding a cause to the chancery court, and directing a foreclosure of a mortgage, does not take

away the power of the chancellor to allow amendments of the pleadings, and to make such other orders as equity, and the right of the case may demand. His right to do these things, is as full in such a case, as in any other pending in his court; the effect of the mandate from the court being only to require him, upon the state of the pleadings and proof remaining the same as it was when the case was decided here, to render the decree therein directed; *Wailes v. Johnson*, 3 C. 421.

148. *Same.* The power of a chancellor over a decree of this court, sent to the Chancery Court for execution, is rather ministerial than judicial—to enforce the execution of the decree, not to inquire into its validity. He cannot inquire into any fact which, though not expressly, was yet incidentally and necessarily involved in the decision of this court, in rendering the decree; and hence, it will be an unwarranted exercise of power for the chancellor to quash an execution issued from the Chancery Court to enforce a judgment rendered in this court, upon the ground that the person against whom the execution was issued and the judgment rendered, in his capacity as administrator, was not in fact administrator at the time of the rendition of the judgment against him in this court; *Henderson v. Winchester*, 2 G. 290. See *post*, 186.

XI. Re-argument and Re-hearing.

149. *Granted more readily when judgment in the court is final.* A re-argument is not a matter of the same moment, where the judgment is reversed and cause remanded, as when the judgment here is final; and in the latter case, the court will be more inclined to yield to an application to grant one; *Tunstall v. Walker*, 2 S. & M. 638.

150. *When applied for to argue a new point.* It is a strong reason for refusing a re-argument, that counsel applying for it propose to raise a new point in it, not noticed in the first argument. Counsel ought to cover their whole ground at first, and not make experiments on a single point, and if that fails, change their position; *Tunstall v. Walker*, *supra*. A re-argument will not be granted to enable counsel to discuss a question not argued on the first argument, or assigned for error; *Ramsey v. Barbaro*, 12 S. & M. 293.

151. *Re argument at subsequent term.* This court has the right, at a term subsequent to the one at which a cause has been decided and judgment entered in it, to grant a re-hearing. This power, however, will not ordinarily be exercised; but if the former decision was on a plain mistake of the facts, as contained in the record, and would have the effect to bar important rights, a re-hearing will be granted; *Roberts v. Edmondson*, 4 S. & M. 730.

152. *Same.* Whether this court has the power to modify its decree after the term at which it was rendered; *Quere?* But if it has, it will not do so after the lapse of a year from its rendition, unless absolutely necessary

to prevent injustice. It will not be done if the same end can be attained by applying to the Chancery Court to which the cause was remanded, for an amendment of the pleadings; *Wailes v. Johnson*, 3 C. 421. See *ante*, 146, 147.

XII. Practice.

1. Certiorari.

153. *When applied for.* After the defendant in error has pleaded to the assignment of errors, "*in nullo est erratum.*" it is too late to apply for a *certiorari*; that plea admits the correctness of the record; *Patrick v. McKernon*, 5 H. 578.

154. *For redundant matter in the record.* The object of a *certiorari* in this court is to perfect the record, and will lie as well when it is shown that the transcript contains what it ought not to contain, as when it does not contain what it ought to contain; *Harris v. Planters' Bank*, 4 S. & M. 701.

155. *For diminution in record: Case in judgment.* When the transcript of the record from the court below, which is certified to this court on writ of error, shows that a judgment, final in its nature and character, was rendered, if the defendant in error relies upon the fact that such judgment was afterwards set aside in that court, he should suggest a diminution of the record, and pray for a *certiorari*, and if upon the return of the *certiorari*, an order setting aside the final judgment be certified to this court, the writ of error will be dismissed on motion; *Byrne & Co. v. Jefferies*, 9 G. 533. See *ante*, 4.

156. *Proof required on application.* A *certiorari* will not be granted if resisted, unless satisfactory proof be made of the defect in the record, and that it can be corrected. The statement of counsel on these points made on information is not sufficient; *Patrick v. McKernon*, 5 H. 578.

2. The Citation.

157. *Tests of.* The citation should be tested in the name of the chief justice of this court; and in this case the writ of error was dismissed for this defect, and also because the citation was improperly served; *Coleman v. Tidwell*, 5 H. 12.

158. *Service of.* The leaving of a copy of the citation at the office of the attorney for defendant in error is an insufficient service; *Ib.* See *ante*, 157. An acknowledgment by defendant of service of the citation endorsed on it by the clerk below, is a mode of service unknown to the law; and if there be no other evidence of service, the writ of error will be dismissed; *Cox v. Wadlington*, 3 H. 57.

159. *Alias citation.* A writ of error will be dismissed, if the plaintiff in error fail for fifteen days after the return day to apply for an *alias* writ, the original being not returned served; and this, although the plaintiff in error produces an affidavit of the sheriff, showing that he had duly served the original, and lost it; *Newell v. Briggs*, 3 H. 45. An *alias* will not be granted without proof of diligence in serving the original; but it will

be too late to make objection on the ground of want of diligence, on a motion to quash made at a term subsequent to the one at which the *alias* citation issued; *Natchez Ins. Co. v. Stanton*, 4 H. 7.

3. Delay Cases.

160. *How disposed of.* Delay cases, under the rule, will be dismissed on suggestion of counsel in writing; *Adams v. Munson*, 3 H. 77. Since the passage of the statute requiring three dockets to be kept in the High Court, one for each district, a case cannot be submitted as a delay case, except during the time in which the docket on which it appears is under consideration; *Coppage v. Hall*, 9 S. & M. 360.

4. Dismissals, and Motions for.

161. *Necessity for motion to dismiss.* No motion to dismiss is necessary when the court has no jurisdiction; the court will of itself dismiss a cause at any time when it discovers it has no jurisdiction; *Pickett v. Pickett*, 1 H. 267. An objection to the writ of error or appeal cannot be urged, as a ground for dismissal, on the final hearing; it should be raised by a motion to dismiss; *Robertson v. Johnson*, 40 M. 500.

162. *When motion made.* Where the appeal was returnable to the December term, and the record was not filed till the 3d day of January, the court will not entertain a motion to dismiss for the delay in filing the record, which was not entered until after the record was filed. The motion should have been made before; *Carmichael v. West Feliciana R. R. Co.* 2 H. 817. (See *post*, 168.) A motion to dismiss a case because the death of the appellant had been suggested several terms before, and no steps had been taken to revive, is premature, if made before the cause is regularly reached on the docket; *Burns v. Stanton*, 2 C. 580.

5. Causes for Dismissal.

163. *No writ in the record.* Where a cause is brought up by writ of error, and there be no writ in the record, it will be dismissed; *Dévané v. Calching*, 2 H. 884.

164. *For improper service of citation, improper teste, and failure to apply for alias,* see *ante*. 157, 158, 159.

165. *For want of jurisdiction,* see *ante*, 161.

166. *For bad appeal bond.* If the appeal bond be defective in not containing a covenant to pay the recovery in the court below, and the costs and the judgment in the High Court, the appeal will be dismissed; *Bowie v. Hagan*, 5 H. 13. See *APPEAL*, 3, 4, 5, 9.

167. *For want of final judgment,* see *ante*. 4, 155.

168. *For failure to file record in time.* When the plaintiff in error fails to file the record on the first day of that term of this court to which it is returnable, the cause will be docketed and dismissed on motion of defendant in error, and upon his filing a copy of the record, or a copy of the citation executed. And this

rule is not changed by the act of 1839 (H. & H. 542. §§ 55, 56), providing for a separate docket for each of the three districts and authorizing errors to be assigned on the day the cause is taken up; *McGee v. Caruthers*, 2 S. & M. 443. (See *ante*. 162.)

169. *Costs on dismissal for want of jurisdiction.* Where an appeal or writ of error is dismissed for want of jurisdiction, the appellant or plaintiff in error is liable to be taxed in this court with costs; and the cost of the transcript of the record from the court below, is properly a part of the costs in this court; *Work v. Mallory*, 3 C. 172, overruling *Green v. Whiting*, 1 S. & M. 579, which held that this court had no jurisdiction to render a judgment for costs in such a case, and could only strike it from the docket.

170. *Setting aside dismissal.* Where a cause has been dismissed for want of service of citation, the order of dismissal will not be set aside at a subsequent term, on a showing of diligence then made; that showing should have been made on the hearing of the motion to dismiss; *Harper v. Lowry*, 6 H. 268.

6. Joinder in Error.

171. *Failure to join in error.* On default of the defendant in error to file his joinder in error, within the time prescribed by the rule of court, this court will not reverse the judgment for want of such joinder, but will proceed to hear the cause *ex parte*. This is the English rule, and is most consonant to justice; *Mason v. Lane*, 5 H. 11. (Joinder in error is not required under the present practice. G.)

7. Revivor.

172. *Revivor and abatement.* When the appellant dies before the return term, his representatives are entitled to revive; and the cause will not then be dismissed for want of assignment of errors; *Carmichael v. West Feliciana R. R. Co.*, 2 H. 817. And by the common law, writs of error and appeals, did not abate by the death of either party after the assignment of errors; and under our statutes, abolishing the assignment of errors, the filing of the record must be considered as the assignment of errors in this respect; *Torry v. Robertson*, 2 C. 192. A writ of error or appeal does not abate by the death of appellant or plaintiff in error, but after such death the court may proceed without revivor to examine the errors assigned, but not to render judgment; *Burns v. Stanton*, 2 C. 580. And if the plaintiff in the court below die after the rendition of a judgment in his favor, a writ of error will lie against his administrator to revive that judgment, without its having been revived in his name; *N. O. J. & G. N. R. R. Co. v. Rollins*, 7 G. 384.

173. *Same: Privity between administrator and his successor.* Under the statutes of this State, the administrator *de bonis non* is in full privity with the previous administrator. He may prosecute or defend a writ of error to revise a judgment rendered in favor of, or against his predecessor without revivor; and

where a writ of error is sued out in such case, after the appointment of an administrator *de bonis non*, a *scire facias ad audiendum errores* may properly issue from this court to notify the administrator *de bonis* of the pendency of the writ here; *Mayer v. McClure*, 7 G. 389.

174. *Death of party after submission.* If a party die after his cause has been argued and submitted, and taken under advisement, and before a decision made at a subsequent term, judgment will be entered *nunc pro tunc*, so as to make it of the term at which the cause was submitted, and previous to the death of the party, and the judgment may then be revived; *Tunstall v. Walker*, 2 S. & M. 638.

174a. *Revivor here sufficient in court below.* The revival of a suit here, by or against an administrator, is sufficient for all subsequent proceedings in the court below, without any new revival in that court; *Cannon v. Cooper*, 10 G. 784.

8. Miscellaneous.

174b. *Practice in relation to correction of errors in fact in this court.* When an error in fact, committed in the rendition of a judgment in this court, is sought to be corrected by motion made at a term subsequent to the rendition of the judgment, the party making the motion should give at least ten days' written notice to, or have citation served for ten days on, the opposite party or his attorney; *Miss. & Tenn. R. R. Co. v. Wynne*, 42 M. 315.

XIII. The Record.

174c. *Is the only medium between this and the inferior court.* The record is the only medium by which this court can examine any question presented to the court below; *Green v. Robinson*, 3 H. 104. This court can act only on the record from the court below, which contains a case sufficiently certain to enable this court to determine what it is; *Carraway v. Board of Police of Yazoo Co.*, 1 H. 23. And this court can notice nothing not properly a part of the record, though embraced in it; *Kibble v. Butler*, 14 S. & M. 207.

175. *Acts in pais no part of the record.* No acts of the parties *in pais* are parts of the record unless made so by bill of exceptions. Hence the affidavit and bond of a claimant in a proceeding under the statute, are no parts of the record, and the court cannot notice them for any fact which is not otherwise disclosed by the record; *Id.*

See further on this subject, BILL OF EXCEPTIONS, 6, 7, 8, 9, 10.

176. *What the record contains.* The final record in this court embraces citation, writ of error, the transcript of the record from the court below (except deposition in chancery cases), the assignment of errors and joinder, all interlocutory orders, and the final judgment; and the plaintiff in error, though successful, is liable to the clerk for the costs of the same; *Officers of the Court v. Fisk*, 7 H. 403.

177. *Matter of record per se must not be in bill of exceptions.* This court will not revise the action of the court below in granting or refusing a new trial, unless both the motion for a new trial and the judgment thereon be certified to this court as a part of the record, otherwise than in a bill of exceptions; *N. O. J. & G. N. R. R. Co. v. Allbritton*, 9 G. 242; *Barrington v. Miss. Cent. R. R. Co.*, 3 G. 370. The record must also show the final judgment; *Rogers v. McDaniel*, 3 H. 172; *S. P., Whitfield v. Westbrook*, 40 M. 311; *Moody v. Nichols*, 1 C. 109; *Smith v. Calcote*, 41 M. 656. See *ante*, 129.

178. *Amendment of the record.* This court cannot allow an amendment of the record, the effect of which would be to cure a defect which existed when the writ of error was sued out, and thereby defeat the writ. Hence when judgment in ejectment was taken, after the expiration of the lease, as stated in the declaration, a motion to amend by inserting a longer lease, was disallowed in this court; *Lindsey v. Henderson*, 5 C. 502. It will, however, amend informal judgments by supplying clerical omissions of the court below, and enter up proper judgment in such cases; *Buckingham v. Nelson*, 42 M. 417.

XIV. Miscellaneous.

1. Costs.

179. *What costs plaintiff in error liable for, though successful.* See *ante*, 176.

180. *Costs of the transcript a part of.* The costs of the transcript of the record in the court below, is properly chargeable as a part of the costs in this court; *Work v. Mallory*, 3 C. 172.

181. *Costs where dismissal for want of jurisdiction.* Where an appeal or writ of error is dismissed for want of jurisdiction, the plaintiff in error is liable to be taxed with the costs in this court; *Work v. Mallory*, *supra*; which overrules *Green v. Whiting*, 1 S. & M. 579, which held that this court, in such a case, had no jurisdiction to enter any judgment except to strike the cause from the docket.

2. Construction of the Opinion of the Court.

182. *Language construed with reference to the facts of the case.* However general the language of this court may be, it must be construed with reference to the facts of the case; *Bell v. Tombigbee R. R. Co.*, 4 S. & M. 549; *Buckingham v. Bailey*, 1b. 538; *Pass v. McRea*, 7 G. 143; *Garnett v. Cowles*, 10 G. 60.

3. Res Adjudicata.

183. *First decision is.* The decision of this court, in a cause once here, is final on all the points of law adjudicated, and the court will not re-adjudge these matters when the cause is brought here again; *McDonald v. Green*, 9 S. & M. 138. The points so settled constitute the law of the case in all subsequent proceedings in the court below, and in this court, when brought here a second time; and

the judgment on the second writ of error or appeal must be the same unless a different one is authorized by new facts developed; S. C., 13 S. & M. 445; *Bridgeforth v. Gray*, 10 G. 136; *Stewart v. Stebbins*, 1 G. 60; *Smith v. Elder*, 14 S. & M. 100. But the rule was once held the contrary, in *McNeill v. Burton*, 1 H. 510. As to the extent of the decision as *res adjudicata*, see *RES ADJUDICATA*, 6.

184. *Same: Case in judgment.* Where the High Court has decided a controversy between two judgment creditors, as to their respective rights to the proceeds of sales made under their respective executions, and a subsequent controversy arises between the same parties as to their respective rights to the proceeds of other sales, made under executions from the same judgments, and under like circumstances, the former opinion will be conclusive of the rights of the parties in the latter controversy; *Martin v. Lofland*, 10 S. & M. 317.

185. *Same: Another instance.* But the decision of this court upon a demurrer to a bill in chancery, is not an adjudication in reference to a plea then filed, but not disposed of or considered; *Abby v. Com'l Bank of New Orleans*, 5 G. 571.

186. *Effect of decisions as to facts in the record.* When a judgment has been rendered in this court, the law presumes that every fact essential to its validity was duly brought to the consideration of, and settled by, the court, including the right and capacity of the parties to the record, to conduct the litigation, and every matter so adjudicated and involved in the record, becomes a part of the record and proves itself, and it cannot be impeached in the Inferior Court, to which it is sent for execution; *Henderson v. Winchester*, 2 G. 290. See *aule*, 148.

4. Stare Decisis.

187. *Rule where prior decisions are conflicting.* Where there are conflicting decisions of this court on the same point, the first wrong and the last right, this court will adhere to the last decision, even where a course of practice in relation to the giving of notice of protests of bills and notes has grown up under the first decision, which would cause loss and inconvenience by its reversal; *Hogatt v. Bingaman*, 7 H. 565.

188. *Rule as to.* This court is not precluded by the decisions of the (old) Supreme Court, but will decide according to its own convictions of the law. Perhaps, no general rule can be laid down, fixing the circumstances which shall determine whether an erroneous decision shall be followed or reversed, but the circumstances of each case must be looked to,—the extent of influence on contracts and interests, which the former decision may have had, whether it be only doubtful or clearly against principle, whether sustained by some authority or oppose to all. Where all this is done, if no particular injury will result from the reversal of an erroneous rule once recog-

nized, it will be done; *Garland v. Rowan*, 2 S. & M. 617.

189. *Necessity for adhering to former decision.* A change by this court of rules of law which it has once established, and on the faith of which contracts have been made or rights acquired, will produce most of the injurious effects of retrospective legislation; *Shelton v. Hamilton*, 1 C. 496.

190. *Where there is only a single decision.* This court will not adhere to a single decision, in conflict with a long, uniform and well settled train of adjudications in other courts, which are based on principles of the soundest policy, when under that decision no important rights could in any likelihood have arisen; *Gully v. Dunlap*, 2 C. 410.

191. *Rules of mere expediency.* Rules of law which relate principally to matters of expediency, when once settled by this court, will not be changed; *Davidson v. Allen*, 7 G. 419.

192. *On points of practice.* This court will not lightly depart from its former rulings, but when a former decision is on a mere point of practice, and no rights have grown up under it, the court will, if it be erroneous, reverse it; *Gwin v. McCarroll*, 1 S. & M. 351.

5. Supreme Court of the United States.

193. *When not followed by this court.* This court, whilst entertaining the highest respect for the Supreme Court of the United States, will not, in regard to questions on which the decisions of this court are, by the constitution and laws, final, change the rules of law settled by it, in order to conform to the rulings of that court; *Shelton v. Hamilton*, 1 C. 496. And this court, in the construction of domestic statutes of the State, passed for the good government of its citizens, and the welfare of the commonwealth, will not yield its well matured and clear convictions to the opinion of the Supreme Court of the United States, but will exercise its judgment, in exclusion of all other tribunals; *Deans v. McLevlon*, 1 G. 343; S. P., *Brian v. Williamson*, 7 H. 14.

See CONSTITUTIONAL LAW, 115, 116.

6. Release of Errors.

194. *Must be pleaded.* A release of errors, either direct or constructive, cannot be taken advantage of by motion—the release must be pleaded; *Vick v. Maulding*, 1 H. 217; *Produt v. McCaleb*, 2 C. 169.

The issuance of an injunction, under the Act of 1857, is a release of errors, in the judgment enjoined, in the same manner as if a release of errors had been executed; *Thompson v. Munson*, 43 M. 176. But under the former statute, (H. C. 760, § 4), it did not operate *per se* as a release; but the chancellor would dissolve an injunction unless a release of errors was filed; *Moody v. Harper*, 6 C. 615.

7. Terms of Court.

195. By the revised constitution of 1865,

the High Court must hold at least two terms in each year, one of which, at least, shall be at the capital, and the other or others, at such other place or places as the Legislature shall direct. But the two terms intended by the constitution, does not simply refer to sittings of the court, but also to stated periods for the holding of the court, at which every causes pending in it shall be legally triable, unless continued for cause. Hence, the act of February 21st, 1867, making four districts in the State, and providing for a term in each district, at which the causes originating in that district shall alone be triable, is, in effect to have but one term in a year, since there is only one term at which the business in any specified part of the State can be disposed of. And for that reason, the act of 1867 is unconstitutional in that respect, and the court will hear, at each of the four terms, all the causes on the general docket for any part of the State; *Opinion of the Court*, 41 M. 54. The whole Act of February 21st, 1867, was decided unconstitutional in *Mobile & Ohio R. R. Co. v. Mattan*, 41 M. 692.

8. Execution on Judgment from High Court.

196. *Circuit clerks issue execution to enforce.* When the High Court of Errors and Appeals has rendered a judgment of affirmation of a judgment of the Circuit Court, or has rendered such judgment as the Circuit Court should have rendered, it is the duty of the clerk of the Circuit Court to issue an execution upon that judgment, on a certificate of the clerk of this court of the rendition thereof, and the execution so issued must conform to the judgment of this court, as certified to the clerk below; *Morton v. Simmons*, 2 S. & M. 601.

197. *Same.* Therefore, when a judgment was rendered on a forthcoming bond, against principal and surety, and the latter sued out a writ of *audita querela*, to be discharged therefrom, which being dismissed, he sued out a writ of error from the judgment of dismissal, and gave a supersedeas bond, with sureties, and that judgment was affirmed, and judgment entered against him and his sureties. Execution on that judgment should issue alone against the parties thereto, and should not embrace in it the principal in the forthcoming bond, who did not sue out the writ of *audita querela*, nor join in the writ of error: but, as to him, an execution can issue on the judgment on the forthcoming bond, as if there had been no subsequent proceedings; *Id.*

198. *Correction of judgments in High Court.* An error of fact, committed on the rendition of a judgment of the High Court of Errors and Appeals, may be corrected by motion, after the term has expired, but the other party should have ten days' notice. A more correct practice, however, would be to correct the error by writ of error *coram nobis*; *Miss. & Tenn. R. R. Co. v. Wynne*, 42 M. 315.

199. *Judgment, erroneous as to one, erro-*

neous to all: Exceptions. This is the general rule. See JUDGMENT 73, and *ante*, 139.

But the rule is different as to judgments on proceedings to enforce mechanics' liens. These may be partly good and partly bad, like decrees in chancery. For instance, the judgment may be good as a personal judgment, but bad in ordering a sale of the land; *Weathersby v. Sinclair*, 43 M. 189.

Highways.

See ROADS.

Hire.

See BAILMENT, 1, 2, 3.

Hotch-pot.

See DESCENT AND DISTRIBUTION, 35, 39.

Husband and Wife.

See MARRIAGE AND DIVORCE. DOWER. WIDOW. CHICKASAW INDIANS, &c., 2.

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I. Wife's Power to Contract at Common Law.

1. *Has no power to contract.* At common law (as contradistinguished from the equity system of jurisprudence), a *femme covert* has no power whatever to bind herself by her contract, which was simply void; if she had separate property, it could only be reached in equity; *Davis v. Poy*, 7 S. & M. 64. But whilst such a contract is void, it is not *malum in se*, nor *malum prohibitum*, but its defect is in the want of the capacity of the *femme covert* to make it; it may be founded on a meritorious consideration, entitling it to the favorable consideration of a court of justice; and hence, where the incapacity ceases to exist, by the subsequent discovery of the wife, the good and valid consideration on which the contract is based, having created a moral obligation to discharge it, she will be bound by her new promise, then made, to carry it out; *Franklin v. Beatty*, 5 C. 347.

2. *Same: Can execute bond as administratrix in certain cases.* If a *femme sole* being an administratrix, marry, and her sureties on her administration bond petition for counter security, she is competent, in conjunction with her husband, to execute the new bond, so as to release the old sureties; *Russell v. McDougall*, 3 S. & M. 234.

3. *She may act as agent.* The wife may, as agent of the husband, make a contract to bind him; but in such case it must be declared on as his contract; *McKie v. Kent*, 2 C. 131. But whilst she is competent to act as agent for another, so as to bind the principal, yet she is unable and incompetent to bind herself to discharge the duties and obligations of an agent so as to make herself responsible on that account. And when she cannot contract expressly, the law will not imply a contract for her; and hence, if she take exclusive possession of a trust estate in which she, jointly with others, is interested, and receive all the profits, she will not be

liable to her co-beneficiaries for their share; *Trucker v. Cocke*, 3 G. 184.

4. *Bond of wife as claimant of property levied on.* Whether a bond executed by a married woman, jointly with her husband, for the delivery of property levied on under an execution against another and claimed by her, is voidable or not; *Quære?* It is not void; and if upon making the claim and tendering such a bond with good security, the sheriff deliver her the property, he will not be liable, as for an unauthorized omission to levy; *Moore v. Chambers*, 11 S. & M. 408. See post, 61.

5. *She may execute receipt.* The wife may execute a valid receipt for her separate estate; *Billingslea v. Young*, 4 G. 95.

II. Power of Husband to act for Wife.

6. *His power to represent wife in the Probate Court.* The husband is authorized by statute to act for his infant wife, in all matters in which personal estate is to be received in her right, and this empowers him to represent her interest on the final settlement of an estate in which she is a distributee; and it is therefore unnecessary that a guardian *ad litem* be appointed for her in such a proceeding; *Frisby v. Harrison*, 1 G. 452. See *vide post*, 8, 9.

7. *May accept a deed for the wife.* The acceptance of a deed by the grantee, or some one authorized to act for him, is essential to its validity. The husband has power to make the acceptance of a deed for the wife; but in order to make such acceptance valid, he must have knowledge of the contents of the deed. The mere acceptance of the written instrument by the husband, the nature and extent of which being unknown to him, cannot be construed into an acceptance of the deed, so far as to affect the rights of the wife, by vesting an estate in her; *McGehee v. White*, 2 G. 41.

8. *Has no power to ratify illegal sale of her land.* The husband has no power to ratify, without the consent of the wife, a void sale of her land, made under a decree of the Probate Court; and hence, a reception of the purchase money by him on her behalf, will not preclude her from insisting on the invalidity of the sale. But if the rule were otherwise, it is clear that if he were the purchaser, a receipt given by him to the administrator for the proceeds, in satisfaction of his indebtedness for the purchase money, would not bind her; *Kempe v. Pintard*, 3 G. 324.

9. *His power to receive money due the wife.* Whether the husband, without the consent of the wife, can receive from the administrator the proceeds of a valid sale made by him of her real estate, so as to discharge the administrator from all liability to the wife; *Quære?* *Kempe v. Pintard*, 3 G. 324. But if she elect after his death to treat the reception as valid, by proceeding against his estate to collect, it will be good; *Knight v. Whitehead*, 4 C. 245. By the Act of 1857, Rev. Code 338, it is provided that the joint receipts of

husband and wife, or the separate receipt of the wife, shall be good for her separate estate, and her husband has now no right to receive her distributive share in an estate; *Anderson v. Gregg*, 44 M. 170. See *ante*, 6.

10. *His power to act as agent for wife.* The husband is not, by virtue of the marital relation, the agent of the wife in the disposition or management of her personal estate, except so far as he is made so by statute; but he may become such agent by her consent. He has no power *jure mariti* to make the wife a member of a partnership; *Atwood v. Meredith*, 8 G. 635.

11. *Same: Act of 1857.* By the Revised Code of 1857, p. 336, art. 25, it is provided, that contracts made by the husband (or wife) "for supplies for the plantation of the wife, or for the maintenance, clothing, care and support of her slaves, and for the employment of an agent or overseer for their management, may be enforced, and satisfaction had out of the wife's separate estate."

11a. *He has no power to submit wife's interest to arbitration.* See ARBITRATION AND AWARD, 2.

11b. *His power to act for wife, who is administrator, &c.* See EXECUTOR AND ADMINISTRATOR, 212a.

III. The Respective Interests of Husband and Wife in her Personal Property, at Common Law.

12. *Husband's right to her personality.* By the common law, the husband, by the marriage, acquired an absolute right to all the personality of the wife, and he might sue for it and recover possession of it in his own name; *Magruder v. Stewart*, 4 H. 204; S. P., *Cable v. Martin*, 1 H. 558; *Lowry v. Houston*, 3 id. 394. Marriage, operated as a gift to the husband of all the wife's personality then in her possession, or which he should reduce into his possession during the coverture; *Killcrease v. Killcrease*, 7 H. 311; *Lyon v. Knott*, 4 C. 548; S. P., *Rabb v. Griffen*, 4 C. 579; *Varner v. Gregg*, 4 C. 590; *Clarke v. McCreary*, 12 S. & M. 347. The husband's right, before reduction to possession, was contingent and qualified, and not a vested right, and could therefore be taken away by statute passed after marriage, and before he recovered possession; *Clarke v. McCreary*, *supra*. See *post*, 16.

13. *His right to wife's choses in action.* There is a distinction at common law between choses in action belonging to the wife, at the time of the marriage, and those accruing to her during coverture, so far as respects the right of the husband in them. In the former case, the wife must be joined with the husband in an action for their recovery, and if they be not reduced into possession during coverture, the right remains in the wife, though, if she die, the right survives to the husband. In the latter, the choses in action are the absolute property of the husband, whether reduced to possession or not, and the husband may sue for them alone; *Wade v. Grimes*, 7 H. 425;

S. P., *Harper v. Archer*, 4 S. & M. 99; *Clarke v. McCreary*, 12 S. & M. 347; *Cook v. Lindsey*, 5 G. 451; *Henderson v. Guyot*, 6 S. & M. 209.

14. *What are choses in action: Legacies and distributive shares.* Legacies and distributive shares in an intestate's estate, are, until payment or delivery, merely choses in action; and where the right to the same property is joint between several legatees and distributees, the property retains its character of a chose in action until division or partition; *Wade v. Grimes*, 7 H. 425; S. P., *Henderson v. Guyot*, 6 S. & M. 209; *Duncan v. Johnson*, 1 C. 130; *Lanehart v. Jeter*, 7 G. 650. And the widow's right to dower in the personality of a deceased husband, is a chose in action until assignment; *Duncan v. Johnson*, 1 C. 130; *Harper v. Archer*, 8 S. & M. 229; S. C., 6 C. 212.

15. *What is a sufficient reduction to possession: Assignment.* An assignment by the husband for a valuable consideration of the wife's chose in action, when made during coverture, is a sufficient reduction of it to possession, and the assignee is entitled to it; *Lowry v. Houston*, 3 H. 394; *Wade v. Grimes*, 7 H. 425. And the sale made by him of the property of an estate in which his wife is interested as distributee, before partition, will be considered as a reduction to his possession of the part sold; and if, in such sale, the wife receive other property as the price of what was sold, this also will be considered as reduced to the possession of the husband, and her right to it will be barred; *Harper v. Archer*, 6 C. 212. And the purchaser at such sale of undivided property, will be entitled to hold it to the extent of the wife's share in it; *Cable v. Martin*, 1 H. 558. See *post*, 17, 18.

16. *Same: Possession without partition.* A possession by the husband by permission of the administrator, of the whole of an estate, in which the wife has a distributive share, is no reduction of the wife's share to his possession, until there has been partition or division by decree of the court, separating and dividing her interest from the right of the others; and a law passed during such possession and before partition, securing the property to the wife, will be good; *Duncan v. Johnson*, 1 C. 130; S. P., *Tinnin v. Price*, 5 C. 619; *Clarke v. McCreary*, 12 S. & M. 349. And the rule is the same, where the wife was administratrix, and held possession during coverture, of the whole estate as such, her interest in it never having been set apart to her; *Lanehart v. Jeter*, 7 G. 630. A voluntary distribution made between the heirs, all being *sui juris*, is equivalent to a decree for that purpose, and possession held by the husband under such a partition, is good to bar the wife's right; but if some of the distributees in such voluntary distribution, be minors, the distribution (as to other property than money) is not only invalid as to them, but it cannot have the effect (since it may be disaffirmed by the infants) of changing the rights of a *femme covert*, who is a distribu-

tee, from a chose in action. And if, upon disaffirmance of such voluntary division by an infant, a new distribution be made, and the same property in that division be allotted to the wife, as was allotted to her on the first, this will make no difference as to the validity and effect of the first division; her right would still remain a chose in action, not reduced to possession up to the last division, notwithstanding her husband may have held possession under the first division, claiming the property as his own under that division; *Kilcrease v. Shelby*, 1 C. 161. But if a will conferring a legacy on a woman, provide that there shall be no division till a future day, the rights of the husband of the legatee will not be prejudiced or lost, if he claims the property and exercises over it all the ownership of which it is susceptible; *Wade v. Grimes*, 7 H. 425. And so the taking possession by the husband, with claim of title, of property left to the wife jointly with another, but not to be divided between them until the happening of an event which did not take place until after the husband's death, is a sufficient reduction of it to his possession to vest the title in him; *Scott v. James*, 3 H. 307. See *ante*, 15, as to effect of sale by husband of the property before division.

17. *Same. Case in judgment.* The first husband died, leaving a widow and child; and for three years, the widow, by permission of the administrator, was in possession of the first husband's plantation, made crops on it with the slaves of the estate, and received the proceeds. She then married again, and had issue by her second husband, which issue, by the death of the child by her first husband when this last child was in *ventre sa mere*, became entitled to the first child's half interest in the first husband's estate. After the second marriage, the second husband had possession of the first husband's estate, which was still undivided; he kept separate accounts for it, sold the crops and received the proceeds. He and his child died, and the widow filed this bill against the representatives of her first husband and of the child, to recover one-half of the first husband's estate, and for an account: *Held*,

1. That she was entitled to recover a half interest, as there was no reduction of it to possession by her second husband.

2. That she was to account for the proceeds of the crops received during her widowhood, less the maintenance and support of her first child.

3. That though the second husband had not reduced to his possession the *corpus* of the first husband's estate, so as to deprive the wife of her rights, yet as to the crops, his sale and disposition of them were considered, so far as the wife's half interest was concerned, as a reduction of them to possession; and as to his child's half interest, as a reception of it by him, as trustee for the child; and that the wife was to be charged in the account as having received her half interest in the crops; *Harper v. Archer*, 6 C. 212.

18. *Same.* And in that case, it farther appeared that the administrator of the first husband, during the time the wife had possession, purchased, without authority of law, slaves for the estate, with the proceeds of the crops; and it was held that these slaves belonged to the estate and not to the wife; and that the representative of the deceased second husband could not claim them as being the property of the wife, reduced to possession by his intestate; *Ib.* See *ante*, 15.

19. *Reduction to possession: Contingent right.* But the husband's right to the personality and choses in action of the wife, did not, at common law, extend to an estate which had been given to the wife on a condition which could not happen during the husband's life; for, as no title or estate could vest in the wife until his decease, she could not until that time, have property or right capable of being reduced to possession by him. Hence, in Alabama, where the common law rule then prevailed, where a bequest was made to a trustee for husband and wife jointly, for life, and to the survivors, though the estate be subject to the husband's debts, and may be sold under execution against him, yet if the wife survive, her contingent right of survivorship has not been destroyed by such sale and she may, after her husband's death, recover the estate; *Sale v. Saunders*, 2 C. 24.

20. *Husband's right after wife's death.* Where a separate estate in chattels is conveyed to a trustee, for the use of the wife, but the settlement makes no disposition of the separate estate after the wife's death, the husband, *jure mariti*, is entitled to the estate on her death; and this right of the husband is a vested one, from the time of the creation of the estate, which is in law, but so much carved out of the husband's interest; and hence, any law passed afterwards, during the life of the wife, which provides for a different descent of her property, will not affect the husband's rights; *Walton v. Olive*, 7 C. 270 (citing *Kimball v. Kimball*, 1 H. 533; *Lowry v. Houston*, 3 ib. 394; *Lyon v. Knott*, 4 C. 548); but in such a case, slaves purchased by the trustee from the income of the wife, after the passage of the Act of 1846, will descend on her death, as provided for in that statute; *Walton v. Olive. supra*.

21. *Same.* And so if a marriage contract be made between husband and wife, by which a separate estate is secured to the wife, with the power to dispose of it at her death, if she die without making any disposition of it, the property goes to the husband; *Kimball v. Kimball*, 1 H. 532; S. P., *Lowry v. Houston*, 3 H. 394. And so, if a chose in action be not reduced to possession during the wife's life, the right to it will survive to her husband; *Henderson v. Guyot*, 6 S. & M. 209. See *ante*, 13.

22. *Instance as to whether a chose in action accrued before or after marriage.* A testator bequeathed to his wife, during her widowhood, the power to manage his estate, and upon her marriage he directed that she should have a child's part of it set off to her: *Held*, that

the will gave her a vested interest upon the death of the testator, and that, as to her second husband, her right was a chose in action accruing before coverture, in which he would have no interest, unless he reduced it to possession during coverture; *Wade v. Grimes*, 7 H. 423.

IV. Husband's Interest in and Power over Wife's Realty at Common Law.

1. Generally.

23. *Husband entitled to rents.* By the common law the husband is entitled, during coverture, to the usufruct of the wife's realty, and he may lease the same during the coverture. This rule is not changed by the Act of 1839 (see *post*), and since that time, as before, the rents of the wife's realty are subject to be applied to the husband's debts; *Baynton v. Finnall*, 4 S. & M. 193.

24. *Emblements of wife's estate.* And where the wife has a lie estate in lands, which is terminated by her death, whilst there is a growing and ungathered crop, the husband is entitled to the emblements; *Hall v. Browder*, 4 H. 224.

25. *Effect of conversion of wife's realty into money.* Where land descended to the wife and her co-heirs, and it was sold for a division under a decree of a competent court, during coverture, this conversion of the land into money will not destroy or affect her interest in the fund or land, and she will be entitled to a separate estate in the money, exclusive of her husband's marital rights, to the same extent as she was entitled in the land; and if the husband receive the proceeds, his estate will be liable for it after his death; *Knight v. Whitehead*, 4 C. 245.

2. The Husband's Courtesy.

26. *What it is and how created.* Tenancy by the courtesy is an estate for life, created by the act of law. It occurs where a man marries a woman, who is seized at any time during the coverture of an estate of inheritance in land, and has by her, issue born alive, which might, by possibility, inherit the same estate as heir to the wife. Four things by the common law were requisite to its existence, viz.: marriage, birth of issue, actual seisin of the wife, and her death. Upon the birth of issue, the estate is initiate, and on the wife's death it is consummate; *Day v. Cochrane*, 2 C. 261; *Malone v. McLaurin*, 40 M. 161; *Redus v. Hayden*, 43 M. 614.

27. *Same: The seisin.* Formerly, actual seisin by the wife was essential, but now the rule is relaxed, so as to allow constructive seisin to have the effect, in some cases, of investing the husband with the estate without an actual entry; as where the possession is vacant, as of wild and uncultivated land, or where the parties in possession are either tenants at sufferance or for a term of years, and do not hold adversely to the wife. But the husband is not entitled to the courtesy

when the wife's estate is a remainder or reversion, expectant on an estate of freehold; *Malone v. McLaurin*, 40 M. 161. Legal seisin or right of entry on the land will do, if there be no adverse holding; *Day v. Cochrane*, 2 C. 261; *Rabb v. Griffin*, 4 C. 579; *Redus v. Hayden et al.*, 43 M. 614.

28. *Same: Instance of constructive possession.* A former husband of the wife, with her, made a joint deed of the wife's land, attempting to convey the fee; but the deed was inoperative as to the wife. After that husband's death, she married again, and brought ejectment for the land, and recovered judgment, but did not have the judgment executed, and a creditor of the last husband levied an attachment on the land after issue was born, and under it the husband's interest was sold: *Held*, that the deed of the first husband did not work a discontinuance of the wife's interest, and upon the death of the husband, by the express terms of the statute (H. C. 615), the wife had the power to enter upon the premises and hold and enjoy them; that the grantee under that deed, having gone into possession under a lawful title, his holding over after its expiration by the death of the first husband, would not be regarded as adverse to the party entitled to the possession, but the grantee would be regarded as tenant at sufferance to the wife; and hence, that the seisin of the wife would be sufficient to create the tenancy by the courtesy initiate in the second husband, and make his interest liable to the attachment; *Day v. Cochrane*, 2 C. 261. See *post*, 32.

28a. *Instance where courtesy denied for want of seisin.* R. devised lands to his widow for life, remainder to his daughter D., who married, had issue, and then died, and after that, the widow of R. died: *Held*, that D.'s husband was not entitled to courtesy in the land, because there was no entry or right of entry during D.'s life; *Redus v. Hayden*, 43 M. 614.

29. *Interest of tenant by courtesy initiate.* By the common law, the husband on the birth of issue capable of inheriting the wife's estate of inheritance, was tenant by the courtesy initiate, and as such entitled to the rents and profits; *Pender v. Dickens*, 3 C. 252; and this land was liable to seizure and sale for the husband's debts; *Day v. Cochrane*, 3 C. 261.

30. *Courtesy under the married woman's law of 1846.* The husband is not entitled to courtesy in the wife's realty under the Act of 1846, unless there has been issue born alive, capable of inheriting the estate; *Ryan v. Freeman*, 7 G. 175.

31. *Courtesy under the Act of 1857.* This act leaves the right of the husband to an estate by the courtesy as it existed at common law, only it is restricted to one-third part of the estate, if the wife leave surviving her a child or children of a former marriage, or descendants of such child or children, except that probably he has no right of possession till after the wife's death; *Rev. Code of 1857*, p. 337, art. 29.

3 Alienation by the Husband of the Wife's Realty.

32. *Effect of such alienation.* At common law the alienation by the husband of land of which he was seized in right of his wife, worked a discontinuance of the wife's estate, till the statute of 32 Hen. VIII. C. 28, provided that no act of the husband alone should work a destruction of, or prejudice the wife's estate; but after his death she or her heirs might enter on the lands in question. This provision has been incorporated in our statute (Poindexter's Code, p. 450; H. C. 615, art. 3, § 6; Rev. Code of 1857, p. 314, art. 38. Under these statutes a conveyance by the husband of his wife's land, aliens only his life interest by the courtesy, and on his death the alienee holds as tenant to the wife and not adversely to her; and she having the right of entry, and possession by her tenant, may alien to another, without violating the law on the subject of maintenance and champerty; *Wildy v. Bonny*, 4 C. 5; *S. P. Day v. Cochran*, ante, 28; *Griffin v. Sheffield*, 9 G. 359. And such tenant cannot purchase in an outstanding title and set it up against the wife. And the tenant's possession, if continued for the period provided by the statute of limitations, will bar, in favor of the wife, an outstanding title adverse to her; *Griffin v. Sheffield*, *supra*.

V. Separate Estate of Wife, under the Statutes of 1839, 1846, and 1857.

1. The Nature and Extent of her Estate, as secured by the Statutes.

33. *Acts of 1839 and 1846 extend only to the enumerated property.* The Acts of 1839 and 1846, for the protection of the rights of married women, extend to secure the wife a separate estate only in the property enumerated in them. They do not extend to a chose in action belonging to the wife at the time of the marriage, it being her right to the exempt property of a former husband, and it goes to the husband, under the rules of the common law; *Lowry v. Craig*. But in the following cases her chose in action being her interest as distributee in an estate, her right to it accruing before, but no distribution having been made at the marriage, was held secured to her by the Act of 1839, which was enacted after the marriage; *Clark v. McCreary*, 12 S. & M. 347; *Duncan v. Johnson*, 1 C. 180; *Kilcrease v. Shelby*, 1 C. 161; *Tinnin v. Price*, 5 C. 619.

34. *Same.* The first section of the Act of 1839 (H. C. 496), provides that "any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property: *Provided*, the same does not come from her husband after coverture." The terms here employed are very broad, comprehending any species of property, real or personal, capable of bequest, demise (devise), gift, purchase, or distribution, and they embrace money; *Mit-*

chell v. Mitchell, 6 G. 108. And if she sell her dower interest in her first husband's land, and invest the proceeds in a slave, she can hold the slave under the Act of 1839; *Garrison v. Fisher*, 4 C. 352.

36. *Same: Her right to slaves under Act of 1839: Hire.* By the Act of 1839, the wife is possessed of a separate estate in her slaves, and the husband has the right to the profits, and to control and manage them; the possession of the slaves by the husband and wife will be regarded as joint, and the husband is not entitled as against the wife to an exclusive possession of them; and he cannot maintain an action for them in his own name without joining her as plaintiff, and the title to the slaves is in her; *Carter v. Carter*, 14 S. & M. 59. He is, however, entitled to their hire, and if a slave of the wife be sold by the sheriff to pay the husband's debt, the wife may recover the slave, but cannot recover hire; *Harvey v. Edington*, 3 C. 22. She can recover hire from the commencement of her suit to recover the slave; *Garrison v. Fisher*, 4 C. 352. The act only secures to her the specific property, the rents and issue go to the husband, and are liable for his debts; *Grand Gulf B'k v. Barnes*, 2 S. & M. 165; *Beatty v. Smith*, 2 S. & M. 567.

37. *Her right to joint possession.* The married woman's law of 1839, did not vest a separate and distinct estate in the wife's slaves, in the husband during his life, but merely gave him the control of the wife's slaves, and the receipt of the profits of their labor. The absolute estate in the slaves was in the wife, and the statute contemplated that they should remain in the joint possession of husband and wife; and hence, the wife can recover her slave held under that act, sold by her husband, even during the husband's life; *Wells v. Treadwell*, 6 C. 717; *S. P., Long v. Hickingbottom*, 6 C. 772; *Smith v. Williams*, 7 G. 545; *Contra, Friley v. White*, 2 G. 442, which held that the husband could dispose of and transfer the possession of the slave of the wife held under the act.

38. *Note payable to husband and wife.* In the absence of all proof to the contrary, the presumption is that a promissory note, dated between the Act of 1839 and the Act of 1846, and made payable to husband and wife domiciled in this State, is not the sole and separate property of the wife; *Work v. Glaskins*, 4 G. 539. But if it be payable to the wife alone, it is *prima facie* the wife's property; *Bodgett v. Ebbing*, 2 C. 245. See *post*, 39, *et seq.*, 81, 100.

38a. *Wife's right as against creditors of husband, to property purchased in his name.* Art. 24, p. 336 of the Rev. Code of 1857, provides that, "if the husband shall purchase property in his own name, with the money of the wife, he shall hold the same only as trustee for her use, but such trust shall be void as against creditors of the husband, who contracted or gave credit, in consequence of the possession of such property." *Held*, that this provision against the rights of the wife was exceptional and almost penal, and should

be strictly construed, that whilst it avoids the trust as against certain creditors of the husband, it did not give them a lien on it, so as to prevent the husband from settling it on the wife in payment of a *bona fide* debt he owes her, and moreover, that the trust was available in favor of the wife as against all creditors of the husband, except those who gave credit on account of this particular property, and that a creditor could not be said to have done this, unless the credit was based on it, by distinguishing it in some way, at the time the credit was given, as the grounds on which the credit was based; *Butterfield v. Stanton*, 44 M. 15.

See DRED, 45, 46, 53. REGISTRATION, 15, 16, 20. VENDOR AND VENDEE, 64. JUDGMENT, 113.

2. The Husband's Interest in Wife's Estate Under these Statutes.

39. *His interest: Life estate: Interest after wife's death.* At the common law, marriage operated as an absolute gift to the husband of all the personal property of the wife then in her possession, or which might be reduced to possession by the husband during coverture. See *ante*, 12, *et seq.* The married woman's law of 1839, secured to the wife, as her separate estate, her slaves; but it also provided that the management and control of them, and the receipt of the profits of their labor, should remain with the husband, and that the slaves should not be aliened without the joint consent of the husband and wife, and that on her death they should go to the issue of the marriage, and if there be none, then they should go and descend to the husband. This statute did not abrogate entirely the common law rights of the husband in the slave property of the wife, which rights remained, by a plain rule of construction, as at common law, except so far as they were modified by the statute, either expressly or by necessary implication. Whatever rights, therefore, the husband had at common law and which were not taken away by the statute, remained in him; and the wife's rights, as secured by the statute, are to be considered as so much carved out of the husband's common law estate, and the remaining interest, not so carved out, continued to be the husband's. His right at common law was absolute, and the statute recognizes this right, except so far as rights inconsistent therewith are given to the wife and the issue of the marriage. These inconsistent rights are, that the wife shall have a separate estate in the slaves during her life (the usufruct being in the husband), inalienable, except by the joint consent of husband and wife, and on her death the slaves were to go to the issue of the marriage. It follows, therefore, on the death of the wife, without issue of the marriage, the slaves remain with the husband *jure mariti*, and not by descent. The husband's interest in the slaves upon the marriage was a fixed right, and not uncertain or contingent. It was in all respects a vested

right, or a present fixed right of future enjoyment, which could not be taken away by subsequent legislation, or a change in the rules of descent; *Lyon v. Knott*, 4 C. 548; S. P., *Cameron v. Cameron*, 7 C. 112; *Olive v. Walton*, 7 C. 270. See *ante*, 20. And in case there be issue of the marriage, the husband's estate will be a life estate, and the issue will be entitled only after his death; *Cameron v. Cameron*, *supra*; *Hoover v. Wells*, 10 G. 445; S. P., *Steadman v. Holman*, 4 G. 550. And the husband being entitled in his own right cannot, as administrator of the wife, maintain trover for one of the slaves; *Hoover v. Wells*, *supra*; *Steadman v. Holman*, *supra*. Yet as his estate is only in the usufruct of the slaves, if he be administrator of the wife he will be compelled to inventory them; *Lanehart v. Jeter*, 7 G. 630. See *post*, 87, 88, 89.

40. *Husband's right under Act of 1846.* Under the 6th section of the Act of 1846 (H. C. 498), the husband is put on the same footing as the children of the wife, as to the inheritance of the slaves and other personal property of the wife (he, however, being postponed to them, and not entitled to inherit, except where there was no children of the wife). And under that statute he will be entitled to take not only her personality in possession, as at common law, but also all that she had a right to in law, the object being to give him all that would at common law have gone to her administrator, and he may sue for and recover the property where there is no issue without being appointed administrator; *Rabb v. Griffin*, 4 C. 579. And on the death of the wife, he has such an interest in slaves held by her under the Act of 1846, where the wife dies without issue, as to authorize him to sue for and recover such slaves without being appointed administrator of the wife; *Varner v. Gregg*, 4 C. 590.

41. *His liability for illegal sale of wife's slave.* If the husband make a sale of the wife's slave, and deliver possession, and deliver a bill of sale, signed by the wife alone, and she afterwards sue for and recover back the slave on account of the invalidity of the bill of sale, the husband will be liable to the purchaser for the purchase money; *Long v. Hickingbottom*, 6 C. 772.

42. *Forfeiture of husband's interest.* Where the husband acquired by his marriage the life estate owned by the wife in slaves, a forfeiture of his interest caused by his illegal act will not enure to the benefit of the wife, but to the remainderman; *Warner v. Warner*, 4 G. 547.

43. *Marriage between dates of Acts of 1839 and 1846.* Where the marriage is solemnized between the dates of the Acts of 1839 and 1846, and the property of the wife at the time of the marriage is in possession of the wife, and at once goes into the joint possession of herself and husband, the rights of the parties thereto will be regulated by the Act of 1839; *Carter v. Carter*, 14 S. & M. 59.

3. The Power of the Wife to Alien and Charge her Separate Estate under the Statutes.

A. POWER UNDER ACT OF 1839.

44. *She has no general power of disposing of her estate.* The general rule at common law (as contradistinguished from the statutes), is, that a *femme covert* having a separate estate, acts with regard to it as a *femme sole*; but that rule is changed in this State, by the statute of 1839, which provides that the slaves held by the wife, under that act, may be sold by the joint deed of herself and husband, executed, proven and recorded, agreeably to the laws in force in regard to the conveyance of real estate of *femmes covert*, and not otherwise; *Frost v. Doyle*, 7 S. & M. 68; *Davis v. Foy*, Ib. 64; *Berry v. Bland*, Ib. 77. See *post*, 117.

45. *Same.* At common law (*i. e.*, in equity), the separate estate of the wife was not subject to her general personal engagements, but was only liable when it appeared that she intended by the contract to charge it; and this intention was generally considered as being manifested, when she contracted as surety for the husband or jointly with him. But under the Act of 1839, she is prohibited from conveying or charging her slave property, except in the mode pointed out by the statute; and hence, her slaves, held under that act, are not liable in equity to be sold for a promissory note executed by her and her husband, even for plantation and family supplies; *Frost v. Doyle*; *Davis v. Foy*, *supra*; *McKee v. Kent*, 2 C. 131. Nor for medical services rendered to her slaves; *Stamps v. Green*, 4 G. 546. Nor is she liable on a forthcoming bond, executed by her and her husband, as sureties for another; *Berry v. Bland*, *supra*.

46. *Same.* Her power to bind her separate property is not enlarged, but restrained by the Act of 1839, which takes away from her the power to bind or encumber her separate estate (land or slaves), except in the mode pointed out in the statute, *viz.*, by joint deed of herself and husband, acknowledged and executed as deeds are required to be for the alienation of her land; *Davis v. Foy*, 7 S. & M. 64; *S. P., Clark v. Slaughter*, 5 G. 65.

47. *Defective sales of slaves.* If the wife exchange one of her slaves for another, and fail to make title according to law, no title to the slave so acquired, vests in her. The other party will be entitled to a return of his slave, whenever she or her representatives disaffirm the exchange; *Hoover v. Wells*, 4 G. 536. But if the husband join the wife in making a conveyance of her slave, and it is defective for non-compliance with the statute on her part, it is nevertheless good, to convey any interest the husband may have in the slave; *Hoover v. Wells*, *supra*. And if she die leaving the husband as her heir, the sale will then be good; *Clark v. Slaughter*, 5 G. 65. And so if the husband sell the slave of the wife without her consent, and afterwards make a settlement on her, in consideration of the money so received by him, the

settlement will be good; for if the wife claim under the settlement, it would be a ratification of the sale, and the title of her slave would vest in her husband's purchaser; *Wiley v. Gray*, 7 G. 510.

48. *Effect of admissions by wife or husband as to her title.* A married woman can do no act, without the consent of her husband, to divest her right to a slave held by her, under the laws of this State; but she can make admissions with reference to the title of a slave in her possession, and such admissions will be evidence against her, and those claiming under her. Hence, though the note of a married woman, given for the hire of a slave, placed in her possession by her father, is not a binding contract on her, yet, being an admission in respect to the title of the slave, it is admissible in evidence in a suit afterwards brought by her heir to recover the slave, to show that she held it under a contract of hire, and not as a gift; *Parr v. Gibbons*, 1 C. 92; *S. C.*, 5 C. 375. But she cannot, either by herself or agent, or husband, make any promise or acknowledgment in respect to a claim set up against her, which will bind her separate estate after death. Hence, when the sole proof of a debt against her, and alleged to have been contracted whilst she was sole, is her husband's acknowledgment of it as just and correct, it will be insufficient to establish the claim against her estate; *Waul v. Kirkman*, 3 C. 609.

49. *Oral gift by a wife of a slave.* A married woman holding slaves, under the Act of 1839, cannot convey the title to them except in the mode prescribed in the statute, *viz.*, the joint deed of herself and husband, separately acknowledged by her before a competent officer. Hence, a verbal gift by her of her slave, without the consent of her husband, conveys no interest in the slave to donee; and if the donee hold possession for three years it will not bar her right, as the statute does not run against her. And if the slave, after possession by the donee for three years, get into the possession of the husband, he may, on being sued for the same by the donee, rely by the wife's consent, on her outstanding title, and set up for her, the exception in her favor in the statute of limitations; *Curtl v. Compton*, 14 S. & M. 56. See *post*, 63, 68.

50. *Wife's right to alien property other than slaves or land.* At common law, a married woman has a right to dispose of her separate personal estate, and the rents and profits of her real estate, as if she were a *femme sole*, unless she be restricted by the terms of the settlement under which she held it. And this power of disposition, exists under our statute, as to all of her separate estate held under the statute, except land and slaves; *Levy v. Darden*, 9 G. 57; *Work v. Glaskins*, 4 G. 539. Thus the joint endorsement by husband and wife, will pass the title of a promissory note payable to her; *Cobb v. Duke*, 7 G. 60; *Work v. Glaskins*, *supra*. See *post*, 115, *et seq.*

51. *Power of wife to mortgage under the Act of 1839.* The wife has power jointly with her husband to make an absolute sale of her separate estate in land and slaves; a power to give a mortgage, which is but a conditional sale, is a lesser power than the power to make an absolute sale, and is included in it. And hence, a mortgage executed by the husband and wife on her separate estate, to secure the husband's debt, is good; *Sessions v. Bacon*, 1 C. 272; S. P., *Stone v. Montgomery*, 6 G. 83. And where the wife mortgages her estate to secure further advances, it is immaterial that the advances were not made in the particular form prescribed in the mortgage, if by the agreement of the husband, acting as her agent, and the creditor, both acting in good faith, another mode substantially the same be adopted; *Stone v. Montgomery*, *supra*. And if in a mortgage by a *femme covert* to secure a debt, it be provided that if any surplus remain upon a sale of the property, it shall be paid to her, she may anticipate the surplus before the sale, and money advanced to her by the mortgage will be considered as advances on the surplus; *Williamson v. Downs*, 5 G. 402. See *post*, 62a.

52. *Same.* The joint note of husband and wife, though void as to the latter, is a sufficient consideration for a mortgage executed jointly by them on the wife's separate estate (citing *James v. Fisk*, 9 S. & M. 144; *Sessions v. Bacon*, 1 C. 272); *Russ v. Wingate*, 1 G. 440. And though a promissory note of the wife is void both in law and in equity, yet if given on account of the separate estate of the wife, it is a good consideration for a mortgage by her and her husband, of her separate estate held under the Act of 1839; *Franklin v. Beatty*, 5 C. 347. See *post*, 57, 94.

53. *The statutes do not apply to property not held under them.* A married woman holding separate property under a settlement in which the mode of alienation by her is pointed out, cannot dispose of it in any other mode than the one prescribed in the settlement. In such a case the mode of alienation prescribed by the statute does not apply, and if it be pursued, and the one prescribed in the settlement be not followed, the alienation will be void (citing *Mitchell v. Doty*, 9 S. & M. 435); *Montgomery v. Agricultural Bank*, 10 S. & M. 566; *Andrews v. Jones*, 3 G. 274. And the statutes of this State, as to the power and mode of disposing of the separate property of the wife, do not apply where the separate estate was acquired by the wife when she was domiciled in another State; *Block v. Cross*, 7 G. 549.

54. *Actions at law against a femme covert.* It is settled law in this court, that an action at law cannot be maintained against a wife to subject, to her contracts entered into during coverture, her separate estate held under a settlement; that could only be reached in equity; and the rule is the same as to her separate estate held under the Act of 1839 (citing *Davis v. Foy*, 7 S. & M. 64; *Frost v. Doyle*, 1b. 68; *Doty v. Mitchell*, 9 ib. 435);

Swett v. Penrice, 2 C. 416. And a judgment rendered against husband and wife, founded upon a contract entered into during coverture, will not bind her separate estate held under the Act of 1839; *Steadman v. Holman*, 4 G. 550.

B. HER POWER TO ALIEN AND CHARGE HER ESTATE UNDER THE ACTS OF 1846 AND 1857.

As to her liability for fraud, see *post*, 156.

55. *Provisions of Act of 1846.* The Act of 1846, was an amendment of the Act of 1839, and gave to the wife the income of her estate. The income of her separate estate was also made chargeable with contracts made by the husband and wife, jointly or separately, for the "necessary clothing, maintenance, care and support of her slaves, and for the employment of any agent for their management or control," and "for supplies for the wife's plantation and slaves," and courts of law were given jurisdiction over all these contracts; H. C., p. 498.

56. *Act of 1857.* This act increased the number of contracts the wife might make, as follows: She was authorized to purchase property with her own money, and it was further declared that "all contracts made by the husband and wife, or either of them, for supplies for the plantation of the wife, or for the maintenance, care, clothing and support of her slaves, and for the employment of an agent or overseer for their management, may be enforced and satisfaction had out of her separate estate. And all contracts made by the wife or by the husband, with her consent, for family supplies or necessities, wearing apparel of herself or her children, or for their education, or for household furniture, or for carriage and horses, or for buildings on her land or premises, and the materials therefor, or for work and labor done for the use, benefit and improvement of her separate estate, shall be binding on her, and satisfaction had out of her separate property." And courts of law were vested with jurisdiction to enforce these contracts; See Rev. Code of 1857, p. 336.

57. *All the acts.* By all the acts her power to alien her slaves was required to be exercised by joint deed of husband and wife, acknowledged by the wife separately as in cases of sales of her realty. And under the Act of 1857, it was provided that "no conveyance or encumbrance for the separate debts of the husband shall be binding on the wife, beyond the amount of her income."

58. *Wife's power to contract generally.* At common law the wife's contract was null and void; and this incapacity still remains and is the general rule. The statutes have made certain exceptions to this and given her power, when she has a separate estate, to contract in certain cases; yet, without more appearing than her simple promise, the contract is *prima facie* void; and it is incumbent on him who asserts that the contract was made about a matter in which the statute authorized her to contract, to show it. Hence, a plea of cover-

ture to an action on a promissory note is good without an averment that it was not made in respect to a matter about which the defendant was authorized to contract. The plaintiff should reply the matter which would make the contract good; *Hardin v. Pelan*, 41 M. 112. And a note given by her will not be binding unless it be shown to have been for a matter in which she was authorized to contract by the statute; *Robertson v. Bruner*, 2 C. 242; *S. P., Whitworth v. Carter*, 43 M. 61; *Dunbar v. Mayer*, *Ib.* 679; *Foxworth v. Magee*, 44 M. 430. And under the Act of 1846, by which she was authorized to contract for plantation supplies, if her note be given for a horse, the plaintiff must show that, and also that the horse was intended to be worked on her plantation; *Robertson v. Ward*, 12 S. & M. 490. But she has no power under these statutes to contract, unless she has a separate estate; and when sued on her contract, that fact, as well as the further fact that the contract was one which she had authority to make, must appear in the record; *Whitworth v. Carter*, *supra*; *Dunbar v. Magee*, *supra*; *Hardin v. Pelan*, 41 M. 114. Nor has she the power under the statute to submit her title to land to arbitration, without the consent of her husband; *Handy v. Cobb*, 44 M. 699. She may buy any kind of property for cash, but only plantation and family supplies on a credit; *Whitworth v. Carter*, 43 M. 61.

59. *Contract for mechanical labor under Act of 1846.* Under the Act of 1846, a married woman is authorized to make certain contracts which shall be binding on the income and profits of her separate estate. Her power to contract is limited by the statute, and she can make none except those specified in it. The making of a contract with a mechanic to repair or build a house on her separate estate is not one of the contracts specified in the statute; and hence such a contract made by her would not give the mechanic a lien on her estate which he could enforce at law; whether he could enforce it in equity not decided; *Self v. Howland*, 1 C. 264.

60. *Power to contract under the Act of 1857.* A married woman, as a general rule, can make no contract. She cannot be estopped by her covenant, nor bound by her conveyance. The exceptions to this are created by positive law. By the Act of 1857, she may make certain contracts binding on her separate estate for her support, or the support, management, or improvement of her separate property; she may convey her estate, real and personal, by deed jointly with her husband, and by implication she may encumber it in like manner to the extent of her income; and in case of a sale of real estate, at least, she will be bound by her covenant of warranty; she may relinquish her right of dower in her husband's land by deed executed jointly with her husband, or by herself alone when the land has been previously conveyed by him; *Stephenson v. Osborne*, 41 M. 119. She has no power to buy land on a credit, or other property, not family or plantation sup-

plies; but if she so buy and refuse to pay the price, the vendor is entitled to the property, for the wife cannot hold it and repudiate her obligation to pay for it; *Foxworth v. Bullock*, 44 M. 457. If she give sureties on her note for the purchase money, they will be liable notwithstanding her release; *S. C., Ib.*; *Whitworth v. Carter*, 43 M. 61; and in case she buy land, the vendor can have the land sold to pay the purchase money; *Ib.*, and *Gordon v. Manning*, 44 M. 756. See *post*, 68a, 93a, 94.

See VENDOR AND VENDEE, 110a.

61. *Same.* "Any married woman, may either jointly with her husband, or separately execute any bond, which may be necessary in any proceedings at law or in equity, to establish or enforce her right to property, or the profits thereof, and the same shall be binding on her separate property;" Rev. Code of 1857, p. 334, art. 31. See *ante*, 4.

62. *Bond for property.* A married woman (previous to the Act of 1857), claimed property levied on under execution, and gave bond and surety (without her husband), and recovered possession of the property. Her claim was not sustained, and she sued out a writ of error, and the judgment was affirmed. She thereupon filed her bill in equity, setting up her coverture, and insisting that she was not liable on the bond or judgment; *Held*, She was not entitled to relief, without offering to restore the property to the position it was in when she got it on her bond; *Quære?* Would she be entitled to relief then? *Kibble v. Buller*, 5 C. 586. See *ante*, 4.

62a. *Power to mortgage for the separate debt of the husband.* The wife has power to mortgage the income of her separate estate for her husband's separate debt; and if the mortgage be of the *corpus* of the estate, it will be good only as to the income; *Foxworth v. Magee*, 44 M. 430.

62b. *Presumption in relation to validity of her contracts.* Where a married woman has a plantation, which she carries on in her own name, and she transacts her business with her cotton factors in her own name, and the accounts are kept in her name, it may be fairly inferred that a promissory note made jointly by her and her husband to the factor, was for supplies furnished to her plantation, and necessaries for herself and family, especially if she fail to make any proof on the subject; *Partee v. Silliman*, 44 M. 272.

62c. *Power to mortgage under Act of 1857.* The wife has the power to mortgage her income for the separate debt of the husband, and if she mortgage the *corpus* of the estate, it will be binding to the extent of her income; *Bacon v. Bevan*, 44 M. 293.

62d. *As to her power to submit to arbitration.* See ARBITRATION AND AWARD, 2. *Ante*, 5, 8.

C. THE FORMS AND REQUISITES TO BE OBSERVED IN ALIENING OR CHARGING HER ESTATE.

63. *The form prescribed by the statute must be observed.* The acts of 1839, 1846

and 1857, are enabling as to the wife, and the right to contract conferred by them on her must be exercised strictly as therein prescribed, or the contract will be null and void; *Dalton v. Murphy*, 1 G. 59. See *ante*, 49.

64. *Bill of sale of slaves must be acknowledged: Case in judgment.* The wife can make no valid sale of a slave held by her as her separate estate, unless the bill of sale be acknowledged according to the statute, on the subject of her conveyance of realty. Hence, when the certificate of acknowledgment stated, "that being examined privately, she states that she signed and sealed the above instrument, uninfluenced in any manner whatever," it was held that it was bad: 1st. Because it did not show an examination separate and apart from her husband. 2d. There was no acknowledgment of delivery; *Garrison v. Fisher*, 4 C. 352; *S. P., Toulmin v. Heidelberg*, 3 G. 268. But if the certificate show that she acknowledged that she "executed" the deed, that will do, as that term embraces signing, sealing and delivering; *Smith v. Williams*, 9 G. 48.

65. *Same: Another instance.* The certificate of acknowledgment should show that the examination was made "privately," as well as separate and apart from her husband; *Warren v. Brown*, 3 C. 66. This was overruled by *Love v. Taylor*, 4 C. 567. See 66, *post*.

66. *Same.* A certificate of the acknowledgment of a married woman to a deed, which states, that she was examined "separate and apart from her husband, and she thereupon acknowledged that she signed, sealed and delivered the deed voluntarily, without any fear, threats or compulsion of her husband," is sufficient. It is unnecessary to state that the examination was private, as the object and purpose of the examination is to show that the wife acted without the influence of her husband; *Love v. Taylor*, 4 C. 567.

67. *Surplusage in certificate.* If the certificate to a mortgage of her separate estate, be in all respects formal, the addition to it of the words, "and in bar of dower," will be treated as surplusage, and cannot have the effect to limit or restrict the conveyance; *Stone v. Montgomery*, 6 G. 83.

68. *Probate clerk may take acknowledgment.* By the statute (H. & H. p. 368, § 99), a probate clerk may properly take and certify an acknowledgment of a married woman, to a conveyance of her separate estate; *James v. Fisk*, 9 S. & M. 144.

68a. *The deed must be joint.* By our statute, the wife cannot convey her land, except by joint deed of herself and husband. She may release her dower by a separate deed, when her husband has previously conveyed the land; *Ezelle v. Parker*, 41 M. 520. See *ante*, 60.

69. *What is a joint deed of husband and wife: Case in judgment.* Where immediately at the conclusion of a deed made by the wife, the husband appends, that "he consents to the above obligation of his wife,"

and he then signs and seals the writing, and acknowledges the signing, sealing and delivering of the deed, it is his deed as well as hers, and good as a joint deed of husband and wife, required by law to pass her estate. The writing which he appended will be considered as a part of the deed; *Armstrong v. Stovall*, 4 C. 275.

See DEED, 4.

And so a deed, on its face purporting to be a conveyance of the separate property of the wife with her husband's consent, is good, if signed and sealed, by them though the husband's name does not appear in the body of the deed as one of the grantors; *Stone v. Montgomery*, 6 G. 83.

70. *Deed of wife and husband's agent.* An agent of the husband, with power to sell his land, has no authority to join in a deed with the wife, so as to sell her land, and such a deed is a nullity; *Toulmin v. Heidelberg*, 3 G. 268.

71. *Covenant of wife in deed for husband's estate.* A *femme covert* is not bound by her covenants in a joint deed of herself and husband, conveying his estate, and she is not therefore estopped by such a deed, from afterwards acquiring an interest in the land so conveyed, adverse to the grantee; *Griffin v. Sheffield*, 9 G. 359.

As to estoppel to set up title to property, after receiving proceeds of an unauthorized sale, see *post*, 140.

D. ASSAILING THE CERTIFICATE OF ACKNOWLEDGMENT.

72. *Can the wife dispute her acknowledgement.* Whether a married woman, having acknowledged to a proper officer that she executed a deed freely, &c., can show that it was done through duress, and thus contradict the certificate of the officer; *Quere?* *Warren v. Brown*, 3 C. 66. Having so acknowledged, she cannot show the duress so as to defeat the rights of the purchaser without notice; *Love v. Taylor*, 4 C. 567.

73. *Can she show the certificate to be false.* Whether a married woman can assail her deed by showing that the certificate of the officer to her acknowledgment is false, was not decided; but it was decided that the officer himself was incompetent as a witness, to show that his certificate was false; *Stone v. Montgomery*, 6 G. 83.

See DEED, 41 to 44.

4. Gifts from Husband to Wife.

74. *Statutes: Acts of 1839 and 1857.* See *post*, 137, *et seq.* The Act of 1839 (H. C. 496, art. 4, § 1), after giving the wife power to hold as her separate estate any property real or personal, which she might acquire by gift, purchase, bequest, distribution, &c., contained this proviso: "Provided, that the same do not come from her husband after coverture." The Act of 1857, Rev. Code, p. 336, art. 23, contained this proviso: "Provided, that any deed from the husband to the wife for her use, shall be void as to his credi-

tors, who were such at the time of executing the deed."

75. *Direct gift from husband to wife at common law, and under the Act of 1839.* At common law a gift from the husband to the wife directly, without the intervention of a trustee, was void; *Ratcliffe v. Dougherty*, 2 C. 181; *S. P., Tourney v. Sinclair*, 3 H. 324; *Butterfield v. Stanton*, 44 M. 15. But notwithstanding this rule, if the gift was but a fair and reasonable provision for the wife, a Court of Equity will sustain it as against the husband and his representatives, but not against his creditors; *Ratcliffe v. Dougherty*, *supra*. The act of 1839 is an enabling statute, and was intended to secure rights to married women, and not to take away from them any rights which they possessed before its passage; and that proviso in it which prohibited gifts from husband to wife was not intended to deprive her of any right in equity to take such gift, which she theretofore had, but only to guard against a construction of the statute which might allow such gifts to be made in fraud of the husband's creditors; and such gift now stands on the same footing exactly as it did before the statute was passed; *Ratcliffe v. Dougherty*, *supra*. Such a gift, if *bona fide*, and not with a view of future indebtedness, is good in equity against the subsequent creditors of the husband; *Warren v. Brown*, 3 C. 66; *Wells v. Treadwell*, 6 C. 717. And a subsequent sale by the husband of the property so settled on the wife to a purchaser, without notice of the settlement, is not *per se* fraudulent nor conclusive evidence of fraud in the settlement; but it is *prima facie* evidence of fraud, and throws on the wife the burden of showing that it was *bona fide*. The statute of frauds does not make voluntary conveyances, but only fraudulent conveyances, void; *Wells v. Treadwell*, *supra*; *S. P., Wells v. Wells*, 6 G. 638. Such a settlement will be very reluctantly disturbed at the instance of collateral heirs of the husband, and as against them a Court of Equity will assist the wife to recover her husband's bounty; *Wells v. Wells*, *supra*.

76. *Same: Instance of upholding the gift against a subsequent purchase.* The husband had received considerable property by the wife which, by the law then in existence, was his own. Afterwards, when he was embarrassed, he made a settlement of a part of the property on the wife, and subsequent to this sold one of the slaves, so settled, to a purchaser without notice of the wife's claim; and the wife brought the suit to recover the slave. *Held*, that the settlement, though voluntary, was not fraudulent, as it appeared to have been made on a meritorious and just consideration, and without a fraudulent intent, and that the wife was entitled to recover; *Wells v. Treadwell*, 6 C. 717.

77. *Purchase by husband in wife's name.* An advance of money by the husband, as the price of land, to which a deed is taken from a third party to the wife, is not the same thing as a conveyance directly by the hus-

band to the wife, so far as the legal title is concerned. In such a case, the legal title not being conveyed directly by the husband to the wife, is vested in her, notwithstanding the proviso to the 1st section of the Act of 1839, see *ante*, 74; *Warren v. Brown*, 3 C. 66. Such a purchase is an advancement to the wife, and good against him and his voluntary grantees; *Futcher v. Fletcher*, 2 G. 265.

78. *Direct from husband to wife under the Act of 1857.* By Art 23, p. 336 of the Rev. Code of 1857, it is provided that any "deed from the husband to the wife for her use, shall be void as against his creditors who were such at the time of executing the deed." Because, before that time, such a deed was utterly void at law, and therefore that provision could have no operation, unless construed to authorize the making of such a deed at law, except in the case therein prohibited, it will have that construction, and a deed made thereunder will not be void at law; but the provision is repealed by the Act of 1867 (Session Laws, p. 727, § 8), yet that repeal does not invalidate a deed made when the law authorized it; *Baygens v. Beard*, 41 M. 531. This provision also only prohibits voluntary settlements, it does not prevent the husband from making a conveyance of property *bona fide* and on a fair and valuable consideration; *Butterfield v. Stanton*, 44 M. 15. See further on this subject *post*, 137, *et seq.*

78a. *Gift by husband to wife of his exempt property.* An insolvent debtor who was engaged in business in this State, which subjected him to the will of his employer as to where he should reside, made in this State, where he was then domiciled, a gift, in good faith, to his wife of a slave which he held by law exempt from execution, and in a few days thereafter in obedience to the command of his employer, he removed to Tennessee, leaving the slave in this State: *Held*, that the gift was valid, and that the slave was not subject to a judgment against the husband rendered in this State before the gift was made; *Smith v. Allen*, 10 G. 469.

5. Suits by and against Husband and Wife.

79. *Wife may sue at law by statute.* The statutes of this State have conferred upon married women the general capacity to sue at law jointly with their husbands in relation to their separate estates, whether held under these statutes or under a settlement, and hence, if the coverture of the wife is relied on in bar of a suit in the joint names of husband and wife, it is sufficient for her to reply that the subject matter of the suit is her separate estate, without setting out the manner in which she claims title; *Lery v. Darden*, 9 G. 57.

80. *Wife's right to use husband's name in a suit.* The wife may use her husband's name to recover her slave, if he be absent from the State, and do not appear expressly to have objected. Could he object if indemnified against the costs. *Quære?* *Merritt v. Doss*, 2 G. 275. But generally the husband is a necessary party to all suits affecting the wife's separate estate, unless cause be shown

to the contrary; *Winston v. McLendon*, 43 M. 254. But by the Act of 1857 (Rev. Code, p. 336, art. 26) she may sue alone if her husband refuse to join her. Generally he ought to be a party wherever his wife's separate estate is affected by the suit; *Winston v. McLendon*, 43 M. 254.

81. *Suit on note payable to wife*. By the common law the husband might sue alone in his own name or in the joint names of husband and wife, upon an express promise made to the wife, but under the Acts of 1839 and 1846 (and 1857), a note made payable to the wife is at least *prima facie*, her separate property, and the suit on it should be in the joint names of both; *Bodgett v. Ebbing*, 2 C. 245.

82. *Suit on promise to husband and wife jointly*. If a promise be made to husband and wife jointly, and there is a breach in the lifetime of the wife, the right of action for the breach survives to the husband; *Pender v. Dicken*, 5 C. 252.

83. *As to actions against husband and wife jointly*. See *ante*, 54, 55, 56, 61, 62. See also PLEADING, 22a.

84. *Judgments against husband and wife*. Where a slave held by the wife, under the Act of 1839, is levied on and sold under a judgment against husband and wife, rendered on a note made by them during the marriage, the sale is void and does not divest the wife's title, nor will the statute of limitations run against her claim to recover the property in specie; *Hurvy v. Edington*, 3 C. 22; S. P., *Steadman v. Holman*, 4 G. 550.

84a. *When wife a material party*. The general rule is, that a wife becomes a material defendant in chancery only from the time she is ordered to answer separately, but if she voluntarily answer separately, and her answer be received, she then becomes a material party; *Denniston v. Potts*, 11 S. & M. 36. She is a material party to a bill to foreclose a mortgage on her husband's land, when she joined in the mortgage to relinquish her dower; *Ib*.

84b. *Husband's fraud on her in relation to suit against her*. It is no ground for a bill of review by the wife to revise a decree *pro confesso*, rendered against her to foreclose a mortgage on her separate estate, given by her to secure her husband's debt, that her failure to defend the suit was in consequence of the fraud of the husband in concealing from her the nature and extent of the mortgage, and in deceiving her with the statement that the suit was a mere matter of form, and could not affect her rights, if the creditor did not participate in the fraud; *James v. Fisk*, 9 S. & M. 144.

84c. *Action on note: Case in judgment*. A note signed thus "C. D. R., guardian and H. D. R., guardian rights of my wife, C. D. R.," affords no legal inference that C. D. R. and H. D. R. are husband and wife, so as to make bad on demurrer a declaration against them on the note without describing them as husband and wife; *Robertson v. Banks*, 1 S. & M. 666.

84d. *Suit by wife against husband. A femme*

covert cannot sue her husband except by *prochein amis*, but a failure in this respect is waived, unless taken advantage of by demurrer; *Kenley v. Kenley*, 2 H. 751.

84e. *The wife may sue, though not disturbed in possession*. The wife without being disturbed in her possession may maintain a bill in equity to annul a transaction by which her title to her separate property held under the Act of 1839, has been fraudulently divested; *Pennington v. Acker*, 1 G. 161.

6. Earnings of the Wife.

85. *They belong to the husband*. The earnings of the wife, being the proceeds of her own labor, by the common law, belong to the husband, and the rule is the same under the Married Woman's Law of 1839. Hence, if a slave be bought by the wife, in her own name, by the proceeds of her labor, and it be afterwards mortgaged by the husband, the mortgagee will hold in preference to the wife; *Henderson v. Warmack*, 5 C. 830, S. P., *Sharpe v. Maxwell*, 1 G. 589; *Armstrong v. Armstrong*, 3 G. 279. But by the Rev. Code of 1871, the earnings of the wife belong to her.

7. Descent of the Wife's Property after her Death under the Statutes.

86. *As to husband's interest after her death*. see *ante*, 39, and *post*, 83.

87. *Her children's right*. Under the Married Woman's Law of 1839, the right of the wife, to her slaves, was secured to her as a separate estate, subject to the control and management of her husband, and such slaves could only be sold by the joint deed of husband and wife. On her death, the slaves were "to descend and go to the issue of the husband and wife jointly begotten." Under this statute, the children took the slaves by descent and not by vested remainder. Where, therefore, the wife did not die till after the passage of the Act of 1846 (which provided that on her death, her slaves should go to all her children, whether of that or another marriage), her slaves held under the Act of 1839, would go and descend, as provided under the Act of 1846, to all her children; *Marshall v. King*, 2 C. 85; *Bates v. Cotton*, 3 G. 266; *Olive v. Walton*, 4 G. 103. And her slaves held under the Act of 1839, go, on her death, to her administrator, as if she were a *femme*; sole and without distribution, her issue cannot maintain replevin for them; *May v. Rocket*, 3 C. 233; *Parr v. Gibbons*, 5 C. 375. But where there is a husband surviving, see *ante*, 39, and *post*, 88.

88. *Husband's right*. The surviving husband, when the wife has left no issue, may maintain a suit in equity in his own name, to collect a mortgage debt due the wife, by her former guardian, where there are no subsisting debts against her; and the guardian will not be permitted to show that there will be a future indebtedness of the ward, to him, on a final settlement in the Probate Court, in order to defeat the husband's suit; *Ratchiff v. Davis*, 9 G. 107. See *ante*, 39.

89. *Descent of slaves under Act of 1846.* The surviving husband is not entitled to a life estate in the slaves of the wife held under the Act of 1846; upon her death, they descend immediately to her children; *Olive v. Walton*, 4 G. 103; *Richmond v. Delay*, 5 G. 83.

90. *Descent under Act of 1857.* By this Act (Rev. Code, p. 337, art. 28) the wife's personalty, upon her death, goes to the husband and her children; if there be no children it goes to the husband.

90a. *Descent of slaves held under a settlement.* Slaves held by a married woman under a settlement, will, upon her death, descend according to the statute, where there is no limitation of the property, in the deed, directing where the property should go after her death; *Olive v. Walton*, 4 G. 103; S. P., *Kimball v. Kimball*, 1 H. 532.

8. Miscellaneous.

A. THE SCHEDULE.

91. *Same: It need not be recorded.* That provision of the Act of 1846, which requires a schedule of the wife's separate property to be recorded, is directory merely; it is not made a condition precedent to the wife's right of enjoying the property, and the failure to record it is no ground for the forfeiture of the wife's right. Nor in case of a voluntary settlement by the husband on the wife (when he afterwards sold the settled property), is the failure to record the schedule *per se* a badge of fraud; but if there be other fraudulent circumstances, this failure ought to be considered in connection with them, as tending to show fraud; *Wells v. Treadwell*, 6 C. 717.

B. PROOF OF HER TITLE AGAINST HER ADMINISTRATOR.

92. *Proof of wife's title against her administrator.* The fact that the administrator of the wife has returned certain personal property in his inventory, as the property of the wife, is sufficient evidence of the wife's title to it, on a motion against the administrator, for the appointment of a receiver for the wife's estate in his hands; *Tinnin v. Price*, 5 C. 619.

C. NOTICE TO PURCHASER OF WIFE'S ESTATE.

93. *Notice to purchaser of wife's estate.* If a purchaser of a slave take a joint bill of sale from husband and wife, it will go far to show he had notice of the wife's claim, though he allege he had no such notice, and took the bill of sale in that way from caution merely; *Garrison v. Fisher*, 4 C. 352.

D. CONVEYANCE TO WIFE ON HER CREDIT; ON HUSBAND'S CREDIT.

93a. *Conveyances to wife for her promise to pay.* A deed made to a married woman in consideration of her promise to pay the purchase money, is, as to third parties, a good conveyance of the title to her, and upon it she may maintain ejectment. Whether it

would be binding on the vendor, without actual payment, is not a question which third parties can raise; *Harmon v. James*, 7 S. & M. 111.

93b. *Purchase on husband's credit.* Property purchased by the wife, owning a separate estate, upon the joint note of herself and husband, if actually paid for by her means, is her separate estate, and not liable for his debts; *Ratliffe v. Collins*, 6 G. 581. But if the property be purchased in the wife's name, on the husband's credit, with the expectation that it shall be paid for out of her separate estate, but is not so paid for, it is liable for the husband's debts. If it were paid for by her means, it is her duty to show it; *Hopkins v. Carey*, 1 C. 54.

94. *Purchase by wife on a credit, and mortgage for the purchase money.* A wife buying property on a credit, may execute a mortgage on that property for the purchase money thereof. Such a contract would not be void, to all intents and purposes, but only at the election of the wife, and if it be beneficial to her she may treat it as valid. And in such a case, it is immaterial whether the husband join the wife in making the note for the purchase money; *Armstrong v. Stovall*, 4 C. 275. See *ante*, 51, 52, 58, 60.

VI. Separate Estate under Settlements.

1. What is Necessary to Exclude the Husband's Rights.

95. *Intent to exclude husband must be clear.* The marital rights of the husband are not to be defeated by a deed to the wife, unless an intention be clearly expressed that the property is to be held for the separate use of the wife; *Williams v. Claiborne*, 7 S. & M. 488. His rights are favored at common law, and the intention to exclude must be clear; *Smith v. Henry*, 6 G. 369.

96. *No set form of words necessary.* No set form of words is necessary to exclude the husband's marital rights. Any terms which show a manifest intention to exclude the right of the husband, or to show that the wife's control is independent of the husband, are sufficient to create a separate estate in her; *Taylor v. Stone*, 13 S. & M. 652 (citing *Grand Gulf Bank v. Barnes*, 2 S. & M. 165); S. P., *Smith v. Henry*, 6 G. 369.

97. *Husband excluded only so far as a valid contrary disposition is made.* By marriage agreements, the marital rights of the husband are excluded only to the extent that a valid legal instrument operates to do so. Where, therefore, a settlement made in contemplation of marriage, contained a limitation of slaves, to the intended wife for life, and after the termination of her life estate, then to her heirs, and in default of heirs, to other parties; the limitation over being otherwise void, the fact that the slaves belonged to the wife at the time of the settlement, and that the husband joined in the deed, will not render it valid. The limitation over being void, the husband will be entitled to the

property, just as if no limitation ever had been made; *Carroll v. Renick*, 7 S. & M. 798.

98. *Instance of exclusion of husband.* L., in Alabama, in 1835, conveyed to the husband and another as trustees certain slaves "in trust for the use of five grandchildren of L., being children of the husband and of L.'s daughter, the said husband and wife to have the possession and use of said slaves during their natural lives, and after the termination thereof, the slaves to be divided among the said grandchildren; they, the said slaves, to be at no time under the disposition of the husband, except for the maintenance and support of said grandchildren, and to be at no time liable for his debts or liabilities." In 1836, the husband sold one of the slaves, and after six subsequent sales, the slave was sold to the plaintiff, and by some means got into the possession of the wife (L.'s daughter) in this State, after the husband's death, and plaintiff sued the wife for his recovery: *Held*, that, by the deed the wife took a separate estate in the slaves for life, remainder to the children, and that the husband had no power to sell the slaves; *Taylor v. Stone*, 13 S. & M. 652.

99. *Another instance.* A conveyance of a slave to trustees upon the trust that they "will permit N. H., wife of I. H., to have and enjoy the use and possession of the slave during her natural life, and after her death, that the trustees will convey the slave to her heirs," both by the rule of equity in England, and by the law of Alabama, vests a separate estate in the slave in the wife; the words, that the wife shall "have and enjoy the use and possession of the property," sufficiently manifest the intention of the grantor to exclude the husband; *Smith v. Henry*, 6 G. 369.

100. *Instance in which the husband is not excluded.* In a grant of property at common law to a married woman, the words, "in her own right," would not convey a separate estate to her; and under the married woman's law of 1839 such a deed would not vest in a wife an estate different from that secured by that act; *Grand Gulf Bank v. Barnes*, 2 S. & M. 165.

101. *Effects of appointing trustee on husband's interest.* By the law of Alabama, which in this respect is different from the general doctrine, the intervention of a trustee in a gift to a married woman is no evidence of an intention to exclude the husband's marital rights; *Smith v. Henry*, 6 G. 369. See *post*, 102, 103.

See EXECUTOR AND ADMINISTRATOR, 1.

2. Construction of Marriage Settlements.

102. *Effect of recital of fact in.* When in a deed settling certain personal property on the wife by her mother, it is recited that the mother bought the property from the husband, and there is no other evidence that the husband ever owned it—that recital, in a controversy between the husband's creditors and the wife, will not be evidence that the property is the husband's; the whole deed is to be taken together; and whilst it recites that the property was once the husband's, it

also recites a purchase from him by the wife's mother; *Palmer v. Cross*, 1 S. & M. 48.

103. *Construction by lex loci.* A marriage settlement is to be construed according to the place where the parties resided, and where it was made and the marriage consummated; but it may be otherwise when the settlement was made with a view to its execution elsewhere; *Carroll v. Rennick*, 7 S. & M. 798.

103a. *Construction of settlement: Case in judgment.* By a contract made in the State of Tennessee, in contemplation of marriage, certain slaves owned by the wife were conveyed to a trustee "for the use of the wife during her natural life, and from the termination of that estate to the heirs of her body and their heirs forever; and in case she should die without such heirs, or having such heirs, they should die before they arrive at mature age, then to her brothers by her mother's side and their heirs forever." The marriage took place—the wife died leaving a son, who died before his majority, the husband having removed the property to this State: *Held*, that by the contract the absolute interest in the property vested in the wife, and on her marriage, in her husband; *Ib.*

103b. *Construction of articles and executed settlements.* Limitations in marriage settlements already executed, are subject to the same rules as limitations in other instruments; it is only in case of marriage articles, where the settlement is to be afterwards, executed, and the trusts are executory, that an exception to this rule is permitted; *Ib.*

104. *Construction of ante-nuptial settlements.* Ante-nuptial settlements, when fairly made, are favored by the courts, not only on account of the security thereby afforded to the wife, but because a provision for the issue of the marriage is usually the great and immediate object in view; and, therefore, a favorable exposition will be made of the words of such instruments to support the intention of the parties, especially where the words refer to a provision for the children; *Gorin v. Gordon*, 9 G. 205.

104a. *Construction of settlement: Case in judgment.* The father, and his daughter and her future husband, entered into an ante-nuptial agreement, which, after reciting "that the father being desirous of making a suitable provision for his daughter, upon her marriage, as her marriage portion," stipulated "that he agreed to deliver to his daughter, upon her marriage, as her marriage portion, certain slaves;" and further, that the future husband and wife "being desirous to reserve said property to the heirs of the wife," if any, and to prevent the same from being sold, or otherwise disposed of during her natural life, agreed with themselves, and the father, "that the said slaves, so soon as they should be delivered to the said" husband "after marriage, shall be and remain in possession of said" husband and wife "for and during the natural life of the" wife, "and that the income from the labor of the slave, shall accrue to the" husband "during th;

natural life of the" wife, "to be disposed of in such manner as he shall, in his discretion, think proper;" and that all the estate acquired by such income shall be the absolute property of the husband, "and his heirs forever;" and if the "husband" shall die, leaving issue alive by the wife, "the said slaves shall descend to and become the property of such issue, unless the said" wife "shall have issue by a subsequent marriage, and in that case all the issue shall take, share and share alike, on the death of the wife." "But in case the wife shall die without issue then alive," then "on her death, the said slaves shall revert to the donor and his heirs forever." After the marriage was solemnized, the husband died, leaving issue of the marriage and the wife surviving, and one of the slaves was seized under execution for a debt of the husband: *Held*, per HANDY, J., and FISHER, J., that the instrument vested an estate in the slaves in the wife for life, which the husband might enjoy for his life; that upon his death, his interest terminated, and the estate vested in interest in the children of the marriage, together with the issue which the wife might have by a subsequent marriage living at the time of her death, but not to vest in possession till the death of the mother; *Heard v. Garrett*, 5 G. 152.

104b. *Abejance avoided*. A construction of a settlement, which leaves the title to the property in abeyance for any length of time, will be avoided. *Ib*.

105. *Construction of power of appointment in*. In construing a marriage settlement, courts will not hold a naked power of a limited and special character, reserved to the settler, to be a power coupled with an interest, or a power of revocation, so as to enable him to defeat a provision for the children, if any other construction can be adopted, consistent with the terms of the instrument; *Gorin v. Gordon*, 9 G. 205.

106. *Same*. Where it is apparent from the terms of a marriage settlement, that the issue of the marriage shall take the whole of the remainder after the death of the parents, a power reserved to the settler to apportion this remainder, by will, among the children, will not enlarge his estate into a fee, and in such a case if the power is not executed, the children will take equally; *Ib*.

3. Registration of Marriage Settlements.

107. *Registration necessary*. A marriage contract made in this State, by which the title to personal property is conveyed to the wife, must (under the Act of 1822) be recorded in the county where the property remains, and if it be removed to another county, it must be recorded there within twelve months from the removal thither; and if not so recorded, a sale of it by the husband alone, to a purchaser without notice, would divest the wife's title; *Moss v. Davidson*, 1 S. & M. 112; S. P., *Pickett v. Banks*, 11 S. & M. 445. See DRED, 53. REGISTRATION, 15, 16.

108. *Registration of foreign settlements: Case in judgment*. M., in 1808, in Virginia,

settled a certain slave upon her daughter (who was a married woman) for life, remainder to her children. The deed was duly recorded in Virginia, where the property was and the parties resided. The daughter and her husband removed to this State in 1836, bringing the slave with them. In 1838 the husband died, the deed never having been recorded: *Held*, in a controversy between the wife and the husband's creditors, that the property was not liable to the husband's debt. That the Act of 1822 (H. & H. p. 344, see DRED, 53) requiring deeds to personal property to be recorded in the county where it is situated, did not apply to deeds conveying property not within the State where they were made, nor to deeds made before the passage of the act; *Palmer v. Cross*, 1 S. & M. 48; S. P., *Taylor v. Stone*, 13 S. & M. 652; *Prewett v. Dobbs*, 13 S. & M. 431; *Presley v. Rodgers*, 2 C. 520; *Barker v. Stacey*, 3 C. 471. See REGISTRATION, 3, 4, 5.

4. Trustees in Marriage Settlements: Husband Trustee for Wife: Transactions between them.

109. *Trustee's title and right*. A trustee holding the bare legal title to protect the separate property of the wife from the husband's control, may, even after the husband's death, by consent of the wife, assert his title against those claiming adversely to her; *Gully v. Hull*, 2 G. 20. Yet in such a case, the trust being satisfied, the wife can also sue; *Mitchell v. Mitchell*, 6 G. 108.

109a. *Title of trustee not defeated by conveyance of husband and wife*. The legal title of a trustee in a marriage settlement is not defeated by a joint conveyance of the estate by the husband and wife during coverture; *Ib*.

109b. *Transactions between wife and trustee*. The wife may deal with her husband or her trustee in regard to her trust estate, but in either case the transaction will be watched with jealousy. In this case she executed a mortgage on her separate estate to secure a debt of her husband, for which her trustee was surety, and by which the trustee was released; and it was said, that this cast a strong shade of suspicion over the transaction, but there being no proof of improper conduct or undue influence by either, the transaction was not disturbed; *James v. Fisk*, 9 S. & M. 144.

110. *Husband trustee for wife where none is appointed*. Where no trustee is named in a marriage settlement, the husband is trustee, and as such entitled to the possession of the trust property, and he should not be removed even at the instance of the wife, unless it is shown that he has abused the trust; and his misconstruction of the contract in his own favor is not an abuse of his trust, if it be unaccompanied by any overt act in accordance therewith; *Kenley v. Kenley*, 2 H. 751. He is trustee for wife where none is appointed; *Wiley v. Gray*, 7 G. 510.

111. *Same*. The husband is regarded as a trustee for the wife, whenever a disposition of her estate for his benefit, is attempted,

and the rule applicable to ordinary trustees acquiring an interest in the trust estate will be enforced against him with the greatest vigor; *Burks v. Loggins*, 10 G. 462. A transaction vesting in the husband the wife's estate, is to be scrutinized with jealousy; the husband being in such a case her trustee, the transaction is *prima facie* fraudulent as to her, and will be so held, unless the husband show affirmatively, not only the utmost good faith, but that the wife ought, in equity and good conscience to have acceded to it; *Pennington v. Acker*, 1 G. 161; S. P., *Burks v. Loggins*, 10 G. 462. And in such a case the husband will not be permitted to prove a different consideration from the one mentioned in the contract; *Ib.*

112. *Agreements between husband and wife, injurious to her, not presumed.* Agreements between husband and wife, in relation to her separate estate, which are injurious to her and beneficial to him, will not be presumed; but every reasonable intendment will be indulged to the contrary (citing *Allen v. Miles*, 7 G. 640; *post*, 147); *Burks v. Loggins*, 10 G. 462. Hence, if the husband, upon a joint deed for land being executed by himself and wife, take from the purchaser his note for the purchase money, payable to the husband or bearer, it will not be presumed to have been done with the wife's consent; and her right to collect the note and enforce the vendor's lien will not be affected by an assignment of the note, or of a judgment recovered on it, made by the husband to a third party, having notice that it was her separate property; *Burks v. Loggins*, *supra*.

113 *Husband cannot waive invalidity of judgment to wife's injury.* The husband will not be permitted to waive the invalidity of a judgment rendered against him, and which is sought to be collected out of property claimed by the wife, if it appear that he and the creditor have combined together to subject the property so claimed for the benefit of the husband. In such a case a fraudulent conveyance of property by the husband to the wife will not be set aside; *Hemphill v. Hemphill*, 5 G. 68. See TRUSTS AND TRUSTEES, 68, *et seq.*

5. Jus Disponendi of Wife, under a Settlement.

A. WIFE HAS ONLY THE POWERS CONFERRED BY THE DEED.

114. *Whether she can be deprived of her property by her fraudulent conduct.* Whether a *femme covert* can be deprived of her separate estate in any other mode than the one prescribed in the settlement, even by her fraudulent conduct; *Quære?* A married woman stood by and suffered, without objection, slaves, her separate estate, to be valued for the husband, and in his presence, with a view of his taking stock in a bank by a mortgage of the slaves as his own property; *Held*, that this conduct did not divest her right to the slaves, in favor of another creditor of the husband; *Palmer v. Cross*, 1 S. & M. 48. See ESTOPPEL, 4. *Post*, 140.

115. *Whether she is a femme sole, or only*

one sub modo. Whether a *femme covert* is, as to her power of disposing of her separate estate, a *femme sole*, or has only such powers as are conferred on her by the instrument under which she claims; *Quære?* *James v. Fisk*, 9 S. & M. 144. See *post*, 117.

116. *She has only such powers as are conferred by the settlement.* It seems that a married woman, as to her separate estate, is not a *femme sole*, only so far as the instrument creating the estate constitutes her such; and in the disposition of her estate and the charging of it, she is restricted to the mode pointed out in that instrument; and that if she contract in any other mode, or attempt to make any disposition of her estate in any other mode, such contract and disposition do not bind her estate. And this is the rule, without reference to the intention of the *femme sole*, in making the contract or disposition; *Doty v. Mitchell*, 9 S. & M. 435. And it also seems that it is incumbent on a party seeking to hold her separate estate liable to her contracts, to show that the contract was made according to the mode pointed out in the instrument creating the estate; *Doty v. Mitchell*, *supra*.

117. *Same: Cases cited and construed.* The cases of *Berry v. Bland*, 7 S. & M. 83, *ante*, 44, and *post*, 126; and *James v. Fisk*, 9 S. & M. 144, *ante*, 115, cited and explained and declared not to decide the question in reference to the power of a married woman to act in the disposition of her separate estate, as a *femme sole*, but only as fixing the rules by which the intention of the wife to charge her estate is to be determined; *Ib.*

118. *Same: Must follow power, and not the statute.* A married woman having a separate estate under a settlement, in which the mode of alienation by her is pointed out, cannot dispose of it in any other way than the one prescribed in the settlement. In such a case the mode of alienation pointed out by the statute, does not apply, and if it be pursued, it will be void (citing *Doty v. Mitchell*, 9 S. & M. 435); *Montgomery v. Agricultural Bank*, 10 S. & M. 566. But if the settlement give her general powers of alienation, and point out no mode, then the alienation must be in accordance with the statute; *James v. Fisk*, 9 S. & M. 144.

119. *Wife has only the power given by the settlement.* A married woman holding a separate estate, is not a *femme sole* as to her power of disposing of the estate; she has only such power of disposing of it, or charging it as is given in the instrument creating it; *Self v. Howland*, 1 C. 264; S. P., *Andrews v. Jones*, 3 G. 274, decided in October, 1856.

120. *Same: Powers under the statutes of 1837, 1846 and 1857.* The foregoing principles, that the wife has only such powers as are conferred by the statute, and that they must be executed as therein prescribed, have been applied uniformly to alienations and contracts of the wife, in respect to her land and slaves held under the statutes; See *ante*, 44, 54. As to all other species of property held under

these statutes, she is regarded as a *femme sole*, with absolute power of disposition, *inter vivos*; see *ante*, 50.

121. *Instances of settlements: Construed as to powers conferred on wife.* By a marriage settlement made in North Carolina, the property of the wife was secured to her as her separate estate, and the rents, issue and profits thereof "to be used and applied and disposed of at her will and pleasure and discretion, and in such manner and to such intent as she might think proper." The settlement also conferred on the wife, the power by deed executed in the presence of two or more credible witnesses, to alter and revoke any of the trusts of the settlement; and in the same manner to create, limit or appoint any new or other trusts, concerning the same, or of so much thereof, as the revocation shall be made." *Held*, that a bill single executed by her jointly, with her husband, did not bind her separate estate; *Doty v. Mitchell*, 9 S. & M. 435.

122. *Same: Another instance.* Where the first clause in a marriage settlement gave the wife the unrestrained power of alienation, and a subsequent clause pointed out the mode, it was held that the two clauses were not inconsistent; and that the mode pointed out in the subsequent clause must be adopted; *Montgomery v. Agricultural Bank*, 10 S. & M. 566.

123. *Same: Another instance: Profits invested.* Where the profits of the separate estate of a married woman, secured to her by a marriage settlement, has been invested in the name of the husband by mistake, and he afterwards made a deed in trust, securing it to the wife, and referring to the marriage settlement as the foundation of her right to it, and he gave her in the deed unrestrained power of alienation; it was held that her power of alienation of the property so conveyed to her by the husband, was to be regulated and governed exclusively by the marriage settlement, and not by the deed of the husband, which was designed only to correct a mistake in the investment of the profits of the estate secured by the settlement; *Ib.*

124. *Sale by husband and wife: When control is vested in a trustee: Statute does not apply in such a case.* Where a slave is conveyed to a trustee for the benefit of a *femme covert*, and which by the terms of the deed was to remain under the trustee's control for the benefit of the wife, the wife has no right to dispose of it, and a purchaser of the slave from her and the husband, under a sale, made in accordance with the statute, cannot hold it at law against the claim of the trustee; nor is he entitled in equity to an injunction against the execution of a judgment at law against him in favor of the trustee for the recovery of the slave; nor to be substituted to the usufructuary interest of the wife in the judgment; *Jordan v. Thomas*, 5 G. 72.

B. THE MORE RECENT DECISIONS MAKE HER A FEMME SOLE ABSOLUTE.

125. *Her power absolute.* Where the in-

strument creating a separate estate in a married woman (in cases not governed by the statutes of this State on that subject), is silent as to her power of disposition over it, neither restricting it nor prescribing the mode in which it is to be exercised, the power of disposition is absolute, as an incident to the property, and the estate is that of a *femme sole* (citing *Garrett v. Dabney*, 5 C. 335); *Block v. Cross*, 7 G. 549; *S. P., Darden v. Levy*, 9 G. 57; *Garrett v. Dabney*, *supra*.

C. LIABILITY OF WIFE FOR HER GENERAL ENGAGEMENTS—HER INTENT TO BIND HER ESTATE.

126. *Not bound by her general engagements:*

Proof of intent. At common law (as contradistinguished from our statutes), the separate estate of the wife was not liable to her general personal engagements; but it was only liable when it appeared that she intended by the contract to charge it. And this intention was generally considered as manifested, when she contracted as surety for the husband, or jointly with him; *Berry v. Bland*, 7 S. & M. 77; confirmed on this point by *James v. Fisk*, 9 S. & M. 144.

127. *Same.* The general debts and personal engagements of a married woman, contracted during coverture, are not chargeable on her separate estate, even where she has the power, under the settlement, of charging it, unless there be an intention on her part, when she makes a contract, to create such charge. But such intention need not be positively expressed—it will be inferred when the debt has been contracted during coverture, as principal, or as surety for the husband, or jointly with him. And it will also be inferred when the husband, as her agent, and by her consent, made a promissory note in her name for the rent of land on which to work her slaves, or for plantation supplies. And such a contract will be enforced against her in equity; *Boorman v. Groves*, 1 C. 280 (citing *Berry v. Bland*, 7 S. & M. 77; *Mitchell v. Doty*, 9 S. & M. 435).

128. *Same.* Whether the separate estate of a married woman is bound by her contract, depends upon her intention at the time, and her intention may be shown by her positive declarations, or may be inferred from her conduct and the circumstances under which the debt was contracted; (citing *Boorman v. Groves*, 1 C. 280); *Block v. Cross*, 7 G. 549.

D. MISCELLANEOUS, AS TO WIFE'S AND HER TRUSTEE'S POWER TO ALIEN AND CHARGE HER ESTATE.

129. *Power over corpus of trust estate.* A married woman may charge in equity a trust estate secured to her to the extent of her interest in it, but no farther, and hence, if only the proceeds or profits are settled to her use, she cannot charge the *corpus* of the estate; *Prewett v. Land*, 7 G. 495.

130. *Chancery will direct a sale of the corpus.* When property is vested in a trustee for the support and maintenance of a married

woman and her children, and the trustee is charged with a discretion to sell the *corpus* of the estate for this purpose, a court of equity will control this discretion, where it is abused, and compel the trustee to sell a portion of the principal of the estate when it is necessary for the welfare of the beneficiaries, but it will not order a sale to pay improvident contracts and extravagant purchases of the *cestui que trusts*, even when they were sanctioned by the trustee; *Ib.*

131. *Power of disposition over separate estate acquired in another State.* The statutes of this State regulating the powers of married women over their separate estates, only apply to cases where the separate estate was acquired when the married woman was domiciled in this State, and they do not enlarge or restrict the rights and powers of *femmes covert* over property acquired by them in another jurisdiction. In such a case her power of disposition is regulated by the law of the State where the acquisition was made, and where she was then domiciled, and this power she may exercise in this State after her removal hither; *Block v. Cross*, 7 G. 549; *S. P., Andrews v. Jones*, 3 G. 274.

132. *Effect of foreign marriage settlement on realty acquired here.* A mortgage executed by husband and wife, resident in this State, according to our law, upon lands situated here, is binding; and the wife cannot defeat it by setting up a marriage contract made in Louisiana (where the marriage was celebrated), by which it was agreed that their rights to property acquired should be governed by the laws of that State; *Lapice v. Gereau*, W. 480.

VII. The Wife's Equity to a Settlement out of her Property.

133. *The nature and extent of the principle.* The principle recognized in courts of chancery known as the wife's equity to a settlement out of her property, and which requires the husband, when seeking to collect the wife's choses in action, or equitable assets, to make provision out of them for the wife, has no application where the husband has reduced the property to his possession, for then his legal right is perfect, and he is no longer under the necessity of invoking the aid of the courts to secure to him the wife's estate. Yet, if after such reduction to his possession, he voluntarily permit the property in which, by his marital rights, he has acquired only a life estate, to go into the possession of the wife, under an invalid agreement with her for a separation, and she has placed it in the hands of her bailee, and the husband has instituted suit in her name and his jointly, against such bailee for its recovery; a court of chancery will, at her request, upon the principle of the wife's equity, restrain the suit at law against the bailee, until the husband has made provision for the wife, such as the chancellor may direct, even if it be a settlement of all the property. And this is especially so, when the property consists of

slaves held by the wife under Act of 1839; for as to them, though the husband has the profits, yet the wife is entitled to a joint possession with him, and is the holder of the title; *Carter v. Carter*, 14 S. & M. 59.

134. *The amount of the wife's equity.* The amount of the wife's equity is settled in the discretion of the chancellor, and may extend to the whole of her property; but where the equity is enforced against a husband who had surrendered the property under an invalid agreement between him and the wife to live separate, it was held improper to give the wife the whole estate, without providing indemnity to the husband against any debts which she may have contracted during the separation, and also without providing indemnity against the removal of the property from the State to protect ulterior interests in it; *Ib.*

135. *Effect of adultery of wife on her right.* The adultery of the wife, committed whilst she, by consent of the husband, is living separate from him, is no ground of forfeiture of any right which she has by law in her separate estate held under the Act of 1839, nor of her right, called her equity, to a settlement out of her own property; *Ib.*

VIII. Post-nuptial Settlements by Husband on Wife.

See *ante*, 74 to 78.

137. *When good against creditors of the husband.* The husband and wife may after marriage contract for a transfer of property from the husband to a trustee, for the separate use of the wife; and such a settlement, when made *bona fide* and upon a valuable and adequate consideration, is good against the creditors of, and purchasers from, the husband; *Wiley v. Gray*, 7 G. 510; *Butterfield v. Stanton*, 44 M. 15.

138. *What is a valuable consideration.* The devotion by the wife of her separate estate to the use of the husband or the making of a charge on it for his benefit, will support a settlement of the husband's property to the separate use of the wife. And the principle recognized by some of the authorities—that voluntary advances of her separate estate, made by the wife for the use of her husband, will not support, as against the creditors of the latter, a subsequent settlement made by him for her benefit, unless there was a valid agreement between them at the time the advances were made, that she should be secured in that way, or unless the advances were intended to serve as the basis of a settlement to be afterwards made—does not apply to a settlement made by the husband as indemnity for the wife's separate property, which he, without her consent, converted to his own use. In such a case, the right of the wife to a settlement, does not depend upon any agreement which she may have entered into, but upon the indebtedness of the husband to her, and his consequent obligation to discharge it; for a man may voluntarily do whatever by law he may be compelled to do. Such a set-

tlement should, however, be *bona fide*, reasonable, fair, and but an adequate compensation for her property converted to his own use; *Ib.*

138a. *Same.* When a wife charges her separate estate for the payment of her husband's debts, or applies her estate to that purpose, and it does not appear to have been intended by her as a gift to the husband, equity will decree the husband's assets to be applied in exoneration of the estate, or in payment of the money advanced. And such advances made by her are a good consideration for a subsequent conveyance, to a trustee for the use of the wife, of the husband's property, to a value equivalent to the advances, and such a conveyance will be good as against the creditors of the husband; *Butterfield v. Stanton*, 44 M. 15.

139. *Same: Liability of her husband as her trustee.* Where the wife has no other trustee to take charge of her separate estate, the husband is regarded as her trustee, and if without her consent he appropriate her property to his own use, he will be her debtor to that extent, and will be compelled in equity to make ample compensation to the wife, by a settlement on her out of his own property; *Wiley v. Gray*; *Butterfield v. Stanton*, *supra*.

140. *Same: Where husband's conversion did not divest wife's title.* It is no objection to the validity of a *post-nuptial* settlement made by the husband on the wife, and as indemnity for the value of her slaves, which the husband had sold without her consent, that the sale did not divest the wife's title; for, by claiming under the settlement and accepting the benefits thereof, she is estopped from setting up her title to the slaves so sold without her consent; *Wiley v. Gray*, *supra*.

141. *Sale of dower in Louisiana no consideration for settlement.* By the laws of Louisiana the wife has no dower or other interest in the realty purchased by the husband after marriage, and to which she contributed nothing; and therefore, her uniting with him in a conveyance of it constitutes no valuable consideration to support a settlement made by him to her separate use; *Vertner v. Humphreys*, 14 S. & M. 130.

142. *Insolvent husband preferring wife as a creditor.* The husband, if insolvent, may prefer the wife in making payment of his debts, and it is no reason for assailing the transaction on the ground of fraud, that the husband paid the wife interest, if he were liable to pay it; *Roach v. Bennett*, 2 C. 98. But the right of an insolvent debtor to prefer one creditor to another, must be exercised in good faith and without any design of securing a benefit to himself. And this rule applies to a preference given by the husband to the wife; *Mangum v. Finucane*, 9 G. 354.

143. *Same: Case in judgment.* Where a creditor of an insolvent husband is indebted to the wife, on account of her separate estate, and upon a settlement of accounts, the husband becomes, by agreement of all the parties, substituted as debtor of the wife, he may,

after such settlement and substitution, make a valid payment of the debt to the wife, in preference to his other creditors, if it be done *bona fide*, and without a design of securing a benefit to himself. But where the husband has advanced money to the wife to purchase property, and the purchase has been made, and legal proceedings commenced to subject the property to the husband's debts, then an agreement made between the parties (husband, wife, and a creditor of the husband) by which the advance made by the husband to the wife, was accepted as a satisfaction of the debt due by the husband to his creditor, and of the debt due by the latter to the wife, will not secure the property to the wife as her separate estate, exempt from the claims of the husband's creditors; *Ib.*

144. *Wife's money invested with husband in property.* If money of the wife be invested in the purchase of property, and the deed taken to her, her interests as against the husband's creditors, will be protected only to the extent of her separate estate so invested; *Hopkins v. Carey*, 1 C. 54. See *ante*, 138a.

IX. Husband's Liability to account for Profits of Wife's Estate.

145. *Liability of husband for interest.* Wherever the wife has a separate estate, which she permits the husband to use, and there be no stipulation that he shall pay interest, the law will presume, in the absence of any circumstance showing a contrary intention or understanding, that he shall not account for interest. But if from the mode of dealing between them, there be any circumstance from which it may reasonably be inferred, that the intention of the parties was that interest should be charged, then he is properly liable for interest; *Roach v. Bennett*, 2 C. 98.

146. *Same: Case in judgment.* Where the trustee in a marriage settlement for the benefit of the wife, places her funds in the hands of the husband, as his agent, and for investment in the best manner he can for the benefit of the wife, and the husband use the funds himself instead of investing them, he will be liable for interest at such rate, not exceeding the highest legal rate, as the evidence shows the wife's money could have been safely and securely invested; *Ib.*

147. *Same.* Agreements between husband and wife in relation to her separate estate held under the Act of 1846, and which are injurious to the wife and beneficial to the husband, will not be presumed, but every reasonable intendment will be indulged to the contrary; and hence, the husband will be liable to account to the wife for both the principal and income of her estate, which he has applied to his own use during coverture, unless it appear affirmatively that the wife intended he should take it as a gift; *Allen v. Miles*, 7 G. 640. See *ante*, 112.

148. *Same: Provision of Code of 1857.* By art. 28, p. 337, of the Code of 1857, it is provided, "that neither the husband nor his

representatives shall be liable to account to the wife or her representatives, for the rents, profits, or income, arising from her separate property, after the expiration of one year from the time of receiving the same."

148a. *Husband as debtor: Remedy of the wife: Judgment at law.* The relation of debtor and creditor may subsist between husband and wife; chancery is the proper forum, however, to enforce the claims. Yet, if the husband make no objection, a judgment against him in favor of the wife, in a court of law, is not void, and cannot be collaterally impeached, even by a creditor of the husband; *Simmons v. Thomas*, 43 M. 31. See *ante*, 137, *et seq.*, and *post*, 203.

X. Husband's and Wife's Liability for Debts and Acts of the Wife.

1. Husband's Liability.

149. *Husband's liability under the Acts of 1839 and 1857.* Whether, since the passage of the Act of 1839, securing to married women their property, as a separate estate, the husband is liable for the debts of the wife, contracted *dum sola*; *Quære? Dickson v. Miller*, 11 S. & M. 594. But under the Act of 1857, he is not liable for the debts of the wife contracted *dum sola*; *Bacon v. Bevan*, 44 M. 293.

150. *Liability at common law: Promise by husband to pay.* The husband upon his marriage becomes responsible for the debts of the wife contracted *dum sola*; but this responsibility ceases upon the dissolution of the marriage, if there has been no recovery against him; and his responsibility as husband will not be enlarged by his mere naked promise to pay the wife's debt, nor by an account, stated by him of his wife's debt, and such promise and account stated are not binding on the husband after the wife's death; nor will any express promise made by him after the dissolution of the marriage, to pay the wife's debt, bind him, unless it be in writing and on a sufficient consideration. For after dissolution of the marriage, the husband stands as a mere stranger to the wife's debts, the contingent liability which he was under during coverture being extinguished. Nor would the rule be different, if he be the wife's executor; *Waul v. Kirkman*, 13 S. & M. 599.

151. *Same.* If the husband, whilst executor of the wife, make a proposition in writing to bind himself personally for the wife's debt, in case indulgence is given, it must be shown that the proposition was accepted; *Ib.*

152. *Same: Case in judgment.* During coverture, the husband and a creditor of the wife before marriage, had her indebtedness made out in the shape of an account, and the husband gave this receipt, "Received an account as above stated, and found it correct;" *Held*, that this imposed no liability on him to pay the wife's debt after her death. Nor will a letter written during coverture by the husband to the creditor, referring to the debt, as a debt "we (husband and wife) owe," and

also referring to an understanding between the husband and the creditor for its payment, amount to anything more than an admission of his liability as it then existed, and it forms no foundation to make him responsible after her death; *Ib.*

153. *Same: Promise of husband to pay wife's debt: Propositions: Case in judgment.* After the wife's death, the husband (who was appointed executor by her will) wrote to her creditor, whose debt was created before marriage: "Before deciding whether or not to undertake the executorship, I wish to confer with you respecting our debt; you know the condition of the estate (the wife's), it owes little save to you; your debt is very large, and if pressed to collection, will sweep nearly the whole estate; if five or six years can be given, and crops be good, the debt may be extinguished and property enough saved to give me a support." He then expressed a wish to divide the debt into instalments, and to give his notes and a deed in trust on the property, to secure the debt: *Held*, that at most this letter could be considered as a proposition to become personally responsible on condition of forbearance; and to make him liable, it must be shown that the creditor acceded to the proposition, and gave the forbearance; *Ib.*

154. *Husband's liability for wife's engagements.* The husband is not responsible for the wife's contracts, though made by him as her agent, if they be made in the wife's name, and if the credit were given to her exclusively on the faith of her separate estate, and the party intended to charge her and not him; *Swift v. Penrice*, 2 C. 416; S. P., *Bacon v. Bevan*, 44 M. 293; *Dunbar v. Meyer & Co* 43 M. 679. As to effect of husband giving his note for wife's debt, see PAYMENT, 4.

154a. *Liability of husband for necessities for wife.* The liability of the husband for necessities furnished the wife grows, out of the marital relation, and as a consequence of the obligations assumed by him on the marriage, that he will supply her with all necessities convenient and suitable to her station in life, and this liability exists though the husband be an infant. If the husband neglect to furnish necessities, the wife may purchase them, and though he dissent, he will be liable therefor; *Dunbar v. Meyer & Co.* 43 M. 679.

154b. *Power of wife to bind husband.* Although the wife possesses no inherent power to bind her husband, yet if they cohabit, and goods purchased by her are consumed in the family, the assent of the husband will be presumed; and if he omits to furnish necessities, this is an implied authority to the wife to buy them on his credit; *Ib.*

2. Wife's Liability.

155. *Liability of wife for her debts, dum sola.* The separate property of the wife, owned by her before marriage, may be subjected in equity to the payment of necessities furnished her while sole and a minor; and it is no bar to such a claim that a verdict and judgment had been rendered in favor of hus-

band and wife in an action at law for the same debt, the verdict being upon the issue made by the plea of the husband setting up his bankruptcy. Such a plea is but a plea in abatement, and is no defence against a debt due by the wife where she has separate property out of which it can be made; *Dickson v. Miller*, 11 S. & M. 594.

156. *Wife's liability for her fraud.* Whether a married woman, by participating in the fraud of her husband in acquiring title to, and possession of, land in her own name, can subject her separate estate for the damages; *Quære?* But such damages were refused in this case, because it was not shown that she was privy to the fraudulent agreement by which the deed was made to her; *Howcott v. Collins*, 1 C. 398. For wife's liability generally, see *ante*. 126, 123, 44 to 71.

XI. Infant Femme Covert.

157. *Is entitled to her estate from her guardian.* By statute, a minor ward upon marriage, is entitled to receive her estate from her guardian; *Wood v. Henderson*, 2 H. 893.

158. *The husband may represent infant wife.* The husband is authorized by statute to act for his infant wife, in all matters in which personal estate is to be received in her right, and this empowers him to represent her interest on the final settlement of an estate, of which she is a distributee; and it is, therefore, unnecessary to appoint a guardian *ad litem* for that purpose; *Frisby v. Harrison*, 1 G. 452. *Sed vide ante*, 9.

159. *Not bound by her relinquishment of dower.* An infant *femme covert* is not bound by her relinquishment of dower; and if she claim dower after such relinquishment, she is not bound to refund any of the purchase money received by her husband; *Markham v. Merritt*, 7 H. 437.

160. *Cannot sell land or slaves.* The Act of 1846, in relation to the separate property of married women (H. C. 498, § 4), authorizes a married woman owning slaves in her separate right, to contract for the sale of such slaves jointly with her husband: "*Provided*, that all such sales shall be evidenced by bills of sale under seal, acknowledged by such married woman, as deeds of married women are required to be acknowledged." This provision does not refer to the form of the acknowledgment alone, but it requires that every essential to the validity of an acknowledgment of a deed to realty by a married woman, should be observed; and hence, a bill of sale of a slave, executed by an infant *femme covert*, is not valid and binding on her; *Cason v. Hubbard*, 9 G. 35.

As to right of infant widow to administration, see *INFANTS*, 18.

XII. Wills and Testamentary Papers by Wife.

161. *Marriage a revocation of will.* By the common law, the marriage of a *femme sole*, was a revocation of a will made by her, for the reason that marriage destroys the ambulatory nature of the will, and left it no longer

subject to her control, and, moreover, by the marriage, the wife's chattels vest in the husband, which puts an end to the will. And if she become a *femme sole* again by the dissolution of the marriage, the will is not revived without republication; *Garrett v. Dabney*, 5 C. 335.

162. *Exception where she has separate estate.* But it seems, that these rules do not apply, where the estate bequeathed by the will is secured to her as her separate property, for in England, the wife was regarded, as to her separate estate, as a *femme sole*, and capable of disposing of it in any manner not prohibited by the settlement. The wife has not, however, as to her separate estate, held under the Act of 1839, such a power of disposition. The husband has a vested interest in her property, which she could not alienate without his consent; and hence, the same rule would apply as to wills made by her before marriage, as it existed at common law when she had no separate estate. Nor is the rule changed by the Act of 1821 (H. C. 649), which declares that "no devise made according to the statute, nor any clause thereof, shall be revocable, but by cancellation, or another will or codicil." This statute also existed in England, and was uniformly held to apply to express acts of revocation, and not to revocations by inference of law, or by implication from various circumstances, among which is a subsequent marriage of a testatrix; *Ib*.

163. *Power of married woman to will her estate held under our statutes.* Whether a married woman has, under any circumstances, the power of disposing, by will, of her separate property, held under the Acts of 1839 and 1846; *Quære?* *Garrett v. Dabney*, 5 C. 335. The Acts of 1839 and 1846, are enabling statutes, and must receive such construction as to enlarge and not abridge the rights of married women, in reference to their separate estates; and, moreover, the modes prescribed for the disposition of their separate estates by *femmes covert*, refer to conveyances made by them *inter vivos*, and they do not affect their right to make wills, as it existed before their enactment; and this right is, to make a will of their personal chattels by the assent of their husbands; *Lee v. Bennett*, 2 G. 119. She cannot make a will without the consent of her husband; nor does the abandonment of the wife by the husband, invest her with such a power; *Cain v. Bunkley*, 6 G. 119.

164. *Married woman's will must be probated.* Whether a testamentary document, made by a *femme covert* with the assent of her husband, be regarded as a will, or as an instrument in the nature of a last will and testament, it is equally necessary that it be regularly admitted to probate; *Lee v. Bennett*, 2 G. 119.

See *WILLS*, 112, 112a.

XIII. Agreements between Husband and Wife for Separation.

165. *Agreements to separate are void: But*

collateral stipulations may be good. Articles of separation are void; but a stipulation in them to allow a separate maintenance to the wife, is enforceable against the husband, when made through the intervention of a trustee; *Tourney v. Sinclair*, 3 H. 324. But a deed to slaves made directly by the husband to the wife, without the intervention of a trustee, is void at law, whatever effect it may have in equity; *Tourney v. Sinclair*, *supra*. See *post*, 171.

166. *Same.* Whether an agreement of separation between husband and wife be invalid or not, because not in writing; *Quære?* But whether valid or not, it is invalid if made directly between husband and wife, and without a trustee for the wife, and cannot be enforced even as to property included in it; *Carter v. Carter*, 14 S. & M. 59.

167. *Same: Jurisdiction of chancery.* It seems in a proper case, a court of chancery would have jurisdiction to enforce the obligations undertaken by the husband and wife, in a valid agreement of separation; but in such case it would not assume the power to force them to separate, or live together, but merely to compel them to perform any contract stipulated to be performed upon such separation; *Ib.*

168. *Husband and trustee, but not wife, bound by.* An agreement between husband and wife alone, without the intervention of a trustee, to live separate, is void for want of power in the wife to contract; but the agreement is valid, when made through the agency of a trustee for the wife. In such a case the husband will be bound by his covenant and conveyances to the trustee, for the benefit of the wife, and the trustee will be bound by his covenants, on the part of the wife, to indemnify the husband against liability for her support or for her debts, and against her claims on his property. But the wife being under a disability to contract, is not bound by covenants in a deed of separation. They are void as to her, though her trustee might be liable on his agreement, in damages for her failure, to abide by hers. Hence, a provision in articles of separation, by which the wife relinquishes all her right to the husband's property, is not binding on her; and notwithstanding her agreement, she may after his death, set up her claim to her legal share of his estate, including property exempt by law from execution; *Stephenson v. Osborne*, 41 M. 119.

169. *Provision for separation, ceases on reconciliation.* Where a settlement is made by the husband on the wife, for a permanent separation, a reconciliation and cohabitation afterwards, extinguishes any future claim of the wife under the settlement, and her right will not be revived by any subsequent disagreement between the parties; *Weathersby v. Weathersby*, 10 G. 652.

170. *Same: Case in judgment.* At the marriage in 1833, the wife was the owner of two slaves. In 1837 there was a separation by mutual agreement between husband and wife, and the husband gave up

to the wife these slaves, as her separate property, and surrendered his marital rights therein, and permitted her to retain possession of them. In 1840 the parties were reconciled, and the wife returned to the husband, bringing with her the slaves. Afterwards she filed her bill for a divorce, and also to recover the slaves, under her title as above stated: *Held*, that the surrender of the slaves in 1839, by the husband, was not an absolute gift of them to the wife, but a provision for separation, and that on reconciliation, notwithstanding the passage of the married woman's law of 1839, during the period of separation, the original right of the husband was revested, and that the wife could not recover them; *Ib.*

171. *Articles of separation: Direct conveyance by husband to wife not good.* Husband and wife agreed on articles of separation. The wife relinquished her right to dower in his estate, and her father executed a bond to the husband to indemnify him against any debts or liabilities the wife might thereafter contract; and in consideration thereof, the husband released and conveyed to the wife directly, all the property he had acquired by virtue of his marriage with her, among which was a promissory note on a third person, which the husband endorsed and delivered to the father. This note, after the death of the wife, was collected by the father. The husband afterwards, as administrator of the wife, brought an action against the executor of the father to recover the sum so received: *Held*, that the conveyance of the husband, even if upon a consideration favored in law, was void at common law; and that upon the collection of the note by the testator, if a right of action accrued to any one, it was not to the representative of the wife, but to the husband, and therefore he could not recover in this action; *Mills v. Richards*, 5 G. 77.

See *ante*, 165.

XIV. The Doctrine of Entireties.

172. *Joint devise, or grant to husband and wife: Alienation of husband.* Where a devise or grant is made to husband and wife jointly, they take by entireties, and not by moieties, and the husband cannot alone without joining his wife, divest the estate of the wife. But this rule applies in general, to real estate, and to fee simple interests therein. In regard to terms for years, and to chattel interests, where they hold by entireties, the husband may alien the property, so as to bind the wife; but this is to be understood only where there is no restraint in the devise or grant, on his common law right; *Taylor v. Stone*, 13 S. & M. 652.

173. *Same.* Where a deed is made to husband and wife jointly, they are not joint tenants, but tenants by the entirety; that is, each is entitled to the whole and every part of the estate just as if they both were one person, for so they are considered; and upon the death of one, the other is entitled to the

whole estate. The husband may take the rents and profits during the coverture, but he cannot alien so as to bind the wife. This doctrine of the common law is not repealed in this State, either by our statutes, securing to married women separate estates, nor by the statute abolishing the *jus accrescendi* of the survivor of two or more joint tenants; *Hemingway v. Scales*, 42 M. 1.

XV. Conflict of Laws in relation to Marital Rights.

174. *Law of domicile of marriage governs.* The law of the domicile of the marriage, fixes the rights of husband and wife to personal property acquired there, and rights so acquired and vested, will be recognized and enforced everywhere. And where there is a subsequent change of the domicile, the acquisitions made in the new domicile will be governed by the laws there; *Lyon v. Knott*, 4 C. 548.

175. *Marriage contract: Construction of.* A marriage contract, where both parties reside in the place where it was made, and the marriage was consummated, will be construed according to the laws of that place. But it would seem, that if the contract were made with a view to its execution elsewhere, it would be governed by the laws of the place, with a view to which it was made; *Carroll v. Renich*, 7 S. & M. 798.

176. *Where the domicile of the parties is different, the law of the husband's domicile governs.* Where the domicile of the husband and wife, at the time of the marriage, is in different States, and the marriage takes place at the domicile of the wife, but with the intention of both parties that their future domicile shall be that of the husband, and this is carried out by a return to the husband's domicile and permanent residence there, the marital rights of the parties, as to their personal property owned at the time of marriage, will be governed by the law of the husband's domicile. And hence, if the husband's domicile were in this State, and the wife's in another, the wife's right to her personal property owned at the time of the marriage, would be secured to her under the laws of this State; *Land v. Land*, 14 S. & M. 99; *Vertner v. Humphreys*, 14 S. & M. 130.

177. *Same: As to realty.* But the rule is different as to immovable property. The marital rights, as to that, whether owned at the time of the marriage or subsequently acquired, is governed by the *lex rei sitæ*; *Vertner v. Humphreys*, 14 S. & M. 130; *Lapice v. Gereaudau*, W. 480. Thus, a mortgage executed by husband and wife, resident in the State, according to our laws, upon lands situated here, is binding; and the wife cannot defeat it by setting up a marriage contract made in Louisiana (where the marriage was celebrated), by which it was agreed that their rights to property subsequently acquired should be governed by the laws of that State; *Lapice v. Gereaudau*, *supra*.

178. *Powers of wife over property acquired*

elsewhere. The statutes of this State do not apply to, nor enlarge, nor restrict the powers of *femmes covert* over property acquired by them whilst they were domiciled in other States; and upon their subsequent removal here, they may exercise here all the powers over personal property brought with them, and acquired in other jurisdictions, which they had by the law of their former domicile; *Block v. Cross*, 7 G. 549.

179. *Marital rights of widow on death of husband.* The widow of a person dying, domiciled in this State, is entitled to dower in his real property situated here, and also his personality, according to the laws of this State, although the matrimonial domicile was elsewhere. And this rule applies equally to property acquired in the matrimonial domicile as to property acquired here, wherever, by the laws of that domicile (as they are in this State), the wife has no vested interest by the marriage in the husband's property, but only the privilege of taking a certain share of the estate of which he died owner, notwithstanding any disposition of his will to the contrary; *Hairston v. Hairston*, 5 C. 704. See CONFLICT OF LAWS, 21 to 34.

XVI. Statute of Limitations, as it affects Rights of Married Women.

180. *Statute does not run against a married woman.* The statute of limitations does not run against a married woman; and if she make an invalid gift or conveyance of her slave, the donee or purchaser cannot set up the bar of the statute against her rights; and if the slave so given or granted get into the possession of the husband, he may, on being sued by the donee or grantee, set up, by the wife's consent, the exception in the statute of limitations in her favor; *Curll v. Compton*, 14 S. & M. 56. And so, if her slave be illegally levied on and sued, her right to recover is not barred by the statute of limitations; *Harvey v. Edington*, 3 C. 22; S. P., *Fatheree v. Fletcher*, 2 C. 265.

181. *Not barred because trustee is barred.* The rights of *femmes covert* and infants, who are the equitable owners of slaves, are not barred by reason of the failure of the trustee in whom the legal title is vested, to institute suits for their recovery, until after the lapse of the period prescribed by the Statute of limitations. Their rights in this respect are the same, whether they be the legal or equitable owners of the property, and whether they be a trustee or not; *Feurn v. Shirley*, 2 G. 301; *Bacon v. Gray*, 1 C. 140; S. P., *Adams v. Torrey*, 4 C. 499.

182. *Bar of statute where wife purchases during adverse possession.* A's adverse possession of the premises in controversy commenced in 1841. The wife of B., in 1842, whilst the land was so held adversely, purchased it at sheriff's sale, made under a judgment rendered against B., and which was a lien on the premises. B. and wife brought suit in 1852 to recover the lien, on the wife's title: *Held*, that the recovery was not barred

either under the Act of 1822, or the Act of 1844, because the period prescribed under the former act, viz.: twenty years, for the adverse possession, had not elapsed; and because, when the latter act was passed, the wife was a *femme covert*; *Merritt v. Doss*, 2 G. 275.

183. *Where wife has a joint action, with one sui juris.* It is a well established rule, both in law and equity, that if one of several persons entitled to a joint action be capable of suing, at the time the cause of action accrued against the defendant, and the suit be not instituted in the time prescribed by the statute, all the persons so entitled to the joint action are barred, including infants and *femmes covert*; *Jordan v. McKenzie*, 1 G. 32.

184. *Husband's incidental right not barred.* The husband's right of possession, as to the rents and profits of the wife's realty, is but an incident to the title of the wife. His seizin is not sole and separate in himself, but joint, with the wife, and in her right; and if the statute of limitations be no bar to the right of the wife, on account of her coverture, it will be no bar to the right of the husband, which is merely incidental, and does not vest till after the recovery of the land; *Merritt v. Doss*, 2 G. 275.

185. *Bar of statute, where chose in action accrues to wife during coverture.* A chose in action accruing to the wife during coverture, vests absolutely in the husband, who may sue for it in his own name, without joining his wife as co-plaintiff, and it is therefore subject to the bar of the statute of limitations, notwithstanding the coverture of the wife; *Cook v. Lindsey*, 5 G. 451.

See LIMITATION OF ACTIONS, 121 to 127.

XVII. Miscellaneous.

1. Paraphernal Property.

186. *Wife's right to.* Jewelry and furniture of the wife are paraphernal property, and may be sold by her, and the proceeds invested in slaves, in the name of a trustee, for her separate use; *Gully v. Hull*, 2 G. 20.

2. Power of Husband over Wife.

187. *Right to chastise.* The husband may be convicted of an assault and battery on his wife, though by the ancient common law he had the power of chastising her; and perhaps now the right of moderate chastisement in cases of great emergency might be exercised; *Bradley's Case*, W. 156.

3. Separate Trade of the Wife.

188. If the husband permit the wife to purchase goods on a credit, to be resold by her as a trader, either on her separate account, or for their joint benefit, he will be liable at law for the price; but she being incapable in law of making such a contract, it will not be binding on her; and therefore a bill in equity cannot be maintained against husband and wife to enforce the collection of the debt; *Morris v. Palmer*, 3 G. 278. Nor can she

by his consent become a member of a mercantile partnership; *Flaxworth v. Magee*, 44 M. 430. But by the Rev. Code of 1871 she may become a trader on her own account.

189. *Lien of creditor.* A person who sells goods to the wife, to be resold by her as a trader, has no lien on the profits for the collection of his debt; *Morris v. Palmer*, *supra*.

4. Right of Wife to Alien Realty under the Act of 1822.

190. *She may alien under that act.* It seems that under the Act of 1822 (H. & H. 347, § 19), which provides that no estate of a *femme covert* in lands, tenements, &c., in this State, shall pass by her deed or conveyance, except with a previous acknowledgment, before certain officers, upon an examination made separate and apart from her husband, a married woman has the power to alien her land by deed, when properly acknowledged, as in cases of relinquishment of her right to dower; *Surget v. Little*, 2 C. 118.

5. Wife's Right to Guardianship and Administration.

191. *Wife entitled when next of kin.* When the wife is next of kin to an orphan, she is entitled to the guardianship; the right is personal, however, and does not vest in the husband; but she may be appointed, if the husband will execute the bond for her, and the same rule applies to her right of administration; *Farrer v. Clark*, 7 C. 195. The letters must be granted to her, and not to her and her husband jointly, to the exclusion of the next of kin. The husband has no more right than a stranger; *Richards v. Mills*, 2 G. 450.

6. Possession of Wife's Easement by Husband.

192. The use and occupation by the husband and his family, of a right of way, purchased in his own name, but appurtenant to the wife's land, is a sufficient possession by the wife of the right of way, to authorize a judgment in ejectment against both husband and wife, in favor of a plaintiff who has a common interest in the right of way; *Gordon v. Sizer*, 10 G. 805.

7. Circumstantial Proof that Marriage was in this State.

193. *Case in judgment.* Proof that the guardian of an infant female removed to this State, with her property, including the slave in controversy, in the year 1846; that she married in 1854, and thereupon the slave was delivered to her by her guardian, and that she soon thereafter resided with the defendant in this State, who bought the slave, taking from her and her husband a joint bill of sale, is sufficient, in the absence of all proof to the contrary, in a suit by her to annul the sale on the ground of her infancy at the time it was made, to show that she was married in this State, and acquired and held title as a *femme covert* under our laws; *Cason v. Hubbard*, 9 G. 35.

8. Law of Louisiana on Paraphernal and Dotal Property, and Power of Wife to Contract.

194. *Husband has no right to alien.* By the Civil Code of Louisiana, the separate property of husband and wife is that which either has, at the marriage, or subsequently acquires by gift or inheritance, and the husband has no power to alien the property of the wife, paraphernal or dotal; *McMurren v. Soria*, 4 H. 154.

194a. *Authority of wife to make contract.* By the Civil Code of Louisiana, the authorization of the husband is necessary to enable the wife to make a contract. This authorization in commercial contracts, is presumed if he permits her to trade in her own name, and to execute all her other contracts where he is himself a party to them.

If she subscribe a promissory note with the husband, it must be proven that the debt contracted, was applied to her own use; *Partee v. Silliman*, 44 M. 272.

9. Husband and Wife as Witnesses for each other.

195. *Each incompetent where the other is interested: Case in judgment.* Where property is levied on for a debt of the husband, and claimed by the wife under the statute, the husband is an incompetent witness for the wife on the trial of the issue thus made; *Moore v. McKie*, 5 S. & M. 238.

196. *Same: Husband cannot attest a will in favor of the wife.* The husband is incompetent to attest a will which makes a devise or bequest to the wife to her sole and separate use; *Rucker v. Lambdin*, 12 S. & M. 230.

197. *Competency of husband and wife under Act of 1857.* The wife was excluded by the common law, from being a witness for the husband, upon the ground that they were one person in law, and as the husband could not testify for himself, so the wife could not, her interest being identical with his; but by the Rev. Code of 1857, art. 190, p. 510, the incompetency of any person as a witness, whether a party to the suit or otherwise, by reason of interest in the result of it, is abrogated, and the wife is, therefore, a competent witness for the husband; *Lockhart v. Luker*, 7 G. 68.

198. *Same.* Prior to the passage of the Act of 1857, the husband and wife were incompetent to testify for and against each other, not only on the ground of interest, but more especially on account of the privileged sanctity with which the law regards the confidential intercourse of married life; and their incompetency on this last ground is not removed by the statute. And in this case the whole testimony of the wife was ruled out, notwithstanding a part of it was in reference to what passed between her and the other party. And the conclusion of the court was that the wife was incompetent as a witness for her husband, and not that the particular testimony she gave was incompetent; *Dunlap v. Hearn*, 8 G. 471.

199. *Husband and wife competent, except*

to disclose confidential communications. The incompetency of husband and wife as witnesses for and against each other at common law, arises first, from their identity of interests; second, from principles of public policy. The statute of this State having removed the incompetency arising from interest, there remains no legal obstacle to the admission of the testimony of the one, in favor of the other, where it does not disclose confidential communications between them, which are excluded from public policy; *Stuhlmüller v. Ewing*, 10 G. 447.

200. *Widow may testify for husband's executor.* The widow is a competent witness on behalf of her deceased husband's executor, to prove a conversation between her husband in his lifetime and the opposing party, in relation to the subject matter of the suit; *Id.*

201. *Competent for each other in criminal cases.* Art. 193, p. 510, of the Rev. Code of 1857, is as follows: "In criminal case, husband and wife shall be competent witnesses for each other."

10. Divestiture of Wife's Separate Estate by Revocation of Deed.

202. *Same.* If a deed conveying to a married woman property as her separate estate, reserve a power of revocation to the grantor, upon the payment of a specified sum of money to the grantee, the deed vests in her no interest or estate which cannot be divested by the grantor, by the simple act of revocation, done in accordance with the terms of the deed, without her consent. And, therefore, it is unnecessary, to the validity of the revocation, for a conveyance of the property to be made by husband and wife, as prescribed by the Acts of 1839 and 1846; *Billingslea v. Young*, 4 G. 95.

11. Wife's Right to sue Husband's Executor at Law.

203. *Case in judgment.* The reception by the husband of money belonging to the wife, under the Act of 1839, does not create a trust estate, which is only cognizable in a court of equity. In such a case the husband is agent for the wife, in whom the legal title to the money is vested, and upon her husband's death, she may maintain an action at law against her husband's executor to recover it; *Mitchell v. Mitchell*, 6 G. 108. See *ante*, 148.

12. Husband assuming apparent Ownership of Wife's Estate.

204. *He cannot thereby divest her interest.* Although the husband may hold himself out to the world as a member of a partnership, and thus become a partner as to the creditors of the firm, yet this will not preclude the wife from showing, in a controversy between her and a separate creditor of the husband, who is seeking to hold the alleged interest of the husband in the firm assets, liable to his debt, that such interest is in reality hers, and, therefore, not subject to the separate debt of the husband; *Atwood v. Meredith*, 8 G. 635.

13. Wife cannot acquire Interest adverse to Husband's Vendor or Landlord.

205. *Same.* The rule is well established that where a purchaser has been put into possession, he cannot afterwards acquire a title, and set it up against his vendor. If he extinguish an encumbrance, or buy in an outstanding title, all he can require is the repayment of the money he has paid out; and this rule applies where the vendee's wife purchases an outstanding title, or extinguishes an encumbrance. In such a case the husband and wife are regarded as identical; and to allow the wife to purchase where the husband is forbidden, would be a mere evasion of the rule. And so if a third person purchases with his own means, but in reality for the wife, and to give her the benefit of it; *Hardeman v. Cowan*, 10 S. & M. 486. And the rule is the same where the wife, or a third person for her, purchases a title to land which the husband possesses as tenant for another; *Taylor v. Eckford*, 11 S. & M. 21.

Ignorance.

See LIMITATION OF ACTIONS, 183.

Ignorance of Law.

See CRIMINAL LAW, and *Whitton & Ford's Case*, 8 G. 379.

1. *Courts will not relieve against.* Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of the facts, though under a mistake of law. Every man is charged, at his peril, with a knowledge of the law; *Lyon v. Sanders*, 1 C. 530.

2. *Same: Case in judgment.* Therefore, where a creditor accepted in discharge of a note, held against several makers, one of whom was dead, the note of the surviving makers, and of the executors of the deceased maker, under the impression that the executors had a right thus to bind the estate, it was held that he was not entitled to rescind the agreement and recover on the old note, on account of such mistake. The case might have been different, if the creditor had acted on the opinion of the debtors, who had undertaken to enlighten him on that subject; *Ib.*

Illegitimates.

See BASTARDY.

Imparlançe Term.

1. *Each defendant entitled to.* Where there are several defendants, and one of them be not served with process to the first term, but is served to the next, the latter term is the imparlançe term as to him, and the cause cannot be tried at that term without his consent, or a discontinuance as to him. Each defendant is entitled to a term in which to plead after service of the writ on him; *Maury v. Commercial Bank of Natchez*, 5 S. & M. 41.

See PRACTICE, 20 to 22a.

Impeachment of Witness.

See EVIDENCE, 258 to 269.

Indictment.

See CRIMINAL LAW.

Independent Covenants.

See VENDOR AND VENDER, 20, 21. MUTUAL AND DEPENDENT AND INDEPENDENT COVENANTS.

Indians.

That an Indian is a competent witness in a suit between white persons, see *Newman v. Harris*, 3 S. & M. 565; *Coleman v. Doe*, 4 S. & M. 40.

See CHICKASAW INDIANS, DANCING RABBIT TREATY.

Indian Reservations.

See CHICKASAW INDIANS, DANCING RABBIT TREATY, LAND LAWS OF UNITED STATES.

Indorsers.

See BILLS OF EXCHANGE AND NOTES.

Infants.

1. *Appearance by.* An infant can only appear by guardian. He cannot appear by attorney; *Lee v. Jenkins*, 1 G. 592.

2. *Guardian ad litem for infant.* A guardian *ad litem* can be appointed only after an infant has been served with process; *Prewett v. Land*, 7 G. 495; *Stanton v. Pollard*, 2 C. 154; *Price v. Crone*, 44 M. 571; *McAllister v. Moye*, 1 G. 258; *Ingersoll v. Ingersoll*, 42 M. 155; *Johnson v. McCabe*, 1b. 255. The answer of the guardian *ad litem* must not be his personal answer, but the answer of the infant, and no decree can be made on any admission contained in the answer, but the case against the infant must be made on proof *aliunde*; *Ingersoll v. Ingersoll*, *supra*; *Johnson v. McCabe*, *supra*; *Wells v. Smith*, 44 M. 296. Nor has the guardian *ad litem* power to submit the infant's rights to arbitration; *Fort v. Battle*, 13 S. & M. 133. A decree to sell land of infant, without appointment of guardian *ad litem*, is void; *McAllister v. Moye*, 1 G. 258, and it seems that a guardian *ad litem* is necessary to represent infant distributees on the final settlement of the estate; *Frisby v. Harrison*, 1 G. 452.

2a. *When appointed.* It is only when an infant has no legal guardian, or the guardian being legally summoned has failed to appear, or is interested adversely to the infant, that a guardian *ad litem* may be appointed; *Winston v. McLendon*, 43 M. 254; *Wells v. Smith*, 44 M. 296.

2b. *Guardian ad litem may waive notice, &c.* After due service on the infant, and appointment of a guardian *ad litem*, the latter may consent to a hearing at any time; *Pollock v. Buie*, 43 M. 140.

3. *Guardian ad litem not necessary for apprentice.* It is not necessary, under the Act of November 22d, 1865, authorizing the apprenticing of certain infant freedmen, that a guardian *ad litem* should be appointed to represent the interest of the infant. It is the duty of the probate judge to guard and protect the interest of the infant; *Jack v. Thompson*, 41 M. 49.

4. *Suits by infant.* An infant may sue by his guardian or his next friend, who is not his guardian; *Hunt v. Southern R. R. Co.*, 40 M. 391.

5. *Publication of notice of suit against infant.* The statute, (H. C. 682. § 12), requires that when an executor or administrator applies for an allowance of his final account, if any one of the distributees be a minor and a non-resident, publication of citation, as to him, shall be directed to his guardian by name and character, and if he have no guardian the court shall appoint a guardian *ad litem* residing within the jurisdiction of the court, who shall be cited. A final settlement will, therefore, be void as to a non-resident distributee who is a minor, if the citation published be addressed to him by name, and not to his guardian—and if he have no guardian it is essential that a guardian *ad litem* be appointed and cited; *Cason v. Cason*, 2 G. 578. See *post*, 22.

6. *Power of infant to contract: Assent to distribution.* An infant is incapable of assenting to a voluntary distribution of an estate in which he is interested, and such a distribution cannot be upheld on the ground that the law would have compelled a distribution, for the law would not have compelled that distribution, but only one made according to law; *Kilcrease v. Shelby*, 1 C. 161.

7. *Payment of legacy to an infant: His repudiation of it.* The payment of a legacy to an infant is invalid, and at the risk of the executor, and does not discharge him from liability to pay it again, and the infant will be entitled to recover it again, without accounting in any manner for what he has received, but he must refund the price when, having sold personal property, he seeks to recover it back (citing *Hill v. Anderson*, 5 S. & M. 216), *Quinn v. Moss*, 12 S. & M. 365.

8. *Power to rescind contracts.* An infant who has disposed of his personal property, and has done no act since his majority to confirm it, and has pursued his remedy in good time, is entitled to recover it back; and there is no difference in this respect between executed and executory contracts for the sale of personalty. Nor is his right to recover, affected by the fact that his vendee has sold to a purchaser without notice; *Hill v. Anderson*, 5 S. & M. 216. This case was construed by the court to hold that the infant, in case he seeks to recover back his personalty, must refund the price; *Quinn v. Moss*, *supra*.

9. *Same: Case in judgment.* An infant bought land and bank stock from E., at \$8000, and exchanged therefor five slaves, and also gave his note for the balance due on the exchange. The slaves were afterwards sold un-

der execution against E., the purchaser from the infant, and were purchased by H. The infant, on coming of full age, filed a bill in equity against E. and H., to rescind his contract with E., and to recover the slaves from H., and it was held that he was entitled to the relief sought; *Hill v. Anderson*, 5 S. & M. 216.

10. *Infant not estopped by his deed.* An infant is not bound by his deed, nor estopped by any recital in it; and hence, it is unnecessary, in a bill to cancel a deed on the ground of the infancy of the grantor, for the complainant to offer to refund the purchase money stated in the deed to have been paid, if he aver that the deed was without consideration; *Cook v. Tounbs*, 7 G. 685.

11. *Equity has jurisdiction to cancel infant's deed.* A court of equity has jurisdiction of a bill to cancel a deed made by the complainant during infancy, and to recover possession of the land thereby conveyed; *Ib.*

12. *Ratification of acts done whilst an infant.* The giving of a forthcoming bond by an adult, is a waiver of any defence which he may have had against the original judgment, on the ground that it was based on a contract which he made whilst he was an infant; *Robb v. Halsey*, 11 S. & M. 140. See *post*, 16.

13. *Defence of infancy a personal privilege.* The defence of infancy is a personal privilege, and can only be set up by the party himself, or his representatives; it cannot be made by a purchaser of land at a sale under execution, so as to defeat a sale made by the defendant when he was an infant, and which, after his majority, he acquiesced in and approved; *Alsworth v. Cordtz*, 2 G. 32.

14. *Same.* If an infant stand by and permit his father to sell his land, without objection, and afterwards, when he attains his majority, approves the sale by his conduct and declarations, a judgment subsequently rendered against him will not bind the land so as to defeat the title of his father's vendee. *Ib.*

15. *Same.* But infancy is not so exclusively a personal privilege that a trustee may not refuse to pay to the assignee of an infant *cestui que trust*, his share in the trust estate; *Haynes v. Slack*, 3 G. 193.

16. *Ratification by new promise.* A mere casual declaration of an infant, made after his arrival at majority and to a mere stranger, to the effect that he will pay, or intends to pay, a debt created by him during his minority, will not bind the declarant; a promise by an adult to pay such a debt, in order to be binding, must be made to a person then authorized to receive payment, and to give a discharge to the promisor. But the clerk of an agent, who has a note on an infant for collection, and who has been directed by the agent to present it for payment, is not a mere stranger, and a promise to him on presentation of the note is sufficient; *Mayer v. McClure*, 7 G. 389.

17. *Infant femme covert.* As to her powers, see HUSBAND AND WIFE, 157 to 160.

18. *Infant widow.* A widow, who is under twenty-one years of age, cannot be appointed administrator of her deceased husband; *Colins v. Spears*, W. 310.

19. *Sale by the father of an infant's land.* A sale by the father of his infant child's land, is void, both by the common law of England and by the law of Spain, even though it be made to appear that the sale was for the benefit of the child; *Griffing v. Hopkins*, W. 49.

20. *Legislative authority to sell.* Whether the Legislature can authorize executors to sell an infant's land; *Quære? Coleman v. Carr*, W. 258. The power exists. See CONSTITUTIONAL LAW, 92, 96.

21. *Heir of an infant distributee.* If an infant dies at so early an age that he could not possibly have contracted any debts, his heir may, without taking out letters of administration on his estate, recover the distributive share of the infant in the estate of his ancestor; *Hargroves v. Thompson*, 2 G. 211.

21a. *Decree against infants: Proof.* A decree cannot be rendered against infants, who, with their mother are beneficiaries, under a deed in trust, without proof of the debt against them, other than the acknowledgment of the mother. Nor can a decree be rendered for the sale of the property, in such a case, unless the infants be made parties; *Prewett v. Land*, 7 G. 495. See ante, 2.

21b. *Remedy against judgment at law against infant.* If a judgment be rendered against an infant the remedy is not in chancery, but by writ of error, *coram nobis*; *Robb v. Halsey*, 11 S. & M. 140.

22. *Service of process on infant.* By art. 64, p. 489, of the Rev. Code of 1857, process for infants must be served on them personally, and also on their father, mother, or guardian; leaving a copy at the residence of the infant will not do; *Johnson v. McCabe*, 42 M. 255; and the return will be bad if it show personal service on the infant only; *Ingersoll v. Ingersoll*, 42 M. 155; *Winston v. McLeudon*, 43 M. 254; *Mullins v. Sparks*, 43 M. 129. It is essential that the guardian, if a resident, be summoned; and if a non-resident, that publication be made against him; *Wells v. Smith*, 44 M. 296. An infant has no power to waive a copy of the process required by law to be served on him; *Winston v. McLeudon*, 43 M. 254.

See ante, 5. PROCESS, 18.

Innocent Holder.

See BILLS OF EXCHANGE, &c.

Innocent Purchaser.

See VENDOR AND VENDEE, 45, et seq. CHANCERY, sub-division Bona Fide Purchaser.

Injunction and Injunction Bonds.

See CHANCERY, sub-division Injunctions.

27

Inns and Inn-keepers.

1. *Responsibility for loss of baggage.* An inn-keeper is responsible for the property of his guests in any part of his house, unless he show that there was a different understanding between him and the guest; and hence, where the guest ordered his trunk to be carried to his room in which he lodged, and whilst there it was broken open and \$185 of the guest's money taken out, it was held that the inn-keeper was liable, it not being shown that the inn-keeper objected to the trunk being taken there, or that there was any understanding between the parties that the inn-keeper was not to be responsible in that event; *Epps v. Hinds*, 5 C. 657.

2. *Sale of liquors by.* The statute (H. C. 267, § 15) which prohibits inn-keepers from selling liquor on a credit to one person to a greater amount than five dollars, does not apply to licensed retailers; *Brittain v. Bethany* 2 G. 331.

In Personam.

See CHANCERY, sub-division Attachment. ATTACHMENT.

In Rem.

See CHANCERY, sub-division Attachment. ATTACHMENT.

Insanity.

See CRIMINAL LAW. CONTRACTS, 15, et seq. WILL, 5 to 9.

Insolvent Debtor.

See FRAUDULENT ASSIGNMENTS, *passim*. EXEMPT PROPERTY.

Insolvent Estates.

See EXECUTOR AND ADMINISTRATOR, sub-division Insolvent Estates. PROBATE COURT sub-division Insolvent Estates.

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I. Court has no power to Instruct, except on Request of a Party.

1. *Court cannot volunteer instruction.* It is a violation of the statute for the court to instruct the jury, except at the request of one of the parties; *Davis v. Tiernan*, 2 H. 786; *S. P., Taylor v. Manley*, 6 S. & M. 305; *Williams' Case*, 3 G. 389; *Montgomery v. Griffin*, 2 M. 453.

2. *Charge at request of jury: Oral charge.* If the judge after the jury retire, in the absence of the parties and without their consent, at the request of the jury, give them a charge on a point of law about which they state they differ, it will be error. The judge has no right to charge the jury except in the mode pointed out in the statute, viz.: in writing, and at the request of one or both of the parties; *Taylor v. Manley*, 6 S. & M. 305. But whilst such charging is irregular, if the instruction given be in conformity to law, it is no ground for reversal, though excepted to at the time; *Randolph v. Govan*, 14 S. & M. 9. The parties may consent, however, to oral charges, or an oral modification of a written instruction; *Lavenburg v. Harper*, 5 C. 299.

3. *Court may, when requested to charge, give a different instruction.* The statute forbidding judges to charge the jury, except when requested, should receive a liberal construction in favor of the judge's power, and he is not bound by it to give the identical charge asked, or refuse it; but when asked to charge on a certain point, may give an instruction differing materially from the one asked; *Carpren v. Canavan*, 4 H. 370. See *post*, 4, 5.

II. Power and Duty of Court in reference to Modifying Charges asked.

4. *The court has power to add to an instruction.* The court may add to an instruction what is necessary to make it applicable to the evidence; *Doe v. Peck*, 4 H. 407.

5. *Has power to modify charge.* It is within the power of the court to modify instructions asked, and in the exercise of this power, the court may refuse to give a charge, that in an action of slander "the plea of justification is evidence that the words were spoken, though the general issue be also pleaded," and may charge in lieu thereof, that such "plea is evidence of malice, and may be considered by the jury, by way of aggravation of damages;" *Doss v. Jones*, 5 H. 158.

6. *Same.* It is impolitic for the circuit judge, unnecessarily, to interfere by modifying instructions drawn with legal accuracy and precision, both as to the terms employed and the principles asked; yet, as it is the right of the judge to modify instructions asked, so as to make them conform to his views of the law, if such modifications, though unnecessary, declare the law correctly, this court will not interfere; *Mask's Case*, 7 G. 77.

7. *Court is not bound to modify a wrong instruction.* If an instruction be asked which

is partly correct and partly erroneous, the court may refuse it; the judge is not bound to separate the good from the bad, and give the one and refuse the other; *Doe v. King*, 3 H. 125; *Dickson v. Moody*, 2 S. & M. 17.

III. Instructions must be Applicable to the Evidence.

1. Generally.

8. *No error to refuse charge not applicable to the evidence.* The court may refuse instructions when there is no evidence applicable to them; and it is not error to refuse a charge, correct in principle, unless the party asking it show the evidence to which it is applicable; *Newman v. Foster*, 3 H. 383; *Loring v. Willis*, 4 H. 383; *S. P., Miles v. Myers*, W. 379.

9. *Such charges should not be given.* Instructions must be applicable to the evidence and pertinent to the questions raised by it, and if not, they should be refused, however correct they may be as abstract propositions of law; and if inapplicable and impertinent the giving of them will be error; *O'Reilly v. Hendricks*, 2 S. & M. 388; *Payne v. Green*, 10 S. & M. 507; *Wiggins v. McGimpsey*, 13 S. & M. 532; *Hyde v. Finley*, 4 C. 468; *Wright v. Clarke*, 5 G. 116; *Lombard v. Martin*, 10 G. 147; *Herndon v. Bryant*, 10 G. 335; *Dennis v. McLaurin*, 2 G. 606; *Fairly v. Fairly*, 9 G. 280. *S. P., N. O. J. & G. N. R. Co. v. Satham*, 42 M. 607. Thus, it will be improper for the court on the trial of an action for a false warranty of soundness in a slave, and where the defect complained of is secret and internal, to instruct the jury that if the disease were plain and palpable at the time of the sale, it is not embraced in the warranty; *Herndon v. Bryant*, *supra*. But if purely abstract, yet if immaterial, it will not be error, though incorrect; *Garner v. Collins*, 2 W. 518.

9a. *Instance of pertinency.* Where the declaration contained five counts on five distinct acts of trespass, each count, however, alleging the trespass in it to have been committed on a day named, and on divers other days between that day and another day (which days were the same in all the counts), and the proof showed that the defendants were summoned to aid in the execution of legal process, and that several trespasses were committed within the time laid; some when the officer was present, and the defendants aiding him, and some before the officer was present; it was held that the following instruction asked for by defendants, viz.: "that if the jury believe they were acting in aid of the officer, and did not exceed their authority, they were justified," was proper and pertinent, and should have been given, since they had the right to justify a part of the trespasses, if they could not justify all;—the proof showing a justification when the officer was present; *Payne v. Green*, 10 S. & M. 507.

2. *Instructions with reference to the Hypothesis of Facts stated in them.*

10. *Error to give instructions with reference to hypothesis, having no proof. An*

instruction given with reference to facts, hypothetically stated in it, the existence of which there is no evidence tending to show, is calculated to mislead the jury, and therefore erroneous; *Dix v. Brown*, 41 M. 131; *Burns v. Kelley*, 41 M. 339; *Barker v. Justice*, 41 M. 240; *Greenwade v. Mills*, 2 G. 464; *Garnett v. Kirkman*, 4 G. 389; *McIntire v. Kline*, 1 G. 361; *Heim v. McCaughan*, 3 G. 17; *Clarke v. Edwards*, 44 M. 778.

11. *Hypothetical case should be stated fully.* Where a hypothetical case is stated in, and made the basis of an instruction to the jury, it should be stated fully and without omission of material facts, as the evidence tends to establish it in relation to the particular point involved in the instruction, and the rule of law should be correctly expounded, in reference to the case thus stated; and hence, in an action of detinue for a slave, if the evidence tend to show that the slave was purchased by the defendant in his own name, but with the funds, and for the use of the plaintiff, and that the defendant afterwards, as plaintiff's agent, managed and controlled the slave, it will be error to instruct the jury, "that if the defendant purchased the slave and took the legal title to himself, and afterwards held possession, they must find for him," without stating also, that it was necessary that the possession of defendant should have been accompanied by claim of title in himself, and for a period sufficient to bar plaintiff's title by the statute of limitations; *Fairly v. Fairly*, 9 G. 280; S. P., *N. O. J. & G. N. R. R. Co., v. Statham*, 42 M. 607.

3. Must not be merely abstractly Correct.

12. *Abstract charges should not be given.* The court should not charge the jury upon abstract principles of law, not applicable to the evidence; *Myers v. Oglesby*, 6 H. 46; *Powell v. Mills*, 8 G. 691; *Jarnigan v. Fleming*, 43 M. 710; *Evans' Case*, 44 M. 762.

13. *Same.* The court is not bound to give, as instructions to the jury, mere abstract propositions of law, which are more likely to mislead than to enlighten them, even in a case where such instructions, except from their abstract and metaphysical character, would be applicable. And for this reason, the following instruction, asked for by a prisoner against whom the evidence was entirely circumstantial, was held to have been properly refused, viz.: "Whenever the probability of guilt is of a definite and limited nature, whether in the proportion of one hundred to one, or one thousand to one, or in any other limited ratio, it cannot be safely made the ground of conviction;" *Browning's Case*, 4 G. 47.

IV. Must not be on the Weight of Evidence.

14. *Court's power to charge on the weight, and on the tendency of evidence.* The court has not the power to charge on the weight of evidence; yet it has the power to judge of, and charge upon, the tendency of evidence,

and the exercise of this power is essential to the administration of justice. It is a power to be exercised with the greatest caution, and only where there can be no room for doubt. But when the evidence wholly fails to make out the plaintiff's case, and when it does not tend in any justly legal view to establish it, it is the duty of the court to so instruct the jury; *Garnett v. Kirkman*, 4 G. 389; S. P., *Perry v. Clark*, 5 H. 495; *Frizell v. White*, 5 C. 198.

15. *Court has no power to charge on weight of evidence: Instance.* The court was asked to instruct the jury, that the declarations of the defendant, who was sued as endorser, "that T. (one of the endorsers on the same bill) considered that they were exonerated; that he himself thought differently; that there was no use in resisting; that the bill must be provided for; that T. was between him and danger, was not an absolute promise, and a waiver in law of notice of protest." Held, that the instruction was properly refused, as it was a charge on the weight of evidence; *Carmichael v. Bk of Pennsylvania*, 4 H. 567.

16. *Same: Another instance.* And so in a case where the legitimacy of the plaintiff was involved, and there was proof that there was cohabitation between plaintiff's parents, and also direct rebutting proof tending to show they were not married,—it would be error and a charge on the weight of the evidence for the court to instruct the jury, "that cohabitation of a man and woman, and the acknowledgment on their part that they are husband and wife, and the raising and providing for their children, and the acknowledgment of them as such, is legal evidence of marriage; and if the evidence establish such cohabitation and acknowledgment, they must find for plaintiffs;" *Stephenson v. McReary*, 12 S. & M. 9.

17. *Same.* In an action by the payee against one who had signed his name on the back of the note, without an endorsement by the payee, this suit being against him as joint maker—the plaintiff proved that the defendant was indebted to him, and proposed to give him the note of the other joint makers and himself for the debt, and brought the note payable to the plaintiff, and signed by the other joint makers, and that plaintiff refused to accept it because it was not the joint note of the other makers and of the defendant, and thereupon the defendant put his name on the back of the note, and delivered it to plaintiff, who accepted it. The court instructed the jury that the evidence did not tend to establish the defendant's liability: Held, this was erroneous, for if it was intended to charge that parol proof could not establish that the defendant was a joint maker, it was a mistake of law; and if it was intended to charge that the proof was not sufficient for that purpose, it was a charge on the weight of evidence; *Jennings v. Thomas*, 13 S. & M. 617.

18. *Same.* It is illegal to charge the jury that they should rely on the testimony of a party to the suit, unless it be disproved by

other evidence; *Southern Express Co. v. Wolfe*, 41 M. 79. And so a charge "that the declarations and admissions of a party are legal and sufficient evidence against him," is error; *Baker v. Kelly*, 41 M. 696. And so it will be error to charge, "that the direct and positive knowledge of one witness is of more force and value than the doubtful recollection of ten witnesses about the same matter;" *Dunlap v. Hearn*, 8 G. 471.

19. *Same*. The recording by the vendee of a bill of sale to a slave, is a circumstance which the jury may consider with all the other evidence in the case, in determining the *bona fides* of the vendee's title; but it is not a matter which the court is authorized to charge to the jury is evidence of fraud, or is not evidence of fraud; *Fairly v. Fairly*, 9 G. 280.

20. *Same: Where fraud in fact is involved*. It is the peculiar province of the jury to pass upon questions of fraud in fact; it is hence erroneous for the court to give instructions to the jury, based upon the existence of fraud in fact, without informing the jury that they are to judge whether the fraud exists or not. And where an instruction is erroneous for assuming the existence of fraud, the error will not be cured by evidence which seems to make out a case of fraud; *Gilliam v. Moore*, 10 S. & M. 130. See *post*, 26.

21. *Same*. It is a charge on the weight of evidence, and therefore erroneous, to instruct the jury in a trial of the right of property levied on under execution, and claimed by a third person under a mortgage executed to indemnify him as surety for the defendant in execution, "that the mortgage was not of itself evidence of the suretyship of the claimant, but they must look to the other evidence in the case for the establishment of that fact;" *Ib*.

22. *Charges on presumptions of fact*. Presumptions of fact merely should be left to the exclusive consideration of the jury; the court cannot charge the jury that such a fact is to be presumed by them from the proof made of another fact. But if the court so erroneously charge the jury, and at the same time should tell the jury that they must weigh the whole evidence, and form their own conclusions from that, whether the fact so presumed be so or not, it will cure the error. Thus, where in an action for work and labor, under a written contract, the contract was proven, and also that the work was done according to that contract, but there was no direct proof that plaintiff did the work; the court charged the jury, "that proof being made of the contract in writing to do the work, and proof that the work was done according to the contract, the presumption arises that the work was done by the contractor; absolute proof that the work was done is not necessary, the jury must weigh the testimony, and form from that their own conclusions whether it was done by plaintiff or not;" it was held, that the first branch of the instruction was erroneous, and that the better course would, perhaps, have been to

refuse the whole on that account; but that the latter clause sufficiently qualified the first, and that the whole taken together was correct; *Dickson v. Moody*, 2 S. & M. 17.

See *post*, 42.

23. *Same*. An instruction which states to the jury "that a fact proven (if they believe it established), is a circumstance which they may consider in determining the main question before them," is not liable to the objection of being a charge on the weight of evidence. And when a fact proven legitimately establishes the main fact in issue, the court may instruct the jury that if that (minor) fact be proven to their satisfaction, they may infer from it the main fact; *Southern Express Co. v. Thornton*, 41 M. 216.

24. *Power of court to charge with reference to undisputed facts*. Where there is no contest or dispute about the facts of the protest of a bill and notice, if the evidence on these points be sufficient in law to charge the endorser, it will not be error for the court so to charge the jury; *Fleming v. Fulton*, 6 H. 473.

V. Power of Court to assume, in Charging, the Existence of Facts.

25. *When the existence of facts must not be assumed*. The court in charging the jury cannot assume as proven, any material fact controverted in the evidence. Hence, where the question was, whether the delivery of personality was under a gift or a loan, it will be error for the court to charge "that if the plaintiff's evidence, that the property in dispute was a mere loan, is not successfully contradicted, the jury must find for him;" *Dunlap v. Hearn*, 8 G. 471; *S. P., Dougherty & Wife v. Vanderpool*, 6 G. 165. And so where the defence to a note was, that it was given for the purchase of a chattel which was warranted sound, and was in fact unsound, the instructions should not assume, that the note was given for the chattel, but should submit that question to the jury; *Barker v. Justice*, 41 M. 240. See *ante*, 20.

25a. *Must not set out evidence of witness*. The court instructed the jury, that if they believe the testimony of K., the plaintiff (setting out what that testimony was), they might find vindictive damages: *Held*, that this was erroneous, for stating to the jury, what that testimony was, that being a matter to be determined entirely by their judgment; *Southern R. Co. v. Kendrick*, 40 M. 374.

26. *When existence of fact may be assumed*. It will not make an instruction bad, which is otherwise unobjectionable, that a fact is assumed in it to exist, which is fully established by the proof, and about which there is no contradiction in the evidence; *Lamar v. Williams*, 10 G. 342; *Hairn v. McCaughan*, 3 G. 17. Nor will it be error to assume the existence of a fact, which is conceded on the trial by both parties; *Cook v. Whitfield*, 41 M. 841.

VI. Power of Court to construe Writings, and Facts established Orally.

27. *Court must construe effect of writings.* The court should not by instructions, refer the construction of a writing to the jury, but should state to the jury, the proper meaning and effect of it; *Benson v. Benson*, 2 G. 625; S. P., *Randolph v. Govan*, 14 S. & M. 9. And it will be error to leave the construction of a writing to the jury; *Fairly v. Fairly*, 9 G. 280.

28. *Construction of printed advertisement.* Whether representations made in a printed advertisement of the sale of land amount to a warranty, is not a question of law to be determined by the court, but a question of fact for the determination of the jury; *Anderson v. Burnett*, 5 H. 165.

29. *Power of court to construe facts orally proved.* When there is no conflict in the evidence, and no question as to the credibility of witnesses, in an action for a malicious prosecution, the court should instruct the jury whether the facts proven do or do not amount to probable cause; *Greenwade v. Mills*, 2 G. 464. See post, 36.

VII. Instructions must be Perspicuous and Clear, and state Exceptions.

1. Generally.

30. *Must be plain and explicit.* The law applicable to a case should be laid down in the charges to the jury plainly and explicitly; and the refusal of a proper instruction will not be justified because another instruction has been given, which, by inference, lays down the same rule; *Payne v. Green*, 10 S. & M. 507. And a correct instruction given at the instance of one party, fully explaining the point embraced in it, is a good reason why an instruction on the same point, ambiguous in its terms, asked for by the other party, should be refused; *Ellis v. Commercial Bank of Natchez*, 7 H. 294.

31. *Should not be indefinite.* In an action against a railway company, to recover damages for their failure to give the plaintiff, who was a passenger on their cars, an opportunity to get off at a station to which he was ticketed; the plaintiff claimed exemplary damages, and the court instructed the jury that "special damage need not be proven;" *Held*, that whilst this was true as a proposition of law, yet the instruction was too indefinite, and was calculated to mislead the jury; *Southern Railway Co. v. Kendrick*, 40 M. 371.

2. Charge must state Exceptions to the Rule.

32. *Where exceptions pertinent, they must be stated.* The court in charging a general rule of law to which there are exceptions applicable to the evidence, should explain the exceptions. Hence, where the evidence tended to show that the answer of a cashier of a bank (to whom a note had been presented for payment after banking hours) was, "that no funds were there, nor had been that

day, in bank to pay the note," it will be error for the court to charge the jury, "that demand should be made within banking hours," without explaining to them, that it would be good if made afterwards, in case payment was refused, because no funds had been provided on that day to meet the note; *Cohea v. Hunt*, 2 S. & M. 227.

33. *Same.* It is error to charge without qualification or exception, that the declarations of a party are not admissible in evidence in a case where, by law, such declarations are competent; *Baker v. Kelly*, 41 M. 696.

3. Must not be too general, but set out the Rule plainly.

34. *Failure of court to explain the rules fully: Case in judgment.* The proof showed that a debtor by open account, prepared his note therefor and offered it to the creditor, who said: "I intend you to have the money, unless I get in circumstances to need it, and you can burn the note." The court instructed the jury in reference to this state of facts, "that a delivery of the note by the creditor to the debtor, either actual, constructive, or symbolical, and the parting with all dominion over the debt, of which questions they were the judges—was a release of the debt;" *Held*, erroneous, because the court did not explain to the jury the rules of law applicable to the question whether the creditor accepted the note or not, and whether he made a delivery of it to the debtor; for the rules of law applicable to these questions should have been explained to the jury, and not left to their determination; *Young v. Powers*, 41 M. 197. See DAMAGES, 15a, 15b.

35. *Same: On questions of title: Case in judgment.* Where a question of title is involved, the validity of the title is a question of law for the court when the facts are ascertained by the jury. And in charging the jury, the court should not leave the general question of title to their determination, without explaining to them the rules of law determining that question when applied to the facts (citing *Young v. Powers*, ante, 34); *Baldwin v. McKay*, 41 M. 358; S. P., *Greenwade v. Mills*, 2 G. 464.

36. *Same: Malicious prosecution: Probable cause.* It will be error for the court, on a trial for malicious prosecution, to refer, by its instructions, the question of probable cause to the jury, without explaining to them the principles of law by which they ought to be governed in determining that question. If the evidence be doubtful and conflicting, the court should instruct, the jury hypothetically with reference to the different views which they may take of the evidence; *Greenwade v. Mills*, 2 G. 464. See ante, 29.

37. *Same: Adverse possession.* So where the possession of a slave by the defendant commenced under a loan from the plaintiff, it will be error for the court to instruct the jury "that three years adverse possession confers title," without explaining to the jury what is necessary to constitute adverse possession; *Lockhart v. Luker*, 7 G. 68.

38. *Explanation of legal terms necessary.* On the trial of an issue *devisavit vel non*, involving the sanity of the testator, the court instructed the jury as follows: "If they believe from the evidence, that the contestant had always been an obedient, dutiful and good child, but that under the influence of an insane delusion, her father (the testator) considered and believed that she had become disobedient and utterly unworthy of his regard, and he utterly cast her off as a child, and that the paper in controversy was the direct offspring of such insane delusion, they should find against the will:" *Held*, that the instruction was correct as a legal proposition, and to minds versed in legal science and acquainted with legal terms, would be unobjectionable. But as a rule to be practically applied by a jury unskilled in the use of legal terms, it was objectionable in not explaining the legal meaning of the term delusion, and what degree of it should appear to justify a verdict against the will; *Mullins v. Cottrell*, 41 M. 291. Technical terms used in charges must be explained; *Jarnigan v. Fleming*, 43 M. 710.

39. *Must be strictly correct: When evidence conflicting.* In a case where the evidence approximates an equipoise and is conflicting, the court should expound the rules of law applicable, to it with the utmost caution, precision and clearness, avoiding as far as practicable any and all allusions to matters not involved in the issue; and if in such a case an erroneous instruction be given, or one, which though abstractly correct, is irrelevant to the issue, it will be presumed to have had its effect in procuring the verdict, which will for that reason be set aside. The cases in which courts have refused to disturb verdicts for erroneous or irrelevant instructions, are such only where the verdict was clearly right on the evidence, and would not probably be different if a new trial were granted (citing *Harper v. Tarply*, 6 G. 512); *Norfleet v. Sigman*, 41 M. 631. See *post*, 45.

40. *Must be stated so as not to mislead the jury.* An instruction must not only be correct when considered as an abstract proposition of law, but it must express the law correctly as applicable to the evidence in the cause, without danger of misleading the jury; *Lombard v. Martin*, 10 G. 147.

4. Must not be Contradictory.

41. *Contradictory charges are error.* It is improper to give contradictory charges to the jury; *Miss. Cent. R. R. Co. v. Miller*, 40 M. 45. And when an erroneous instruction is given, the error is not corrected by the giving of another, setting out a rule in direct conflict with the rule stated in the erroneous instruction; the contradiction between the two leaves the jury without any safe guide, and is of itself improper; *Southern R. R. Co. v. Kendrick*, 40 M. 374; *Herndon v. Henderson*, 41 M. 584; *S. P., House v. Fultz*, 13 S. & M. 39.

VIII. Construction of Instructions; Errors in Refusing Good and Giving Bad.

1. How Construed.

42. *All construed together.* All the charges must be construed together, both in civil and criminal cases; and if when so construed, the law be correctly expounded, the judgment will not be reversed, because one instruction taken by itself was too broad; *Musk's Case*, 7 G. 77; *Evan's Case*, 44 M. 762. Thus in a case involving the question—whether a sale was fraudulent as to the creditors of the vendor—the court instructed the jury "that if the sale was intended wholly or in part to hinder, delay, or defraud the creditors of the vendor, it is void;" and also instructed the jury, "that however fraudulent it might be on the part of the vendor, the rights of the vendee were not affected thereby, unless he participated in the fraud;" it was held that the two must be construed together, and if the former was too broad, it was properly qualified and explained by the latter; *Childress v. Ford*, 10 S. & M. 25. See *ante*, 22.

43. *Construed with reference to the evidence.* A general term used in a charge will be limited by the evidence; and hence it will not be error to use the term "lost" for "stolen" in a charge in a larceny case, if there be no evidence tending to show that the goods were casually lost; *Belotes' Case*, 7 G. 96.

44. *Good instruction made bad by another: Case in judgment.* In a trial of the right of property in slaves, the claimant relied upon a mortgage with power of sale given by the debtor to him, to indemnify him as his surety; the court below, after having instructed the jury, that the mortgage was *prima facie* good and valid, also instructed them that it rested with the claimant to prove the consideration of the mortgage to be fair and *bona fide*, and to show clearly that he was liable for the debt named in the mortgage as surety for the defendant in the execution: *Held*, that the latter instruction was erroneous, because it implied that the plaintiff in execution had made out a *prima facie* case of fraud with reference to the mortgage; *Gilliam v. Moore*, 10 S. & M. 130.

2. When Refusing Good Instruction no Error.

45. *When verdict right on the evidence.* A new trial will not be granted, because the court refused to give a correct instruction, if the verdict be clearly right according to the evidence, and should not have been different if the instruction had been given; *Prichard v. Myers*, 11 S. & M. 169; *S. P., Wiggins v. McGimpsey*, 13 S. & M. 532; *Holloway v. Armstrong*, 1 G. 594. And in a criminal case where the verdict is clearly right and just, it will not be set aside for an immaterial error in the charges; *Mask's Case*, 7 G. 77. See *ante*, 39.

3. When Giving Bad Instruction no Error.

46. *No error where verdict clearly right.*

The giving of a bad instruction is no ground for setting aside a verdict, where it is clearly right on the law and the facts; *Wiggins v. McGimpsey*, 13 S. & M. 532; *Head's Case*, 44 M. 731; *Evan's Case*, 44 M. 762; *Hanks v. Neal*, 44 M. 212; *M. & C. R. R. Co. v. Whitfield*, Ib. 466. See ante, 39. See HIGH COURT, 96 to 98. NEW TRIAL, 15 to 20 CRIMINAL LAW, sub-division Instructions.

4. The Curing of Error in one by another.

47. *Instance of error cured.* See ante, 22, 42.

48. *Improper qualification cured.* An improper qualification made by the court to an instruction asked, is no ground for reversal, if the benefit of the rule of law claimed in the instruction be secured to the party asking it, by another instruction which is given, and which fully and fairly presents the rule to the consideration of the jury; *Lamar v. Williams*, 10 G. 342.

49. *Instance of one instruction not cured by another.* See ante, 30, 41.

IX. Charges on the Onus Probandi.

50. *Instance of error in this.* See ante, 44.

51. *When court may charge on onus probandi: Case in judgment.* When there is nothing in the plaintiff's evidence tending to prove an affirmative defence relied on by the defendant, it is not improper for the court to charge the jury that it is incumbent on the defendant to prove his defence to their satisfaction; *Lamar v. Williams*, 10 G. 342.

52. *Same: Case in judgment.* In a controversy between the wife and a creditor of the husband, respecting the validity of her claim to property, as of her separate estate, if there be evidence tending to show that the property was purchased through the agency of the husband, and for his benefit, and with his means, it will be error to charge the jury, "that the burden of proof is on the creditor to show that the money used in the purchase came from the husband, and that the law presumes that it came from the wife, until the accompanying circumstance or other proof show the contrary." For such an instruction would, in a great measure, prevent the jury from considering the whole evidence, and determining from that whether the wife's claim is fraudulent or not; *Mangum v. Finucane*, 9 G. 354.

X. Miscellaneous.

1. Confining Jury to Evidence and Issue.

53. *Must confine jury to evidence before them: Case in judgment.* The court instructed the jury that if they believe that any of the witnesses corruptly swore falsely, they had a right to disregard the evidence of such witness entirely; *Held*, that the instruction was illegal, because it did not confine the jury in their estimate of the falsity of a witness to the evidence adduced on the trial;

nor to the manner and demeanor of the witness while testifying; nor to any circumstance apparent upon the examination, and a legitimate subject for their consideration, but permitted them to indulge their suspicions, and even to act upon their own private information, and to condemn a witness unheard and undefended; *Lavenburg v. Harper*, 5 C. 299. See post, 58.

54. *Must not suggest improper issue: Case in judgment.* In a case where the evidence was nearly an equipoise as to whether the defendant, who was sued for the price of cotton, bought it as agent of K, and on the credit of K, or on his own account; the court instructed the jury, at the instance of plaintiff, "that a principal is liable for the acts of his agent, when he acts within the scope of his authority; and although the jury may render a verdict against the defendant, not as agent, but as principal, then, and in that event, the defendant has his remedy against the principal for such damages as he may sustain;" *Held* to be erroneous in suggesting an improper issue to the jury, and to be irrelevant.

2. Refusal of an Instruction, because same Rule has been already given.

55. *Refusal on that account.* It is not error for the court to refuse an instruction, which is pertinent and proper, if it has already been substantially given; *Moye v. Herndon*, 1 G. 110; *S. P., Ellis v. Com'l Bank of Natchez*, 7 H. 294; *Head's Case*, 44 M. 731.

3. Immaterial Instructions.

57. *May be refused.* It is not error to refuse an immaterial instruction to the jury, even if it be abstractly correct. Hence, if the court, in an action of ejectment by the heirs of a decedent to recover land sold by his administrator, refuse to charge, "that the reservation, in the order of sale of his widow's dower, was evidence that the deceased left a widow," it will not be error, as it was immaterial whether he left a widow or not; *Stephenson's Heirs v. McReary*, 12 S. & M. 9; and so if the error in an instruction be immaterial, it will not vitiate the verdict; *Evans' Case*, 44 M. 762.

4. Exceptions to Instructions.

57a. *When marked they are excepted to.* Instructions asked and given, or refused, in the court below, and so marked by the clerk, are to be considered as excepted to, without any formal bill of exceptions; *Watson v. Dickens*, 12 S. & M. 608. And charges so marked are always open for consideration on a motion for a new trial, without any special exceptions having been taken to them; *Mayer v. McLure*, 7 G. 389; but if not so marked by the clerk, they cannot be objected to for the first time on a motion for a new trial; *Drake v. Surget*, 7 G. 458. See HIGH COURT, 113. But in a criminal case the charge must be excepted to; *Scott's Case*, 2 G. 473.

58. *Literal objections when taken.* After verdict, and when the finding is sustained by

the evidence, it is too late to object to an instruction, that it did not expressly confine the jury, in determining the question in issue to the evidence before them, but left them to act on their own belief from any cause; in such a case the presumption is, that the verdict was founded on the evidence, because the evidence warranted the finding; *Heirn v. McCaughan*, 3 G. 17. See *ante*, 53.

5. When Instructions a Part of the Record.

59. *Statute on this subject.* By our statute instructions marked by the clerk "given," or "refused," become a part of the record. If not so marked, they cannot be noticed by the High Court, unless incorporated in a bill of exceptions, or unless the record state elsewhere distinctly that they were given or refused; *Field v. Weir*, 6 C. 56. But where the marking is relied on, the word "given" appearing on an instruction, without anything to show it was put there by the clerk, will not make the charge a part of the record; *Swann v. West*, 41 M. 104.

6. Number of Instructions.

60. *Excess in number.* Instructions given in great numbers are not only injurious, but objectionable in practice; *Clarke v. Edwards*, 44 M. 778.

Insurance.

1. *Contract of: How construed.* Contracts of insurance, like all other contracts, must be construed according to the intention of the parties, as manifested by the words used, taken according to their ordinary signification; *Miss. Mutual Ins. Co. v. Ingraham & Land*, 5 G. 215.

2. *Loss: How ascertained: No average in fire policy.* The underwriters contracted in the policy "to make good unto the assured, their executors, &c., all loss or damage not exceeding (a sum specified) as shall happen to the property by fire." The property at risk exceeded in value the sum insured, and a partial loss occurred exceeding, however, the amount insured; *Held*, that as there was no provision in the policy for an average of the loss between the assured and the underwriters, the assured was, by the terms of the contract, entitled to recover the whole amount insured; *Ib.*

3. *Same: Valued policy.* The amount of indemnity due to the assured in a valued marine policy, where there is a partial loss, less than the amount insured, is the percentage of the damage sustained by the goods, calculated on the value agreed on in the policy, as 10, 15, or 20, or 50 per cent. on said value, and also the cost of saving the goods; and not the difference between the agreed value and the market value of the goods in their damaged condition; *Natchez Ins. Co. v. Buckner*, 4 H. 63.

4. *Same: Mode of assessment: Custom.* And in such case the proper mode of assessing such damage, is by an appraisement made by disinterested persons, whose business and experi-

ence fit them to make it, and not by a sale of the damaged goods at auction. But it is competent to show a custom of the merchants in the place where the contract of insurance was made, that when the damage exceeds 10 per cent., then the goods shall be sold on account of the underwriters, and that the sale, compared with the agreed valuation, shall be the criterion of the damages; *Ib.*; and S. C., 5 H. 744. See *post*, 12, 13.

5. *Same: Offers of compromise and adjustment.* Where a correspondence has taken place between the insurer and the assured in relation to the extent of a loss, and the mode and principles on which it shall be adjusted, and the insurer in a letter states "that the company (the insurer) are to indemnify the assured all damages sustained by a peril of the river," and the effort at an amicable adjustment fails, the parties are remitted to their original rights, unaffected by the correspondence and negotiations for a settlement; S. C., 2 S. & M. 349.

6. *Officers and crew of vessel agents for assured.* The officers and crew of the vessel upon which goods insured in a marine (or river) policy are shipped, are, up to the time, of their loss and abandonment, the agents of the assured. After that time, for the purpose of salvage, they are the agents of the underwriters; *Ib.*

7. *Same: Deviation from contract of insurance.* Any voluntary deviation from the contract of insurance by the master of the vessel, upon which insured goods are shipped, though the risk be not increased thereby, discharges the underwriters. The taking of a brig in tow by a steamboat on the Mississippi river, is a deviation, and discharges the underwriters, unless there be a provision in the policy allowing it. The principle that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the master and crew, has never been extended to a case of voluntary deviation; for where there is a deviation, the underwriters are discharged, whether the loss was occasioned thereby or not; *Ib.*

8. *Same: Construction of policy with reference to deviation: Case in judgment.* A policy which insures against the perils of the river and fire, and "all other perils, losses, misfortunes, that have or shall come to the hurt, detriment or damage of the goods," is not a contract to insure against a loss notwithstanding an act done by the master of the vessel, which would, except for these words, be a deviation in the contract. The words in *italics* do not enlarge the liability of the underwriter so as to exempt the assured from responsibility for the acts of his agents, the master and crew of the vessel; *Ib.*

6. *The assured warrants seaworthiness of vessel.* In marine policies of insurance (as well as policies of insurance on navigable rivers) the assured, though a mere shipper, impliedly warrants that the vessel on which the insured goods were shipped is seaworthy, that it will not deviate from the contract of

insurance, and that the goods shall be properly stowed; *Ib.*

10. *Same: Effect of advertisement as to seaworthiness by the underwriters.* An advertisement by an insurance company that it would insure goods shipped on certain enumerated boats, is, at most, a waiver by the company of the implied warranty by the assured, of the seaworthiness of the vessels so designated; it is, however, a waiver of no other implied warranty by the assured; *Ib.*

11. *Barratry.* Barratry is an offence by the master and marines, not directed against the owner of the goods shipped on the vessel, but against the owner of the vessel; and hence, if the owner of the vessel concur in the act which causes the loss, it is not barratry, and the loss is not covered by a clause in the policy insuring goods against loss by barratry; *Ib.*

12. *Usage to justify deviation.* A usage for steamboats engaged in the carrying and passenger trade, to tow vessels on the Mississippi river, unless shown to be so general and so well known as to raise a fair presumption that the parties to a policy of insurance, contracted with reference to it, will not affect in any way the liability of the underwriters; *Ib.*

13. *Usage is local.* The usage of insurance companies in New Orleans does not affect an insurance company located in another city, even on contracts for insurance on a voyage to New Orleans; *Ib.* See *ante*, 4.

See CORPORATION, 34.

Intercourse Between Belligerents.

INTERNATIONAL LAW.

Interest and Usury.

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I. The Right to take Interest, and Contracts for.

1. *Interest is creation of the statute.* Interest is the creation of the statute. Until December, 1811, there was no statute in this State allowing interest on judgments, and therefore no interest is allowable on judgments rendered before that time. For statutes regulating interest do not have a retrospective effect, and do not apply to contracts made or

judgments rendered before their passage; *Eastin v. Vandorn* W. 214. And judgments, without express legislation for that purpose, would not bear interest. There is no statute, which allows interest on the judgments, which the High Court renders for damages on the affirmation of judgments in the court below, and such judgments for damages do not bear interest; *Hamer v. Kirkwood*, 3 C. 95.

2. *Interest on rent in arrear: Open accounts.* No regulation of the statute applies to the question, whether rent which is allowed against a party who has held possession of land wrongfully, bears interest. In such a case, a court of equity, in decreeing possession of the land, and the payment of rent, has a discretion, according to the circumstances, to allow interest or not. Interest, however, will be allowed on open accounts, or in other cases where the statute does not apply, when by the usual course of dealing, or by express agreement, there is a certain fixed time for payment, and generally in all cases where there has been an unjust detention of the money of another against his will; and by this rule, the wrongful possessor will be charged interest on the annual value of the rents from the end of each year; *Hawcott v. Collins*, 1 C. 398. And the jury may allow interest on open accounts, without proof of an agreement to pay it; *Wiltburger v. Randolph* W. 20.

3. *Interest on open accounts.* Interest is not due absolutely on open accounts, but may be allowed, in the discretion of the jury, by way of damages for an unjust detention of the debt; *Wiltburger v. Randolph* W. 20; *Work v. Glaskins*, 4 G. 539; *Houston v. Cru'cher*, 2 G. 51. And where partial payments have been made on open accounts, the mode of computing the interest is the same as in cases where the contracts bear interest by law, which is to apply the payments first to the extinguishment of the interest; *Houston v. Crutcher*, *supra*.

4. *Exemption from interest: Prevention of payment by legal process.* Without fault on his part, no person can be deprived of a legal right secured to him, by the terms of a contract. A creditor has a legal right to demand interest, upon his debt secured by a promissory note, upon its non-payment at maturity; and hence, the maker of such a note, who has been prevented from paying the same, by legal process sued out at the instance of a third party, will not, upon the removal of such restraint, be relieved from paying the intervening interest. In such a case the debtor has his remedy, by compelling the parties to interplead, and paying the money into court; *Work v. Glaskins*, 4 G. 539.

5. *Same.* Yet in that class of cases where interest is not due by the terms of the contract, but is allowed by way of damages for the unconscientious detention of the debt, courts have held, in the exercise of an equitable discretion, that parties who have been prevented, by legal process, from paying money

due by them. should not be subjected to damages in the shape of interest, as for an unjust detention of the debt; but even then, the debtor will not be released from the intervening interest, where it appears that his failure to pay was not caused by the pendency of the legal process, but by his denial of his indebtedness; *Ib.*

6. *Contract for rate of interest: How established.* The rate at which interest is to be calculated, may be established by the course of dealing between the parties; and the rendition and reception, without objection, of accounts stated, in which interest is charged at a certain rate, is sufficient to establish an agreement to pay that rate; *Carson v. Alexander*, 5 G. 528.

7. *Construction of contracts for.* A note promising to pay a certain sum, "for money loaned at forty per cent., till paid," is sufficiently explicit as a promise to pay interest at the rate of forty per cent. per annum; *Lowry v. Lowry*, W. 207.

II. Interest on Novation and Substitution.

8. *In novation, the interest of old debt may be contracted for.* In the novation of a debt, the rate of interest of the old debt may be contracted for, notwithstanding the legal rate of interest had been reduced when the novation took place, below the rate contracted for; *Sadler v. Hoover*, 2 G. 260. But this rule will not allow a bank, whose charter restricts it to taking seven per cent. interest on loans not exceeding four months, and allows it to take eight per cent. for longer loans, in renewing an over-due note for an eight per cent. loan, to charge that rate, if the new note has only four months to run. The renewal will be considered as a loan, and governed by the charter fixing the rate for loans for different periods; *Killingsworth v. Commercial Bank of Rodney*, 9 S. & M. 628.

9. *Rule where another is substituted as debtor.* A third party may contract to be substituted as debtor in place of another; and, if such substitution be made, the new debtor may lawfully contract to pay the rate of interest which the debt bears, notwithstanding it may be higher than the rate then allowed by law; *Dennistoun v. Potts*, 4 C. 13.

III. Mode of Computing Interest.

10. *Interest paid first.* The mode of computing interest, where there have been partial payments, is by statute, to apply the payment, first to the interest then due, and the balance to the principal; and on the balance of principal then remaining, to calculate the interest to the next payment, and then apply the payment to the interest first, and if any balance, apply that to the extinguishment of the principal, and so on to the end; *Bond v. Jones*, 8 S. & M. 368; *Houston v. Crutcher*, 2 G. 51. See APPROPRIATION OF PAYMENTS, 3.

11. *Same: Settlement of partnership account.* In the settlement of a partnership account, where one partner has advanced

money to the firm to be repaid with interest, the application of partial payments will be made in the same manner as in other contracts, *i. e.*, first to the extinguishment of the interest, and then to the principal; *Stewart v. Stebbins*, 1 G. 66.

12. *Same: Interest computed against an administrator.* Where an administrator is by law chargeable with interest, and he has made disbursements on account of the estate, the interest should be calculated in the same manner, as in contracts for the payment of money, where partial payments have been made, *viz.*, the disbursements should be credited first on the interest due by the administrator at the time they were made, and the surplus, if any, to the principal; *Cason v. Cason*, 2 G. 578.

IV. Liability of Trustees, Executors, and Administrators, &c., for Interest.

12a. See GUARDIAN AND WARD, 58g to 66. EXECUTOR AND ADMINISTRATOR, 253 to 261. TRUSTS AND TRUSTEES, 79.

V. Miscellaneous Decisions on Interest.

13. *Interest an incident to the contract.* Interest is an incident to the contract, and need not be claimed in the declaration; *Washington v. Planters' Bank*, 1 H. 230.

14. *Proof of foreign interest.* In the absence of proof of the rate of interest of another State, the finding of the jury as to that point, will be presumed correct; *Henry v. Halsey*, 5 S. & M. 573.

15. *Liability of the State for interest.* The State has no prerogative to claim one law upon its own contracts as creditor, and another law as debtor. She is entitled to claim interest, and is bound to pay it; *Swann v. Turner*, 1 C. 565. See STATE, 4.

15a. *Trustee: Holder of collateral securities.* The holder of collateral securities is liable for interest, on the amount collected by him from that source, and applied to his own use; but he will only be chargeable with the legal rate, though the securities bore a higher rate; *Tarpley v. Wilson*, 4 G. 467.

16. *Act of 1842: Interest on loaned money.* The Act of 1842 (H. C., p. 643. art. 6), fixes the rate of interest on loaned money at 8 per cent. per annum, where there is no rate agreed on; *Effinger v. Richards*, 6 G. 540.

17. *Agreement as to future loans.* An agreement fixing the rate of interest on future dealings between the parties, terminate by the passage of a law making that rate usurious; *Norcum v. Lum*, 4 G. 299.

18. *Interest on specific legacies.* A specific legatee of stock, or of monied securities, or of slaves, is entitled to the interest or hire from the testator's death, although by the terms of the will the principal is not to be paid or delivered till a future day; *Dowd v. White*, 5 G. 510. Where the bequest is money, the legatee will not be entitled to interest till the lapse of twelve months from the testator's death, and then at 4 per cent.,

which is the English rule, and which is adopted by the court; *Brownlee v. Steel's Executors*, W. 179. The rate is 6 per cent.; *Wheeler v. Brem*, 4 G. 126. And where the legatee is not a child, a general legacy of money is payable at the end of twelve months from the testator's death, unless otherwise provided in the will, and interest will be recoverable from that time, though payment was not demanded. The rule allowing interest from testator's death, where the legatee is a child, does not extend to grand-children; *Wheeler v. Brem*, 4 G. 126.

18a. *Interest on judgments.* See JUDGMENT, 130. APPROPRIATION OF PAYMENTS, 11.

VI. Usury.

1. The Agreement.

19. *The agreement must be wilful, and with intent to violate the statute.* To constitute usury, there must be an agreement between the lender and the borrower, to which both parties assent, by which the borrower knowingly agrees to pay, and the lender knowingly agrees to receive or take, a higher rate of interest than the law allows, and with an intent to violate the statute. An inference of an intention to violate the statute, may be drawn from the lender's knowingly taking illegal interest; but this inference will not be indulged if a different conclusion is consistent with the facts of the case. And if the excess be very small, such as results from calculating the interest at three hundred and sixty days for a year, and this calculation is not made for the purpose of taking excessive interest, but results from the use of interest tables (Rowlett's), for the sake of convenience only, the inference of illegality cannot be drawn; *Planters' Bank v. Snodgrass*, 4 H. 573. (Sharkey, C. J., dissented.)

20. *Agreement to pay interest from date on condition of default.* A stipulation in a contract, that if the debt be not punctually paid at maturity, the debtor shall pay interest from date, is not usurious, and interest will be given accordingly (Smith, C. J., dissented); *Rogers v. Sample*, 4 G. 310.

2. Devices to Evade Usury Laws, and Instances of Contracts held Good.

A. ADDITION OF ATTORNEY'S FEE.

20a. *Charging debtor with attorney's fee not usurious.* Where the creditor had brought suit on his demand and a compromise was made, by which the suit was dismissed, and a renewed note was given by the debtor, for the principal and interest of the debt, and the plaintiff's attorney's fee for bringing the suit—the fee being voluntarily included in the note by the debtor, and not exacted as a condition of the renewal of the loan—it will not be usurious; *Planters' Bk v. Snodgrass*, 4 H. 573. And so where a bank had brought suit against one of its debtors, and required as a condition of dismissing the suit and allowing the debtor to renew his note, that he must pay the attor-

ney of bank one half of his usual commissions; it was held not to be an exaction, as a condition of the loan, but as a consideration of a bargain to withdraw legal proceedings, and hence not usury; *Simmons v. Miss. Union Bk*, 3 S. & M. 781.

B. COMPENSATION TO CREDITOR WHO IS PLEDGEE OR MORTGAGEE.

21. *Fair compensation is not usury.* It is well settled, that where, besides the contract of loan, there is also a contract by way of pledge, mortgage or collateral security, to secure the principal and interest of the loan, that a fair and just compensation for the labor, trouble and expense, to be incurred by the creditor about the pledge or other security, may be stipulated for, but the stipulation must not be merely a cover for usury; *Com'l Bk of Manchester v. Nolan*, 7 H. 508.

21a. *Hazard to receive less than the principal.* In contracts of loan, if there is a hazard that the creditor may receive less than his principal, an agreement that he may receive more than the principal and legal interest, will not constitute usury. But the hazard must be real, and not a mere cover for usury; *Ib*.

22. *Same: Case in judgment.* Hence, where a bank in this State loaned money, and received as security therefor, cotton to be shipped to Liverpool, England, and stipulated to receive as compensation for its trouble in making the shipment, the domestic exchange between the locality of the bank and New York; it was held, that the transaction was not usurious, the bank taking the risk as to whether the exchange would be a loss or profit, and it not appearing that the stipulation was a mere device for usury; *Ib*.

23. *Devices not allowed.* The law will not tolerate any device to defeat its provisions, where the consummation of usury is really intended; *Ib*.

C. LOAN OF DEPRECIATED BANK NOTES AND STOCKS.

24. *Loan of depreciated notes usurious.* If a bank loan, as at par, the notes of other banks which circulate as money in the payment of debts, but are in fact 25 to 30 per cent. below specie par, so that the interest received, and the discount, will be greater than the legal interest, the contract is usurious, and the bank can only recover the specie value of the notes lent without interest; and it makes no difference in such a case, what disposition the borrower makes of the notes lent to him, or at what price he used them (citing *Grand Gulf Bk v. Archer*, 8 S. & M. 151); *Bondurant v. Com'l Bk of Natchez*, 8 S. & M. 533; S. P., *Cook v. Bk of Lexington*, *Ib*. 543.

And the principle is the same, when bank stock is loaned which is depreciated; and in both cases it makes no difference, that the lender used the notes or stock at specie par; *Robb v. Halsey*, 11 S. & M. 140; *Coulter v. Robinson*, 14 S. & M. 18; *Brown v. Nevitt*, 5 C. 801. Nor does it make any difference

in such a case, that the notes or stock lent afterwards reached par, for the contract is to be determined by the circumstances existing when it was made. And the rule is the same when a part of the credit loaned was at par, and a part depreciated; the contract will be usurious as to the whole; *Brown v. Nesbit*, *supra*.

25. *Same*. But this rule does not apply where a bank loans its own depreciated bank notes; for by its charter it is authorized to loan its own notes, and to receive legal interest on the loan; and its failure to pay specie, whereby its notes are depreciated, does not take away the charter right. And, moreover, the bank is by law bound to receive its own issues, in payment of all debts due to it, and in legal effect, the taking of the borrower's note for the nominal amount of its own issues loaned, is but a contract on the part of the borrower, to return the same notes, with interest in the like currency. But if a bank loan the depreciated notes of other banks, the reason ceases, as she is not bound to receive the notes lent in payment of the debt (*Handy, J.*, dissented); *Mauzy v. Ingraham*, 6 C. 171.

D. USURY BY SALE OF PROPERTY.

26. *Sale on credit for greater excess in price than legal interest*. Whether the difference, being greater than the rate of legal interest, between the cash price of property, and the sum for which it is sold on a credit, will constitute usury, depends on the intention of the parties. If the sale be made on such terms, that it was for a cash price, and to be considered as cash, and interest be calculated regularly at a rate exceeding the amount allowed by law, and the sum so produced be added to the cash price, and included in the note for the purchase money, the transaction will be usurious; the intent of the parties being clear that the increased price was contracted for as interest, and *eo nomine*; *Torrey v. Grant*, 10 S. & M. 89.

27. *Same*. A sale of goods at a price beyond their value on a credit, when the object is to cover a loan of money at a usurious rate, has always been held to be within the statute of usury; *Archer v. Putnam*, 12 S. & M. 286.

E. SALE OF CREDITS, AS AFFECTED BY USURY LAWS.

28. *When sale affected by usury*. It is well settled, that when a promissory note is made without reference to a usurious loan or the raising of money, and is complete and valid in the hands of the holder, it may be sold by him for a sum less than its nominal value, and at a rate of discount, which would have made it usurious if it had entered into the original transaction. But in order to make such transfer valid, it must be a *bona fide* sale upon a consideration paid or secured, and must not be in any wise a security for the usurious loan of money by the endorsee or party taking the paper, and it must not be in consideration of forbearance and giving time

of payment for a debt due the party acquiring it; for if it be transferred either upon a loan at unlawful interest, or as security for a pre-existing debt agreed to be forborne at an illegal rate of interest, it falls within the statute against usury; *Newman v. Williams*, 7 C. 42.

29. *Same: Case in judgment*. Hence, where the transferee is a creditor of the holder and assignor, and agrees to give indulgence on the debt for a stipulated time, at an usurious rate, and thereupon, the debtor endorses a valid and legal note of a third party to the creditor, for the amount of the debt so calculated at an usurious rate, the transaction is usurious; and if the creditor file a bill to foreclose a mortgage given by the maker of the transferred note to the debtor and assignor, he can only recover so much of the note and mortgage as the principal of his debt amounted to, and the assignor being a party defendant to the bill, will be entitled to the remainder, including the interest which has accrued on that much of the note as represents the principal of the creditor's debt; *Id.*

F. INTEREST RESERVED IN ADVANCE.

30. *Instance*. Where a note is given, due in twelve months for \$400 and only \$360 is loaned, this a reservation of more than ten per cent. interest, and the contract is usurious; *Hyde v. Finley*, 4 C. 468.

3. Usury by Banks.

See *BANKS*, 87, 88.

31. *Effect of usury by a bank*. The general usury laws of the State, apply to banks and other corporations as well as to natural persons; and if there be nothing in the charter of the bank on this subject, besides a mere prohibition to it, to take interest in excess of a rate named, an usurious contract by it will not be wholly void, but as provided in the general law, will be void only as to the interest; *Com'l B'k of Manchester v. Nolan*, 7 H. 508. The contract of loan, so far as the principal sum is concerned, being within the powers of the corporation, is good, notwithstanding the void and illegal excess, which may be separated from it. It is not like a contract made by a corporation foreign to its existence, as a contract of insurance by a bank and the like; for in such cases the contract is utterly void for want of power. Neither is the taking of usury *malum in se*, but only *malum prohibitum*; and hence, an usurious contract only is invalid to the extent prescribed by law; *Com'l B'k of Manchester v. Nolan, supra*; *Sharkey, C. J.*, in *Planters' B'k v. Snodgrass*, 4 H. 573, in a dissenting opinion, held the contrary of this, citing *United States v. Owen*, 2 Peters' R.

32. *Usury by bank on shorter loan than lawful: Days of grace*. A bank charter allowed it to take interest at 7 per cent. on notes payable within 4 months, and 8 per cent. on notes running longer: *Held*, that a note payable on its face 4 months after date, could draw only 7 per cent. interest, though,

on account of the days of grace, it was not due and payable for 4 months and three days; *Forniquet v. West Feliciana R. R. Co.*, 6 H. 116.

33. *Same*: Where note discounted after its date. When a bank charter allowed it to charge 8 per cent. interest only where the note discounted had 12 months or more to run, it was held that though the note on its face was due 12 months after date, yet if in fact it were not discounted for several weeks after its date, the taking of 8 per cent. interest on it would be usurious; *Killingsworth v. Com'l Bank of Rodney*, 9 S. & M. 628.

34. *Same*: Bank's power to renew note at old rate of interest. Even if a bank holds an over-due note which it has discounted, bearing 8 per cent. interest, yet in renewing the note, the bank can only take the rate of interest allowed by its charter for loans made for the length of time for which the renewed note is to run; and if the renewal be for a period for which the bank is allowed to charge interest at 7 per cent. per annum, it cannot charge 8 per cent., because the old note bore that interest; *Ib.* See *ante*, 11.

35. *Restriction as to interest in bank charter does not apply to loans in a foreign State.* A bank having by his charter general powers to make loans, may make loans in other States; and where it makes such loans, the contract is governed by the usury laws of the *loci contractus*. A restriction in a bank charter as to the rate of interest which it may charge, operates only in the State where the bank is chartered, and does not operate to make a loan made in another State usurious, if the loan be made in pursuance of the laws of that State; *Knox v. Bank of United States*, 4 C. 655.

36. *Effect of usury on forfeiture of charter.* A restriction contained in the charter of a bank, as to the rate of interest or discount which it may take on loans, is a regulation intended for the benefit of the public, and its deliberate violation by the bank is a cause of forfeiture of its corporate franchises; *State v. Com'l Bank of Manchester*, 4 G. 474. See *BANKS*, 87, c8.

4. Effect of Usury on Contracts.

37. *Does not avoid the whole contract.* Usury does not make the contract wholly void, but only to the extent of the interest. Hence, a partner cannot avoid a usurious contract made by his associate, upon the ground that the whole contract is void. He can only avoid it to the extent of the interest (citing *Grand Gulf Bank v. Archer*, 8 S. & M. 151, digested under *BANKS*, 87, 88); *Wallace v. Fouché*, 5 C. 266.

38. *Effect of custom on usury.* Where more than legal interest has been reserved, notwithstanding any custom of a particular place fixing a higher rate, it is firmly settled that no more than the principal can be recovered (citing *Bondurant v. Com'l Bk of Natchez*, 8 S. & M. 533; *Archer v. Putnam*, 12 S. & M. 286; *Coulter v. Robertson*, 14 S. & M. 18); *Wallace v. Fouché*, *supra*,

By statute of 1857, only the excessive interest is forfeited.

39. *Same.* In ascertaining the balance due on a debt upon which usurious interest has been exacted, the proper mode is to charge the debtor with the principal of the debt, and credit him with all the payments, including the amounts paid on it as usury; *McAllister v. Jerman*, 3 G. 142.

40. *It affects renewed note.* If an original note be affected by usury, every renewal of it will likewise be affected; nor will the usury be cured when a greater sum than the usurious interest has been paid on the note; *Torrey v. Grant*, 10 S. & M. 89. And the rule is the same if a third party, by agreement of debtor and creditor, substitute his note in place of the note affected by usury; and it makes no difference in such a case that the substituted note, as between the maker and the original debtor, was based on a good and valuable consideration; *Coulter v. Robertson*, 14 S. & M. 18.

See *CONTRACT*, 23. *Post*, 52.

VII. Conflict of Laws on Usury and Interest.

41. *Lex loci solutionis governs.* A note made in this State and payable in Louisiana, and stipulating for a rate of interest allowed by the Law of Louisiana, is not usurious, though the rate exceed that allowed by the laws of this State; and in the absence of proof as to the law of Louisiana, the rate stipulated will not be presumed usurious by that law; *Martin, Aiken & Co. v. Martin, Pleasants & Co.*, 1 S. & M. 176; *S.P., Robb v. Halsey*, 11 S. & M. 140.

42. *Interest by lex loci contractus.* If a merchant, residing in this State and doing business here, advance for a customer the amount of a bill drawn by the latter and payable in New Orleans, La., he will be entitled to interest according to the course of trade and the agreement between them in relation to their dealings with each other, though it exceed the legal rate of interest in Louisiana; *Carson v. Alexander*, 5 G. 528.

43. *Lex loci governs where contract violates lex solutionis.* Where a contract made in one country to be performed in another, stipulates for the payment of a rate of interest allowable by the *lex loci contractus*, but prohibited by the *lex loci solutionis*, it will be governed by the former law. For, as it was competent for the parties to contract with reference to the law of either place, it will be presumed that they contracted with reference to the law of that place, which the contract did not violate. A presumption will never be indulged that a contract is in violation of law, when it is capable of any other reasonable construction; *Brown v. Freeland*, 5 G. 181.

VIII. Remedy of Debtor against Usury.

44. *Relief in equity: Injunction against sale of property under a deed in trust.* The rule in equity, under statutes against usury declaring the whole contract void, which required as a condition of relief against usury, that the complainant should pay what was really due,

is applicable to cases in which a remedy at law might have been had, or in which a discovery was asked in aid of a defence at law, and where it is said the court is not bound to interfere, but having a discretion on the subject, can prescribe the terms on which relief will be granted. That rule has no application to a case where the debtor seeks relief against a threatened sale by a trustee, under a deed in trust to secure a debt affected by usury; for there the debtor has no remedy to restrain the sale, except in equity, and is compelled to resort to chancery in the first instance. Moreover, under our statute there is no forfeiture of the principal, and even at law the lender can recover the money he actually loaned; *Parchman v. McKinney*, 12 S. & M. 631; *Norcum v. Lum*, 4 G. 299.

45. *Same*. The statute (H. & H. 374), provides, that if any contract founded on any other consideration than the *bona fide* loan of money, shall fraudulently and deceitfully express therein, that the same is entered into for loaned money, and specify a greater interest than is allowed by law, and if such fraud or deception shall be discovered in any suit or action, *either at law or equity*, no interest shall be allowed," &c., prevents the application of the rule in equity which requires a debtor to pay the principal and legal interest, when he seeks relief against an usurious contract, to a case where the debtor is compelled to resort to equity for relief in the first instance; *Parchman v. McKinney*, *supra*.

46. *Extent of relief granted: Contracts, executed and executory*. It is a rule both at law and in equity, applicable to usurious loans, that where the debtor sues to recover back usury paid by him, he can only recover the excess over the lawful interest, but this rule applies only, to a transaction completely executed, and does not extend to a case where the whole money being not paid, the debtor seeks to be relieved from liability on an alleged balance of the debt; and in such a case the debtor can have his payments applied to the extinguishment of the principal, though they have been applied by the creditor to the interest. If, in any case, the creditor would have the right to prevent the application of the previous payments to the principal, it could only be done where it appears that they were expressly made as payments of interest, and where in the dealings between the parties the interest and principal are clearly distinguishable; *Ib*.

47. *Where a court of equity will interfere*. A court of equity has jurisdiction to grant relief against an usurious contract, only when there are circumstances connected with the transaction, aside from the usurious agreement, which call for the interposition of the court, on account of the inadequacy of the powers of a court of law to grant full and complete relief (citing *Bond v. Jones*, 8 S. & M. 368; *Smith v. Walker*, 1b. 131); *Kelly v. Weaver*, 8 G. 631.

48. *Same: Case in judgment*. The defendant loaned the complainant a sum of money, and received a conveyance of land

and slaves, by which the borrower was at liberty to redeem the slaves after twelve months, by paying one-half the principal, and the lender was to take the land for the other half. After a year had elapsed, the land was conveyed to the lender absolutely, in payment of one-half the principal, and one of the slaves for the other half, and at the same time, or soon afterwards, it was agreed that the borrower might re-purchase this slave, at any time within three years, at the same price for which he had been sold to the lender. Before the expiration of that period, the borrower re-purchased the slave, and the transaction was finally settled. After this, the borrower filed his bill in equity, charging that the transaction was usurious; that the rent of the land and hire of the slave greatly exceeded in value the legal interest on the sum loaned, and that the land was worth double the price which the lender agreed to pay for it, and seeking an account and a recovery back of the illegal interest. *Held*, there was nothing in the transaction which could give a court of equity jurisdiction, and that the bill must be dismissed; *Ib*.

48a. *Same*. Usury is a defence which can be made at law, when the debtor is sued, and if he neglects to make it there, he cannot come into a court of equity, after judgment. If any discovery is needed to make his defence at law, he can resort to chancery before judgment, and the necessity for such discovery is, therefore, no excuse for not having defence at law; *Smith v. Walker*, 8 S. & M. 131; *S. P.*, *Robb v. Halsey*, 11 S. & M. 140.

49. *Same*. Usury may be recovered back at law, and also in equity, when there are special circumstances to give a court of chancery jurisdiction. Hence, if, after judgment at law, against which the defence of usury was successfully made, and the usury deducted from the note, the defendant voluntarily, in consideration of indulgence granted on the judgment, pay the deducted usury, he will be entitled, in equity, to have the sum so paid credited on the judgment as a payment on it; *Bond v. Jones*, 8 S. & M. 368.

50. *Defence can be made at law*. The defence of usury can be made at law, and when the plea sets up usury alone, that is an admission of the justice of the principal, and a judgment by default may be taken for that, and a trial had on the issue as to the usury; *McLaurin v. Parker*, 2 G. 509.

IX. Miscellaneous.

51. *Promise for indulgence*. A promise to pay more than the legal rate of interest, in consideration of forbearance, is usurious; *McAllister v. Jerman*, 3 G. 142.

52. *Rights of substituted debtor*. The purchaser of a tract of land upon which there is an encumbrance, to secure a debt due by his vendor, is not bound by his agreement to pay the balance due on the encumbrance, to pay more than is legally due, and hence, he can make the same defence as to usury that the vendee could have made; *Ib*. See *ante*, 40.

53. *Bank stock not allowable to be loaned*

as money. Bank stock is not money, and under the law as it existed prior to 1842, and which allowed the reservation of ten per cent. interest on *bona fide* contracts for the loan of money, and eight per cent. on all other contracts; the taking of more than eight per cent. interest on a loan of bank stock, is usurious; *Archer v. Putnam*, 12 S. & M. 286. And, under this law, if the note for the sale of property express it to be for loaned money, and ten per cent. be reserved, it will, nevertheless, be usurious; *Parchman v. McKinney*, 12 S. & M. 631.

54. *Parol proof admissible to show a note was given for loan money.* If usury be set up against a note bearing on its face ten per cent. interest, when such rate is allowed only for loaned money, the holder may show by parol, that the note was given for loaned money; *Luckett v. Henderson*, 12 S. & M. 334.

55. *When defence of usury not waived by promise to pay assignee.* Usurious interest is an illegal consideration for a contract, and if an endorsee take a note with notice that it is affected by usury, he cannot recover, though the maker assured him before he took the note that he had no defence against it; *Torrey v. Grant*, 10 S. & M. 89.

Internal Improvements.

See CONSTITUTIONAL LAW, 121, 124, 20, 31.

International Law.

1. *Rights acquired under former sovereign of country.* During the existence of the Spanish Government in the Mississippi Territory, the laws of Spain controlled the descent and distribution of property, and rights vested under that law will be now respected; *Chew v. Calvert*, W. 54.

2. *Ancient laws remain in force until changed by conqueror.* The ancient laws of a conquered or ceded territory remain in force till actually abrogated by the new government; *Ib.*

3. *Foreign state may sue in our courts.* Any of the States of the American Union have a right to maintain suits in their own names as plaintiffs in the courts of this State; *Hines v. The State of North Carolina*, 10 S. & M. 529.

4. *Law of nations, between States of the Union.* The principles of private international law and the comity of nations, apply with greater force, as between the citizens of the several States of the Union, than between citizens of foreign nations; *Shaw v. Brown*, 6 G. 246.

5. *Rights of free negroes under this law.* Though free negroes are not citizens, yet they are subjects and inhabitants of the State in which they reside, and derive their rights of person and property from its laws, and these rights should be respected in every other State, unless the exercise thereof be positively prohibited or incompatible with the laws and policy of the State in which they are claimed; *Ib.*

6. *Origin of law of nations.* The law of nations is a system of rules which reason, morality, and custom have established among civilized nations, as their public law; *Heirn v. Bridault*, 8 G. 209.

7. *Obligation of the law of nations.* There is no universal and immutable law of nations binding upon the whole human race, civilized and barbarous. Its obligation depends on the persuasion that other nations will reciprocally observe the same rules on their part, in their intercourse with us, as we observe towards them; and hence, where there is an incapacity, from want of enlightenment and civilization on the part of a particular nation, to observe the rules of the law of nations, it imposes on us no obligation to observe it with respect to that nation; *Ib.*

8. *Same.* The law of nations, like the municipal law of a particular nation, has no extra territorial force; and as the former is limited in its operation to the territory of the nation in which it is established, so the latter, having its origin in the necessities growing out of the commercial, diplomatic and social intercourse of civilized nations, and being founded on their voluntary assent, either expressed or implied, cannot be extended to those nations who have not thus assented to it, and are, from their nature and constitution, incapable of civilized intercourse; *Ib.*

9. *Rights of aliens.* It is only by virtue of the municipal law of each State, or the law of nations, which is regarded as a part of the municipal law of each, that aliens have any rights beyond the jurisdiction of their native domicile; *Ib.*

10. *Government de facto defined.* A government *de facto*, as defined in international law, is a government completely, though only temporarily, established in the place of the government *de jure*, occupying its capital and exercising its power, and which is ultimately overthrown, and the authority of the rightful government re-established; *Thomas v. Taylor*, 42 M. 651.

11. *Government de facto in its general sense.* A government *de facto* in its general sense, and not in its technical meaning, is any organized government established for the time being over a considerable territory, in exclusion of the regular government. The acts and obligations of such a government, in hostility to the government *de jure*, are unlawful and of no binding force; but transactions between individuals, if legal and binding under ordinary circumstances, cannot be pronounced of no obligation, because done in conformity to the laws of such *de facto* government; *Ib.*

12. *Confederate States and State of Mississippi not de facto governments.* The Confederate States government, and the State governments organized under it, in relation to the United States and its loyal citizens, were not governments *de jure* or *de facto*, as these terms are used in the law of nations; *Cassell v. Backrack*, 42 M. 56; *S. P., Taylor v. Thomas*, 42 M. 651. But in reference to all matters of internal, private and domestic im-

port, not affected by the laws and Constitution of the United States, and which have been completed and consummated, the Confederate States government and the State governments under it were governments in fact for the time being, for the purpose of protecting the rights of persons and property, and for affording immunity to their citizens from liability and punishment for obeying their laws; and hence, a sale of personal property for taxes levied by the Confederate States, made under their authority, and fully consummated whilst they had possession of the country, is good and valid, and passes title to the purchaser; *Cassell v. Backrack*, *supra*.

13. *Status of State government in Mississippi during the civil war.* The State of Mississippi as one of the United States, and the State as one of the Confederate States, is not identical; and the acts and obligations of the latter government are not binding upon the government erected in the State after the war, under the authority of the United States; *Thomas v. Taylor*, 42 M. 651.

14. *Same.* The provision of the Constitution of the United States, which requires judges, members of the State Legislature, &c., to take an oath to support the Constitution of the United States, is not merely directory, but absolutely necessary, and to this extent, *Hill v. Boyland*, 40 M. 618, is overruled. And the government organized in this State after secession, abolished the old lawful government, and upon the overthrow of the insurrectionary government, there existed no government in this State until one was constructed under the authority of the United States. And the laws and obligations of the government enacted and incurred during the war, ceased, upon the destruction of the government that enacted and incurred them, and were of no binding force upon the government which succeeded, until adopted by such government; *Ib*.

15. *Same.* The present State government is not bound to receive in payment of taxes, or to discharge the "treasury notes," or "cotton money" issued by the State during the war. These issues were made to aid the rebellion, and are null and void as obligations on the State; *Ib*.

16. *Intercourse between belligerents.* During the existence of war between independent nations, all communication, correspondence and intercourse between the citizens of the belligerents, except such as may be warlike in its character, or licensed by the sovereign powers, must absolutely terminate. All contracts between citizens of one of the belligerent powers with citizens of the other, are illegal and void. And this principle is applicable to intercourse and commerce between citizens of the Confederate States and citizens of the United States during the late war; *Mims v. Armstrong*, 42 M. 429; *Shotwell v. Ellis*, *Ib*. 439.

17. *Same: Case in judgment.* In August, 1862, and while the city of New Orleans was in possession of the Federal troops, A., a citizen of that city, through O., his agent,

loaned Confederate States money at the city of Jackson, Mississippi (then in possession of the Confederates), to M., a citizen of this State, and took a mortgage on real estate as security for its re-payment: *Held*, that the contract was illegal, being between belligerents; *Mims v. Armstrong*, *supra*.

18. On the subject of the status of the Confederate States, see CONFEDERATE STATES. See also, *BILLS OF EXCHANGE*, &c., 67c, *et seq*.

Jackson, City of.

1. *Claimants of lots.* The claimants of lots, in the city of Jackson, under the act of the Legislature granting preferences in certain cases, must show that the lots claimed were designated by the commissioners appointed for that purpose; *Bingham v. Phillips*, 1 H. 285.

2. *Title of streets in.* The title to the streets in the city of Jackson is vested by the Act of 1833, in the corporation of the city, and the Legislature has no power without the consent of the city, or without providing for due compensation, to authorize a railroad company to lay its track on them; *Donnahue's Case*, 8 S. & M. 649.

3. *Transfer by governor of the State of notes held for sale of lots in Jackson.* The Act of 1838, which authorizes the governor of the State, on certain conditions, to procure the discount of notes given for the purchase of lots in the city of Jackson, and to transfer the same to the bank discounting them, together with the liens and mortgages taken on them, conferred no authority on the government to bind the State as endorser, by his transfer of the notes; *State v. Mayes*, 1 C. 516.

4. *Cancellation by auditor of sale of lots in Jackson.* The Act of 1841 (Session Laws, p. 284), only authorized the auditor to cancel the sale made by the State of a lot in the city of Jackson, when none of the purchase money was paid; and when he should believe the purchaser and his sureties were insolvent. The act did not authorize him to cancel a sale where the note for the purchase money was not at the time the property of the State; and if he undertake to make such cancellation, where the note belongs to another party, his act is void, and does not give the holder of the note any claim against the State, nor the State any title to the lot so received back; *Ib*.

Jeofails, Statute of.

1. *Applies to pleading, not to proof.* The statute of jeofails will cure defects in pleading, where no demurrer has been filed; but it does not dispense with proper and necessary evidence to sustain the action. A material averment omitted in the declaration will not vitiate the verdict, but its omission from the declaration does not dispense with the proof of it. Hence, if a declaration against an endorser of a bill or note, omit to aver demand and notice, or give an insufficient excuse for a failure to make demand and give notice,

still there must be legal proof of the endorser's liability, or the verdict charging him will be set aside; *Reaves v. Dennis*, 6 S. & M. 89; *S. P. Clark v. Read*, 12 S. & M. 554.

2. *Applies to pleading alone: Extent of its application.* The statute of jeofails applies to points of pleading, and is intended to remedy defects and omissions in points of pleading, and none other. The defective statement of a cause of action is embraced in it; but if there be no cause of action at all stated in the declaration, the statute does not apply; *Wells v. Woodley*, 5 H. 484. It applies to a defective statement of a claim or title, but not to a statement of a defective claim or title; *Delahuff v. Reed*, W. 74. All defects in the pleading, whether of form or substance, which could have been taken advantage of by demurrer, is cured by judgment by default or verdict; *Ragsdale v. Caldwell*, 2 H. 930; *Delahuff v. Reed*, W. 74; *Poindexter v. Turner*, W. 349; *Hudson v. Poindexter*, 42 M. 304; *Winn v. Levy*, 2 H. 902. The statute, after verdict, cures any misconception or mistake as to the form of action; *Cartwright v. Carpenter*, 7 H. 328; *Kellogg v. Budlong*, 7 H. 340; *Breck v. Smith*, 44 M. 690; *Bone v. McGinly*, 7 H. 672. After verdict and judgment, no defect in the pleadings, which could have been taken advantage of by demurrer, will be noticed; *Whitaker v. Comfort*, W. 421. But the statute does not cure a total omission to plead; *Hogue v. Llewellyn*, 42 M. 302.

3. *Same.* The statute will not cure the defect, where the declaration and writ show on their face the plaintiff had no cause of action at the time the suit was commenced. Hence, a judgment by default in a suit commenced on a note, before the expiration of the days of grace, will be erroneous; *Winston v. Miller*, 12 S. & M. 550. And though the statute is very broad, it does not extend to a case where the declaration shows that the right of action is not in the plaintiff; *Haynes v. Ezell*, 3 C. 242. If the declaration shows substantially a good cause of action, but plaintiff's title only is defectively stated, it is good after verdict; *Cole v. Harman*, 9 S. & M. 562.

4. *Judgment by default, has same effect as a verdict.* A judgment by default, cures all the defects in the declaration that a verdict would cure; *Winn v. Levy*, 2 H. 902; *Irwin v. Williams*, W. 314; *Ragsdale v. Caldwell*, 2 H. 930; *Grigsby v. Ford*, 3 H. 184; *Carmichael v. Governor*, 3 H. 236; *Shrock v. Bowden*, 4 H. 426; *Clark v. Gregory*, 5 H. 363; *Wells v. Wooley*, 5 H. 484; *Barfield v. Impson*, 1 S. & M. 326.

5. *Defects in the declaration cured by the statute: Instance.* The statute of jeofails, after verdict, or judgment by default, will cure the following defects in the declaration: *assumpsit* on a sealed instrument; *Dixon v. Richards*, 2 H. 771; and so if *assumpsit* be brought against one for falsely representing that another was liable for work which he induced the plaintiff to do, it will be good after verdict; *Cartwright v. Carpenter*, 7 H.

328; and so if *assumpsit* be brought against an attorney, for collecting depreciated bank notes, it will be good after verdict; *Kellogg v. Budlong*, 7 H. 340; also, the failure to aver notice to an endorser; *Winn v. Levy*, 2 H. 902; *Reaves v. Dennis*, 6 S. & M. 89; *Wilkinson v. Cook*, 44 M. 367. That the bill appears to have been protested at a different place from where it was made payable; *Grigsby v. Ford*, 3 H. 184. That in a declaration by an assignee of a bill single, it is not averred that the obligor did not pay the debt to the obligee; *Clark v. Gregory*, 5 H. 563. That the declaration on a note due 29th January, 1839, avers that the note was presented for payment on the day it fell due, according to its tenor and effect, to wit, on the 28th February, 1839; *Wells v. Woodley*, 5 H. 485. That the declaration fails to aver a promise by defendant to pay the note sued on; *Clark v. Read*, 12 S. & M. 554. That the declaration misdescribes the note sued on; *Barfield v. Impson*, 1 S. & M. 326. That it contains a clerical error in stating that the note sued on fell due before its date; *Shrock v. Bowden*, 4 H. 426. And so if an attachment be taken out partly for unliquidated damages, and the declaration be in trover, the verdict will cure the defect; *Reid v. Wofford*, 4 S. & M. 579. And so in detinue, if the declaration fail to state the separate value of several chattels sued for, it will be good after verdict; *Jordan v. Thomas*, 2 G. 557. And the failure to state in the declaration the amount claimed, or the date of the promise, is cured by verdict; *Delahuff v. Reed*, W. 74.

6. *Variance between declaration and writ.* A variance between the declaration and the endorsement on the writ in describing the contract sued on, is cured by the statute. So is a defect in the endorsement on the writ, in omitting to state the sum actually demanded; and so a clerical error in the declaration in stating the note to be due before its date; *Shrock v. Bowden*, 4 H. 426.

7. *Pleas and replications.* The statute cures the objection, that the plea did not present an issue to the declaration; *Barnes v. Reynolds*, 4 H. 114. And so if a plea be a nullity, and issue be taken on it, the verdict for plaintiff cures the defect; *Henry v. Hoover*, 6 S. & M. 417. And a replication in these words, "Replication in short by consent," is good after verdict; *Halsey v. Pinchard*, 6 H. 279. And so, "issue on second plea," is good after verdict; *Pickitt v. Ford*, 4 H. 246. A replication to two pleas, which is an answer only to one, is good after verdict; *Barrow v. Wade*, 7 S. & M. 49. And so a failure to join issue by a *similiter*, is no error after verdict; *Harman v. James*, 7 S. & M. 111. And so a plea which professes to answer the whole case, but does not, is good after verdict; *Tucker v. Zollicoffer*, 12 S. & M. 591.

8. *Issue on negative pregnant.* An issue on a negative pregnant is cured by a verdict for either party, where the finding shows for which party the judgment should be given. But, as a general rule, a verdict for the party

who tenders a negative pregnant, will not show for which party the judgment should be entered; otherwise, where the verdict is for the other party; *Carmichael v. Browder*, 4 H. 431.

9. *Verdict where there is defect in the issue.* If no plea be filed, it is error to submit the cause to a jury, as on issue joined; and the irregularity is not cured by the statute of jeofails; *McAdams v. Massey*, 1 S. & M. 660; *Beall v. Campbell*, 1 H. 24; *Wilkinson v. Patterson*, 6 H. 193; but this is overruled in *Gairrett v. Felt & Reed*, 3 G. 137, where it was held that such a judgment is not prejudicial to defendant, and will not therefore be set aside. And so where the declaration contains four counts, and there be issue on three only, the verdict will cure the defect; *Smith v. Warren*, 2 H. 895. And so a misjoinder of issue is cured after verdict; *Chichester v. Daggett*, 2 H. 863.

11. *Discontinuances.* In a case where a discontinuance as to one defendant would operate as a discontinuance as to the others, if the latter do not insist on the entry of a discontinuance as to them, but plead, and a trial is had on the merits, the verdict cures the defect, and also the consequences of the discontinuance entered as to one; *McAfee v. Patterson*, 2 S. & M. 593. And so a discontinuance which occurred at common law, by the failure of plaintiff to take judgment on one or more counts in his declaration, which defendant had not pleaded to, is cured by the verdict; *Tucker v. Zollicoffer*, 12 S. & M. 591.

12. *Omission to state consideration in declaration.* The omission in the declaration to state a consideration for the promise sued on, is not cured by the statute of jeofails after verdict; *Minor v. Michie*, W. 24. But this seems to be overruled by the cases in 2 and 5 ante.

13. *Effect of on judgments.* The statute of jeofails applies to judgments only which are regular on their face, as presented by the record and justified by established practice in the particular case; it will not operate to justify a judgment not sanctioned by law, because the defendant has failed to make objection till after the verdict; and hence, it will not justify a judgment of revivor of another judgment where execution had regularly issued on the last judgment within a year and a day, because the defendant made no objection to the *scire facias*; *Locke v. Brady*, 1 G. 21.

14. *Ejectment: Wrong demise.* At the common law, an heir could not recover on a demise laid in his name, during the lifetime of the ancestor, because the heir then had no right of possession, but after issue joined this defect is cured by the statute of jeofails; *Winn v. Coles' Heirs*, W. 119.

15. *Effect of statute.* Under the statute of jeofails, all irregularities and errors in pleading are cured by verdict; *Hudson v. Poindester*, 42 M. 304. Yet the statute does not cure an omission to plead. The failure to reply to a plea of payment is not after

verdict cured, and for such omission the cause will be reversed; *Hegue v. Lewellen*, 42 M. 302. See ante, 10.

Joint Tenants.

See TENANTS IN COMMON.

1. *Widow of entitled to dower.* The widow of a joint tenant is entitled to dower in his share of the estate; *James v. Rowan*, 6 S. & M. 393.

2. *The possession of one, the possession of the other.* The possession of one joint tenant is the possession of the other, unless there be an actual ouster; *Ib.*

3. *Joint tenancy abolished.* Joint tenancy, so far as relates to the right of survivorship, is abolished by statute, both in realty and personalty; *Nichols v. Denny*, 8 G. 59.

See CHANCERY sub-division Partition. HUSBAND AND WIFE, 172, 173.

Journeys, Accounts.

1. *Not allowable.* The common law writ of "journeys accounts" by which, when an abatement of a suit happened without fault imputable to the plaintiff, he was permitted to bring a fresh suit, which was a *quasi* continuance of the first writ, and placed the plaintiff in the same situation that he would have been in if he were proceeding on that writ, is inapplicable to our system of jurisprudence, and not allowable in this State; *Crane v. French*, 9 G. 103; see *Davies v. Lowndes*, 49 E. C. L. R. 762, and authorities there cited, for a full discussion of this subject.

Judge.

1. *May change his opinion.* A judge may change his opinion during the progress of a trial at which he presides, though the opinion be excepted to and embodied in a bill of exceptions; *Winn v. Cole*, W. 119.

2. *Judge of criminal court may re-examine party committed.* The judge of the criminal court may re-examine the cause of commitment, and remand or discharge the prisoner, as he shall judge him guilty or innocent; *Doty's Case*, W. 230.

3. *Judge may give evidence.* A judge cannot give judgment on his private knowledge; he must be sworn to give evidence like a juror; it is error, therefore, for a probate judge to refuse letters of administration to the next of kin, upon the ground that within his private knowledge, the applicant had *manu-a-potu*; *Smith v. Moore*, 3 H. 40.

4. *Judge may refuse to hear evidence when satisfied.* When an issue on the sanity of a testator is tried before a judge, if he be entirely satisfied, from the evidence already given, of the sanity of the testator when the will was made, he may refuse to hear testimony as to his insanity after that time, but such evidence is competent, and it would be error to exclude it from the jury, if the issue were tried by one; *Bruck v. Luckel's Execu-*

tor, 4 H. 459. And when the court is advised of the facts to be proven, and it refuse to hear evidence to prove them, it would be ground to reverse the judgment, as it would have been if this testimony had been excluded from the jury; but the High Court will consider that the facts so offered to be proven were not sufficient, in the judge's opinion, to change his opinion, and will consider the propriety of the judgment as if the testimony had been admitted, and if, on that hypothesis, the finding be right, it will be sustained; *Parker v. Whiting*, 6 H. 352.

5. *Selection of special judge by statute.* The statute authorizing the parties to select a member of the bar to preside as judge, when the presiding judge is disqualified from interest, does not apply to criminal cases; *Peter's Case*, 6 H. 326.

6. *Appointment of special judge constitutional.* The statute authorizing the appointment of a special judge where the presiding judge is disqualified from interest, is constitutional, and the fact that the special judge acts in the name of the regular judge, is no violation of the maxim, "that no man shall be judge in his own case;" *Grinstead v. Buckley*, 3 G. 148.

See CHANCERY, sub-division Special Chancellor.

7. *Act of court the act of the judge.* Where the law requires a certain duty to be performed by the judge of a court, it is sufficient if it be done by the court if there be but one judge, since, in that case, the act of the court is necessarily the act of the judge; *Boon v. Bowers*, 1 G. 246.

Judges' Notes.

1. *Judges' notes no part of the record.* The notes of the presiding judge of a court is no part of the record of the court, and no evidence to show which of two judgments were rendered first; *Burney v. Boyett*, 1 H. 39. And they are no evidence after the term at which a judgment was rendered has expired, by which the judgment can be amended; *Dickson v. Huff*, 3 H. 165; *Rhodes v. Sherrod*, 8 S. & M. 97; *Boon v. Boon* 8 S. & M. 318. But the notes of a judge may be referred to by him in determining an application addressed to his discretion, as whether the plaintiff should be allowed to give security for costs, or the application be refused on account of his unreasonable delay; *Owings v. McKee*, 5 G. 144.

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I. Jurisdiction.

1. The Notice Necessary.

1. *Judgments without notice void.* The principle is universal, that a judgment, order, or decree without notice, is void, as to the party having no notice of the proceedings against him. The court must not only have jurisdiction of the subject matter, but of the person, to give validity to its decrees and judgments; and it is not in the power of the Legislature under our constitution to dispense with notice; *Jack v. Thompson*, 41 M. 49. A judgment rendered without notice, either actual or constructive, to the defendant, is utterly void, as if the court had undertaken to act in a matter beyond its cognizance; *Ex parte Heyfron*, 7 H. 127; *Gwinn v. McCarrroll*, 1 S. & M. 351; *Prentiss v. Mellen*, 1 S. & M. 521; *Zecharie & Kerr v. Bowers*, 1 S. & M. 584; S. C., 3 id. 641; *Eros v. Smith*, 7 S. & M. 85; *Jenkins v. State*, 4 G. 382.

2. *The notice must be given to all the defendants.* A judgment against several defendants, on notice given to one only, is erroneous as to all; *Demoss v. Camp*, 5 H. 516; *Ayer v. Bailey*, 5 H. 688; *Moody v. Lyles*, 44 M. 121; *Bacon v. Bevan*, 44 M. 293.

3. *Constructive notice.* Where constructive notice is substituted for actual and personal service, the most exact compliance with the statute is required; *Zecharie & Kerr v. Bowers*, 1 S. & M. 584; S. C., 3 id. 641. And if the constructive service of notice by copy left at defendant's residence, be resorted to, it must appear from the return that the defendant was not found, and that there was no competent person at the residence willing to receive the copy, and that it was left at some public place at the residence. The publicity of the place will not be inferred, unless expressly

stated; *Eskridge v. Jones*, 1 S. & M. 595; S. P., *Smith v. Cohea*, 3 H. 35; *Fatheree v. Long*, 5 H. 661; *Foster v. Simmons*, 40 M. 585; *Glenn v. Wragg*, 41 M. 654. See PROCESS, 14, 15.

4. *Same: As to proceedings in rem.* Judgments in proceedings *in rem* are valid, without any other notice to the owner of the thing than that which arises from its seizure, unless the statute requires other notice to be given. Proceedings by the Board of Police to lay out new roads are proceedings *in rem*; the going on the land and marking out the road by the jury, is a sufficient seizure to give constructive notice, and no other is required; *Stewart v. Board of Police of Hinds Co.*, 3 C. 479; *N. O. J. & G. N. R. R. Co. v. Hemphill*, 6 G. 17. Under the Rev. Code of 1857, notice served on the owner is required. See ATTACHMENT, 64 to 66.

5. *Apprenticing freedmen without notice.* A judgment of the Probate Court apprenticing a freedman orphan, under the Act of 22d November, 1868, made without notice to him, is void: *Jack v. Thompson*, 41 M. 49.

6. *Motion against sheriff and sureties.* The sureties of a sheriff are entitled to a notice of a motion against the sheriff and them jointly, for a false return; and a judgment against them without notice or appearance, is void; *Torrey v. Jordan et al.*, 4 H. 401.

2. The Jurisdictional Facts must appear on the Record.

7. *Same.* The jurisdiction of the court, both as to the subject matter and the person, can always be inquired into, whenever the judgment comes in question, either directly or collaterally, and the jurisdiction must affirmatively appear from the record; *Gwin v. McCurroll*, 1 S. & M. 351. Parol evidence is inadmissible to supply an omission in the record in this respect; *Root v. McFerrin*, 8 G. 17.

See PROBATE COURT, 46b, 195. EVIDENCE, 130.

8. *Recital as to notice.* That the record merely recites that defendant had notice, will not do, unless it also show that the defendant received it by the means prescribed by law; *Cloughton v. Black*, 2 C. 185. If the record state that due proof of acknowledgment of service was made it is sufficient; *Winston v. Miller*, 12 S. & M. 550. And in the Circuit Court in an attachment case, if the record recite that due proof of publication of notice was made, it is good; the rule, however, is otherwise in courts of special and limited jurisdiction; in them, the record must contain the proof; *Saffarans v. Terry*, 12 S. & M. 690. *Sed vide* as to courts of special and limited jurisdiction, *Cason v. Cason*, 2 G. 578. See *p. st.* 10. But if the recital be general, as "this day came the parties by their attorneys," &c., the recital will be construed to apply to such parties as the other parts of the record show have been served with process; *Edwards v. Toomer*, 14 S. & M. 75.

See PROBATE COURT, 195, 47. EVIDENCE, 130.

9. *Same: Presumption in favor of judgment as to jurisdictional facts.* The presumption of law, in favor of the correctness of judgments and decrees of courts of general jurisdiction, applies as well to judgments and orders adjudicating jurisdictional facts, as to others; and hence, if the record show that the court did adjudge that a fact existed, the existence of which was essential to the court's entertaining jurisdiction over a party, the record is conclusive in every collateral proceeding in which the validity of the judgment may be impeached; *Cannon v. Cooper*, 10 G. 784.

See EVIDENCE, 130.

10. *Same: In courts of special jurisdiction.* With respect to courts of special and limited jurisdiction, the rule is, that all necessary jurisdictional facts must be shown by the record, in order to sustain the jurisdiction; but this rule applies only to questions of jurisdiction as to the subject matter, for wherever the jurisdiction has once vested as to the subject matter, the rules which govern its exercise as to the person, with respect to process, evidence, &c., are generally the same as those applicable to courts of general jurisdiction. And hence, it is incompetent for a distributee attacking a final settlement of an administrator, to show by parol, that the requisite evidence was not before the Probate Court, when it ordered publication of notice against the distributee as a non-resident. The matter being within the jurisdiction of the court, its judgment is presumed correct; *Cason v. Cason*, 2 G. 578; S. P., *Cannon v. Cooper*, 10 G. 784; *Scott v. Porter*, 44 M. 394.

See EVIDENCE, 130. JURISDICTION, G.

3. Jurisdictional Facts Adjudged, cannot be Controverted.

11. *The judgment is conclusive.* A judgment is not merely *prima facie* evidence of its own validity, but conclusive, where the record shows jurisdiction over the person and the subject matter; and the statement of the record as to jurisdictional facts, as service of process, or appearance, are also conclusive, and cannot be impeached or denied. Judgments of courts of sister States of the Union and domestic judgments, stand on the same footing as to their validity. In either case the jurisdiction of the court rendering the judgment may be inquired into, and in both the statement of the record as to the jurisdictional facts, is conclusive; *Miller v. Ewing*, 8 S. & M. 421; S. P., *Wright v. Weisinger*, 5 S. & M. 210.

See EVIDENCE, 130.

12. *Appearance by attorney.* Where an attorney of the court enters the appearance of a defendant, who is not served with process, by filing a plea for him, and judgment is thereupon rendered against the defendant, whose appearance is so entered, the validity of the judgment as to the defendant whose appearance is so entered, cannot be impeached by a denial of the authority of the attorney to enter the appearance. And hence,

the court in which the judgment is rendered, cannot entertain a writ of error *coram nobis*, to reverse the judgment, and empanel a jury to try the question of the attorney's authority. But if the appearance were entered by the fraud and collusion of the plaintiff, chancery would give relief; and in the meantime the court in which the judgment was rendered, would stay the execution of the judgment until application could be made to a court of equity. But whether equity would interfere in a case free from fraud, on the ground of the insolvency of the attorney; *Quære? Ib.*

II. Void and Voidable Judgments.

1. Instances of Void Judgments.

13. *Judgment without notice or appearance is void.* A judgment without notice or appearance, is void; *Gwin v. McCarroll*, 1 S. & M. 351; and see also other cases cited in *an'e.* 1. 2. 3.

14. *Judgment without jurisdiction.* A judgment or decree rendered in a cause in which the court has no jurisdiction over the subject matter, is void; and a sale thereunder conveys no title; *Doe v. McDonald*, 5 C. 610; *S. P., Commercial Bank of Manchester v. Martin*, 9 S. & M. 613.

15. *Judgment entered at a subsequent term.* A judgment entered at a subsequent term, vacating a judgment rendered at a previous term, is itself void, though the judgment vacated be also void. The proper way to treat a void judgment, is to disregard it, and this may be done collaterally; *McComb v. Ellett*, 8 S. & M. 505. Whether the Circuit Court has power at a term subsequent to the one at which a void judgment is rendered, to set it aside on motion; *Quære? Bosbyshell v. Emanuel*, 12 S. & M. 63. But the court may at a subsequent term quash a void judgment on a forthcoming bond; *Buckingham v. Bailey*, 4 S. & M. 538. And the Circuit Court to which a void recognizance is returned, may at any time set aside the recognizances and the judgment thereon; *Butler's Case*, 12 S. & M. 470. The court has no power over a judgment, after the term at which it was recorded has expired; *Shirley v. Conway*, 44 M. 434.

16. *Judgments void for fraud as to creditors.* A judgment obtained by fraud and collusion between the defendant and a person not a party to the record, and in favor of a plaintiff who had no claims against the defendant, and no knowledge of or participation in the proceedings, with intent to cover up the property of the defendant from creditors and purchasers, is an absolute nullity, and all proceedings under it to enforce it, are also null and void; *Humphries v. Bartee*, 10 S. & M. 282.

17. *Same: Case in judgment.* Turner borrowed \$1500 from Bartee, and gave the latter a bill of sale of certain slaves as security for the debt. Turner, afterwards, in conjunction with an attorney at law, arranged a plan by which Bartee was to be deprived of these slaves, and in pursuance thereof, Turner made

a feigned note to one Reinhardt, who was a non-resident, but had recently removed from the county where Turner resided. On this note, a suit was brought by the attorney against Turner, and judgment recovered, and an execution thereupon levied on the slaves which had been sold by Turner to Bartee; the latter made regular claim thereto, under the statute, and on the trial of the issue thus made, Turner, after swearing he had no interest, was admitted as a witness, and testified that the bill of sale of the slaves which he had made to Bartee, was so made to defraud his (T.'s) creditors. The verdict and judgment were against Bartee, and the slaves were sold under this fraudulent judgment in favor of Reinhardt, and they were purchased by the attorney, who now claimed to be the assignee of the judgment. Afterwards, Bartee discovering the fraudulent nature of these proceedings, filed his bill to vacate the judgment in favor of Reinhardt, and all the subsequent proceedings thereunder, and to recover the slaves; and the court held that the judgment was an absolute nullity, and so were all the proceedings under it; and that the failure of Bartee, on the trial of his claim for the slaves, he being ignorant of the frauds, imparted no validity whatever to the judgment, and that he was entitled to the relief sought; *Held*, also, that a party about to be affected by proceedings under a void judgment, to which he was not a party, may attack the judgment in equity, and show that it was fraudulent; *Ib.*

18. *Judgment void for fraud.* There is this difference between a judgment on a void contract, and a judgment which, though regular on its face, is void for frauds. In the first case, the defendant is bound by the judgment, if he failed to make his defence, without a valid excuse; in the latter case, the judgment being a nullity, the rule requiring diligence does not apply; *Ib.*

19. *Judgment obtained by fraud.* A judgment obtained by fraud is void both at law and equity; *Plummer v. Plummer*, 8 G. 185.

See LAND LAWS OF UNITED STATES, 26.

20. *Judgment on gaming contract.* A judgment on a gaming contract is absolutely void, and will be relieved against in equity, though the defence may have been made at law, and this though the judgment is in favor of an innocent assignee of the contract for value; *Lucas v. Want*, 12 S. & M. 157; *Martin v. Terrell*, 12 S. & M. 571; *McAulry v. Mardis*, W. 307. And such a judgment will be annulled, even at the instance of a judgment creditor of the defendant; *Smither v. Keys*, 1 G. 179.

21. *Judgments against and in favor of dead persons.* A final judgment or decree against a dead party, is void though entered in accordance with an interlocutory decree, made whilst he was alive; *Gervault v. Anderson*, W. 30. And a sale of property thereunder conveys no title; *Parker v. Horne*, 9 G. 215. And the rule is the same when the plaintiff is dead; but if the use be dead, judgment in the name of the nominal plaintiff will be good; *Lee v. Gardner*, 4 C. 521; and

by statute, if the nominal plaintiff die, the action may proceed to judgment in the name of the nsee; *Humphreys v. Irvine*, 6 S. & M. 205; *Grand Gulf B'k v. Jeffers*, 12 S. & M. 486.

21a. *Judgment on acknowledgment of service.* The Circuit Court has no jurisdiction over the person of the defendant, unless he be served with legal process, or enter his appearance by plea, or unless he appear in open court in proper person, and consent that judgment shall be entered against him. Service, or acknowledgment of service of the petition or declaration, will not do. Hence, a judgment is void when rendered on the following agreement endorsed on the declaration: "I acknowledge service of the within complaint, waive summons, and consent that the same shall be docketed, and judgment rendered at the present term of the court now in session;" *Hemphill v. Hemphill*, 5 G. 68. *Sed vide* APPEARANCE, 8.

2. Instances of Judgments held not Void.

22. *Judgment rendered in name of trustee who is removed.* A judgment rendered in the name of a trustee for the State, after his removal, and the appointment of his successor, but in a suit commenced before the removal, is not void, and can be revived in the name of his successor; *Matthews v. Mosby*, 13 S. & M. 422.

23. *Against administrator.* If a suit be brought against an administrator in that capacity, and the judgment be against him individually, the judgment is not void, but only erroneous; *Barringer v. Boyd*, 5 C. 473.

24. *Erroneous judgment when court has jurisdiction.* The judgment of a court, when it has jurisdiction over the subject matter and the person, however erroneous, is not void. Therefore, the Probate Court, having full jurisdiction to determine whether a writing be a will or not, if it admit such writing to record and probate as a will, or as a part of the testator's will, its judgment is conclusive till reversed, and the executor cannot insist, in bar of the widow's petition for dower under such a probated paper, that it is not in fact a will but a deed; *Wall v. Wall*, 6 C. 409.

25. *Change of venue: Failure to transfer certificate.* If, on a change of venue in a civil case, the clerk fail to make a proper certificate to the record, and the parties go to trial without objection, the judgment thus rendered will not be void; *Work v. Harper*, 2 C. 517.

25a. *Defective return of service of process.* If the return of service of process be defective, and there is no appearance, the judgment will not be void, but only erroneous; *Smith v. Bradley*, 6 S. & M. 485; *Campbell v. Hays*, 41 M. 561.

See PROCESS, 17.

3. What Judgments may and may not be Attacked Collaterally.

26. *Void judgment may be so attacked.* A judgment which is void for want of notice, or jurisdiction over the person or thing, may be attacked collaterally; *Campbell v. Brown*,

6 H. 106; *McComb v. Ellett*, 8 S. & M. 505; *Hemphill v. Hemphill*, 5 G. 68, and cases digested in *ante*, 1. 2. 3. And so a judgment void for fraud; *Plummer v. Plummer*, 8 G. 185. And in this last case it was held, that a decree of divorce, obtained through fraud by the wife against the husband, in which she also obtained a decree for certain slaves, was no obstacle to the husband recovering the slaves on a bill framed for that purpose alone, and which did not seek to annul the decree for a divorce. (Handy, J., dissented.)

27. *Voidable and erroneous judgments good till set aside.* A judgment which is merely erroneous and voidable, cannot be impeached collaterally; *Smith v. Bradley*, 6 S. & M. 179; *Work v. Harper*, 2 C. 517; *Wall v. Wall*, 6 C. 409, for which see *ante*, 24.

4. Miscellaneous, as to Void Judgments.

28. *Affirmance of void judgment.* The affirmance of a void judgment, upon purely technical grounds, arising from a defect in the record whereby the true state of the case was not disclosed, does not make it valid *Fender v. Felts*, 2 S. & M. 535.

III. Presumption in favor of Judgments.

29. *Judgments presumed correct.* The judgment of an inferior court is presumed correct in the High Court, unless the record show the contrary; *Lee v. Bennett*, 2 G. 119; *Cason v. Cason*, 2 G. 578. See HIGH COURT, 49 to 64. This presumption exists wherever there is a possible state of facts which would justify the judgment; *Duncan v. McNeill*, 2 G. 704.

30. *Same.* The evidence on which the judgment and decrees of courts of general jurisdiction are founded, is not necessarily a part of the record, nor required to be shown by it. The law presumes they are founded on sufficient evidence; and in the absence of a statement of the evidence in the record, if it appear that the fact in question (though a jurisdictional fact) was adjudicated upon evidence deemed sufficient by the court, that adjudication cannot be collaterally impeached (citing *Cason v. Cason*, 2 G. 587); *Canon v. Cooper*, 10 G. 784. The same rule applies to judgments of the Probate Court; *Pollock v. Buie*, 43 M. 140.

See PROBATE COURT, 47. 195.

31. *Same: Case in judgment.* The record of a judgment rendered in the Circuit Court recited: "that it appeared to the satisfaction of the court, that the cause had been duly and properly revived against M. & C., administrators of J. M., in the High Court of Errors and Appeals, and by the order thereof; and that said administrators had thereby due notice of the pendency of the suit; and therefore ordered it to be revived against them: Held, that this order was sufficient evidence that the revivor had been properly made; *Id.*

32. *Presumption in favor of judgment in High Court.* When a judgment has been rendered in the High Court, the law presumes

that every fact essential to its validity was duly brought to the consideration of, and was settled by, the court, including the right and capacity of the parties to conduct the litigation; and every matter so adjudicated and involved in the record, becomes a part of the record, which proves itself; and it cannot be impeached or questioned in the inferior court, to which the judgment is sent for execution; *Henderson v. Winchester*, 2 G. 290.

See *ante*, 8, 9, 10, 11, 12. *Post*, 126. HIGH COURT, 148, 186.

IV. Judgments as Evidence.

See on this subject, EVIDENCE, 114 to 130.

1. Between Parties and Privies.

32a. *Is evidence of fact on which it is founded, between parties and privies only.* A judgment or decree is evidence of the matter on which it is founded between parties and privies only; between others it is proof only that it has been rendered; *Moore v. Cuson*, 1 H. 53; *Gridley v. Denney*, 2 H. 820; *Cartwright v. Carpenter*, 7 H. 328.

See EVIDENCE, 117.

33. *Evidence against privies: Judgment against buyer, evidence against warrantor.* In an action on a warranty of title to a chattel which has been recovered from the purchaser under an outstanding title, the record of the recovery of such judgment is conclusive evidence against the seller to show the fact of recovery, and the quantum of damages, and if the seller had notice of the pendency of the suit against the buyer, then the judgment will be evidence of the outstanding title; and the fact that the seller was in court during the trial for the recovery of the chattel, is sufficient notice to him; *Pickett's Executors v. Ford*, 4 H. 246.

See EVIDENCE, 119. *et seq.*

34. *Same.* In all cases in which one would have a right of action for indemnity against another, in case a suit is decided against the former, he may give the other notice of the pendency of the suit, and thus make him a quasi party and bound by the judgment; and the rule is the same, if the suit be prosecuted by the party entitled to the indemnity, in the name of the party liable to make the indemnity, and by his consent. Whether in such cases the judgment is conclusive, or only *prima facie* evidence of the facts established by it; *Quære?* It is conclusive in all cases in which the plaintiff's title is by estoppel, or in which the judgment is introduced by him to show his right of recovery; *Cartwright v. Carpenter*, 7 H. 328.

35. *Same: Another instance.* In an action against one who guaranteed the consideration of a note, it is competent to introduce evidence, the judgment rendered in a suit on the note in favor of the makers, and to show by parol, if the record does not otherwise disclose it, that the defence set up was a failure of consideration; and especially is this so, when the guarantor had notice of the pendency of the suit on the note, and permission to assist in prosecuting it. But the bill of

exceptions taken on the trial of that suit, cannot be read in evidence to show the failure of consideration; the witnesses should be produced, and the guarantor allowed an opportunity to cross-examine them; *Robinson v. Lane*, 14 S. & M. 161.

36. *Who are parties: And who are privies: Surety of guardian, &c.* Judgments are conclusive only against parties and privies. A person is bound as a party to a judgment, who has the right to control the proceedings in the cause, to make defence, to adduce and cross-examine witnesses and to appeal from a decision when an appeal lies. Privies are those who stand in mutual and successive relationship to the same rights of property, as heir and ancestor, executor and testator, donor and donee, copartners, joint tenants, &c.; and unless this relationship in reference to the property which is the subject matter of the suit, exists between a party to that suit and another, the latter is not concluded by the judgment. And no privy exists between a guardian, executor or administrator and the surety on his bond; and hence, in the absence of a special stipulation to that effect in the bond, a judgment against the former will not conclude the latter. But a decree against the guardian, &c., in the Probate Court in relation to his accounts, is admissible against the surety, as a part of the *res gestæ* and as the unsolemn admission of the principal, and hence is *prima facie* evidence against him; *Lipscomb v. Postell*, 9 G. 476.

2. Between Strangers.

37. *No evidence.* A judgment is evidence against parties and privies alone; it binds none others. Hence, where a sheriff is sued for a failure to pay over money collected on execution, he cannot show, by way of defence, a judgment of the court appropriating the money to another execution, if the plaintiffs were not parties to nor had notice of that proceeding; *Englehard v. Sutton*, 7 H. 99.

38. *Same: Another instance.* A decree in chancery rendered in a suit between two litigants as to their right to collect a judgment at law, will be a mere nullity as to the judgment debtor, unless he be made a party to the proceeding; *Clement v. Hawkins*, 8 S. & M. 339.

39. *Judgment against sheriff no evidence against his sureties.* A judgment against a sheriff is no evidence against his sureties to establish a breach of his official bond, if rendered without notice to them; *Carmichael v. The Governor*, 3 H. 236.

40. *Where parties are different.* See EVIDENCE, 121, 122.

3. Miscellaneous, on Judgments as Evidence.

41. *Variance between judgment sued on and the declaration: Judgment nunc pro tunc.* A judgment declared on as rendered at December term, 1830, is not proved by the production of judgment rendered at the December term, 1831, *nunc pro tunc* for December, 1830. The variance is material; *Howard v. Cousins*, 7 H. 114. See *post*, 125.

42. *Same: Judgment in Supreme Court.* In an action on a judgment rendered in the State of Tennessee, the judgment was described as rendered in the Supreme Court in that State. On plea of *nul tiel* record, it was shown that the judgment was rendered in the Chancery Court of that State, and on appeal, that a judgment of affirmance was rendered in the Supreme Court: *Held*, there was no variance, and the judgment was properly described as rendered in the Supreme Court of Tennessee; *Barringer v. Boyd*, 5 C. 473.

43. *Variance between judgment and execution.* An execution issuing on a judgment, is properly not a part of the record of the judgment, and if there be a variance between the execution and the judgment, this cannot affect the judgment; *Stephens v. Roby*, 5 C. 744. See *RECORD*, 16.

V. Form of Judgments, and Errors in Form.

See *EXECUTOR AND ADMINISTRATOR*, 317.

44. *Informal, is yet good: Instances.* A judgment entered for "five hundred dollars, the amount of the promissory note in the plaintiff's declaration mentioned, with costs," though technically informal, is good; *Warbington v. Norris*, 3 H. 227. And so a judgment in these words, "plea withdrawn, and judgment by default for eleven hundred dollars," is good and sufficient to support a judgment on a forthcoming bond taken on an execution emanating from it; *Miller v. Patton*, 3 S. & M. 463.

45. *Other instances of informal judgments held good.* One of the defendants pleaded, and upon his plea the jury found for the plaintiff; the other defendant made default, and judgment was entered for the amount of the verdict against both, without any formal entry of judgment by default against the one who failed to plead: *Held*, that the judgment was good and would not be reversed; *Rappleye v. Hill*, 4 H. 295. But if in such a case the judgment be against the defendant in the singular number, it will be construed to be against the one who pleaded alone and not to embrace the others; and the judgment will, therefore, be erroneous in not disposing of the defendant who had not pleaded; *Henry v. Halsey*, 5 S. & M. 573.

46. *Failure of judgment to embrace all found by verdict.* A judgment should embrace all matters well found by the verdict, and a failure to enter judgment for any matter so found, will not raise the presumption that there was no evidence to sustain the finding in that respect. If the verdict were deficient for want of evidence, objection should be made by motion to set it aside; *Abbey v. Merrick*, 5 C. 320.

47. *Judgment on penal bond.* A judgment on a penal bond should be for the penalty of the bond, to be discharged, however, upon payment of the amount of damages found by the jury; but if the judgment be for the damages, it will be a substantial compliance with the rule and no ground for reversal; *Brad-*

ford v. Curlee, 41 M. 558; *S. P., Downs v. Ladd*, 4 H. 40; in which the verdict on a bill single was for the principal and interest as damages in a single sum, instead of a sum for the debt and a sum for the damages, and it was held good.

48. *Construction of judgment against an administrator.* Where the action is against an administrator in his representative capacity, the verdict and judgment against "the defendant," will be construed to be against him in his representative capacity; *Bozmin v. Brown*, 6 H. 349. See *EXECUTOR AND ADMINISTRATOR*, 317, 318.

49. *Judgment which does not set out plaintiff's name.* A judgment will not be reversed when the names of the firm who are plaintiffs in the suit are set forth in the declaration, and the judgment merely states the firm name in the caption, and recites that "the plaintiffs do have and recover," *c.*; *Presley v. Anderson*, 42 M. 274. See *post*, 51.

50. *Clerical error in: Correction.* If in an action against an administrator, the judgment be entered against the defendant individually, it is a mere clerical error, which the court in which it is rendered may correct whenever it becomes necessary to use the judgment in evidence in that court; and it seems without correction it is a good judgment against the defendant as administrator; *Hoggatt v. Montgomery*, 6 H. 93. In such a case the court in which a suit is brought to enforce the judgment, has no power to correct the error; it can only be corrected in the court where the judgment was rendered, or on writ of error; *Barringer v. Boyd*, 5 C. 473.

51. *Insertion of parties' names in final judgment.* The insertion of the names of the parties in the entry of the final judgment is unnecessary, if there be enough in it to connect it with the other parts of the record in which the names are entered, so as to make the judgment a part of the record; and hence, if the clerk, in making the entry, err in the name of the plaintiff, as, for instance, using "Brandon Bank" for "Mississippi and Alabama Railroad Company," it will be immaterial, and the judgment good; *Grimball v. Miss. & Ala. R. R. Co.*, 3 S. & M. 38. And so where the declaration sets out the names of the partners, and the judgment merely states the firm name, and recites "that the plaintiffs do recover," &c., it is good; *Presley v. Anderson*, 42 M. 274.

52. *Omission of word "dollars" in judgment.* The verdict and judgment must correspond with the suit, and for this reason a verdict and judgment in an action for the recovery of money, which are regular in all things, except in omitting the word "dollars," will be good, and that word will be supplied by intendment; *Carr v. Anderson*, 2 C. 188.

53. *Acquiescence in clerical error.* Great indulgence is extended to clerical misprisions, and when they have been acquiesced in for a long time, the omission or inaccuracy, if it reasonably appear what was intended, will

be supplied by intendment; and, therefore, where in the entry of a judgment, the words, "it was considered by the court that the plaintiff recover," were omitted, and the defendant afterwards acquiesced in the sufficiency of the entry as a judgment, by procuring an injunction restraining the execution of the judgment upon other grounds, and kept up the litigation for twelve years, he will not be permitted then to say there was no formal judgment against him; *Davis v. Hoopes*, 4 G. 173.

54. *General judgment on all the counts* By the common law, where there are several counts in a declaration, and some of them bad, and some good, if judgment be entered generally on the declaration, it will be erroneous. But this rule of the common law is changed by the statute (H. & H. 591), providing that where there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good; *Scott v. Peebles*, 2 S. & M. 546.

VI. Judgments by Default.

1. Generally.

55. *Cannot be taken after plea* A judgment by default cannot be taken when there is a plea on file, undisposed of; *Selser v. Wilkinson*, W. 108; *Taylor v. McNairy*, 42 M. 276; and where in the record for the High Court, pleas appear before the entry of the judgment by default, it will be presumed they were filed before judgment, though there is no statement showing when they were filed; *Tomlinson v. Hoyt*, 1 S. & M. 515; *Dickson v. Hoyt*, 3 H. 165; *Irving v. Montgomery*, 3 H. 191. So where the record recites that the writ was returned into court on the first day of the term, and that "thereupon" the defendant filed his plea, which is set out in the appropriate place; it was held that the plea appeared to be properly filed, and that the judgment by default was erroneous; *Purvis v. Forbes*, 5 H. 518.

See PRACTICE, 23, *et seq.*

56. *Effect of judgment by default.* If a party permit judgment by default to be taken against him, it is *per se* an admission of a cause of action, though the declaration should not show it, by failing to aver the existence of a fact which is essential to the defendant's liability, which, however, he might waive. Having failed to plead or demur, he cannot gainsay the judgment; *Claiborne v. Planters' Bk.*, 2 H. 727; S. P., *Winn v. Levy*, 2 H. 902; *Irwin v. Williams*, W. 314.

57. *Failure to state amount in.* If in entering judgment by default, the clerk omit to state the amount, the court cannot at a subsequent term enter a new judgment without notice to defendant. The mode to correct is by petition, and notice as prescribed by the statute, allowing the amendment of judgments (H. & H. C. 18); *Poole v. McLeod*, 1 S. & M. 391. Such a judgment is void, and the amount cannot be inserted by the clerk in making up the final record; *Claughton v. Black*, 2 C. 185.

58. *Where some of the defendants do not plead.* Where some of the defendants plead, and some do not, judgment by default should be entered against the latter; but if there be no formal judgment by default, and judgment for the amount of the verdict against those pleading be entered against all, it will be good; *Rappleye v. Hill*, 4 H. 295; *Henry v. Halsey*, 5 S. & M. 573.

59. *Can only be taken on notice or appearance.* It is error to take judgment by default against a party who has neither been served with process nor entered his appearance; *Prentiss v. Mellen*, 1 S. & M. 521.

60. *Good on notice without appearance.* When the defendant has been duly served with process, judgment by default may be entered against him without an entry in the record showing his appearance; *Carler v. Daizy*, 42 M. 501. See post, 66.

2. When Judgment by Default may be Final.

61. *Same.* Judgment by default final may be entered against the endorser of a promissory note; *Owen v. Little*, W. 326. In such case the interest is calculated by the clerk; *Washington v. Planters' Bk.*, 1 H. 231. So on an action for an award for a specific sum; *Chace v. East*, W. 439. But judgment by default on a foreign note, for principal and interest, cannot be made final, it being necessary to have a jury to ascertain the fact of the rate of interest; *Fretwell v. Dinsmore*, W. 484. And when the declaration on a note contains the money counts, but has no bill of particulars filed, judgment by default final may be taken for the note and interest; *Gridley v. Briggs*, 2 H. 830. The clerk may also calculate the statutory damages on protest, on judgment by default; *Grigsby v. Ford*, 3 H. 184. Judgment by default final may be entered whenever the action is for a sum certain, and on a written instrument which ascertains the amount due; but not when a part or the whole of the demand is upon open account; *Sundford v. Campbell*, 7 S. & M. 107.

See PRACTICE, 28, *et seq.*

3. When they are not Final.

62. *When not final.* A judgment by default on a foreign note cannot be final—a jury must ascertain the interest; *Fretwell v. Dinsmore*, W. 484. Nor where the suit is on open account; *Sanford v. Campbell*, 7 S. & M. 107. And where in an action of covenant on a bond for a breach of its conditions, the defendant makes default, the judgment is not final; it is necessary to prove the breach and the damages, the bond being merely an inducement to the action; *Carmichael v. The Governor*, 3 H. 236.

63. *Same.* In actions on written instruments for a sum certain, the clerk is authorized by statute to make the calculation of the amount due, on the default of the defendant. But this does not authorize judgment to be entered in that way, where there is a plea of the defendant answering the whole action, and a replication by special traverse

in which it is confessed that only a part of the sum sued for is due, and in which are also stated the facts from which the amount due can be calculated, and to which there is no rejoinder by defendant. In such a case there should be a judgment *nil dicit*, with a writ of inquiry; *Grover v. Gaunt*, 6 S. & M. 317.

64. *Revised Code of 1857 on the subject.* In actions of debt for a sum certain, and in actions founded on any instrument of writing ascertaining the sum due, or upon an open account, where a copy of the account is filed with the declaration, if judgment be rendered on demurrer, or by confession, or by default for want of appearance or plea, the clerk shall calculate the amount due for principal and interest, and judgment shall be entered therefor; and such judgment shall be final on the last day of the term, unless set aside. And in actions where the sum due does not appear as aforesaid, and in all actions sounding in damages, if the defendant do not appear and plead, interlocutory judgment by default shall be entered, with a writ of inquiry; Rev. Code of 1857, p. 521, art. 253.

3. Setting aside Judgment by Default.

65. *Judgment entered prematurely.* If a judgment by default be rendered on the third day of the imparlance term, and before the time of pleading has expired, it will, nevertheless, be good, if no application be made to set it aside, and for leave to plead; *Winston v. Miller*, 12 S. & M. 550. See PRACTICE, 34.

66. *Setting aside judgment by default.* Judgment by default will be set aside on affidavit of merits and payment of costs, when the opportunity for trial at the regular term has not been lost; *Porter v. Johnson*, 2 H. 736. And where a writ of inquiry is awarded, the judgment is not final until the writ of inquiry is executed, and the adjournment of the term at which the writ was executed; and hence, such a judgment may be set aside at a term subsequent to its entry, if the writ of inquiry has not been executed; *Maury v. Roberts*, 5 C. 225.

VII. Amendment of Judgments.

See AMENDMENT, 24. 25.

67. *Statute of 18'2. H. C. p. 877, §§ 96. 97. 98.* By this statute it is provided, that where, in the record of any judgment or decree of any superior court of law or equity, there shall be any mistake, miscalculation or misrecital of any sum or sums of money, &c., or of any name or names, and there shall be among the record of the proceedings in the suit, * * * any verdict, bond, bill, note, or any other writing of the like nature or kind, whereby the judgment or decree may be safely amended, it shall be the duty of the court in which the judgment was rendered, or the judge thereof, to amend the judgment thereby, on reasonable notice to the opposite party. This statute is re-enacted in the Rev. Code of 1857, p. 509, art. 186.

68. *Amendment must be on notice.* A judgment cannot be amended except on proper notice to the other party; *Dorsey v. Peirce*, 5 H. 173; yet, if the other party appear and contest the amendment, he cannot complain that he had no notice; *Graves v. Fulton*, 7 H. 592; *Shirley v. Conway*, 44 M. 434. Nor can an order made in vacation amending a judgment, be itself, set aside in term time, except on due notice to the adverse party; *Graves v. Fulton*, *supra*. And so, if in entering a judgment by default, the clerk omit to state the amount, the court cannot, at a subsequent term, enter a new judgment, without notice to the defendant. The proper mode to correct it, is by petition and notice under the statute; *Poole v. McLeod*, 1 S. & M. 39; S. P., *Russell v. McDougall*, 3 S. & M. 234. But where the error is a mere clerical one, as entering, in an action against an administrator, a judgment against him individually, the court may correct it at any time, when it is offered in evidence; *Hoggatt v. Montgomery*, 6 H. 93. See *ante*, 50.

69. *What judgments may be amended.* Judgments by default, as well as other judgments, may be amended, when the clerk has made a miscalculation of the amount due; *Poole v. McLeod*, 1 S. & M. 392; *Graves v. Fulton*, 7 H. 592. But where a verdict is rendered and no judgment entered on it the court must, at that term, give a day, which must not be beyond the next term at which the judgment will be entered; and if this be not done, the cause goes off the docket and is discontinued, and judgment cannot afterwards be entered on it. Such a case is not within the statute, allowing amendments of judgments; *Ralph v. Prester*, 6 C. 744. A judgment cannot be amended after forthcoming bond given on it and forfeited; *Burns v. Stanton*, 2 S. & M. 457; *Dowd v. Hunt*, 10 S. & M. 414.

70. *Limitation in amendments.* There is no limitation as to the time in which applications for amendment under the statute, shall be made; *Graves v. Fulton*, 7 H. 592. But a judgment cannot be amended after forthcoming bond taken and forfeited; *Burns v. Stanton*, 2 S. & M. 457; *Dowd v. Hunt*, 10 S. & M. 414.

71. *The evidence necessary to amend by.* A judgment cannot be amended or entered at a subsequent term as of a former term, *nunc pro tunc*, on parol evidence, or from entries on the judge's docket. It can only be amended where there is something in the record to amend by; *Rhodes v. Sherrod*, 8 S. & M. 97; *Boon v. Boon*, 1b. 318; *Russell v. McDougall*, 3 S. & M. 234; *Dickson v. Huff*, 3 H. 165; *Moody v. Grant*, 41 M. 565.

72. *Entry of judgment nunc pro tunc.* If the verdict be properly recorded, and the entry of the judgment on it void, the court may, at a subsequent term, enter the proper judgment; *Easterling's Case*, 6 G. 210. And so if a verdict be rendered at one term of the court, and from any reason the judgment of the court be not entered, it is competent for the court at a subsequent term to order a

judgment according to the verdict to be entered, *nunc pro tunc* (see *ante*. 69); but if there be no verdict in the record, this cannot be done. When the only evidence of the verdict contained in the record, is the recital of the clerk in entering the judgment *nunc pro tunc*, it will not do, and the judgment so entered will be set aside, though no objection be made by the adverse party to the entry at the time it was made; *Gray v. Thomas*. 12 S. & M. 111.

72a. That judgments are only amendable by matter of record; see *AMENDMENT*, 25.

VIII. Assignment of Judgments.

See *ASSIGNMENT*, 4.

IX. Reversal of Judgments.

73. *Effect of reversal.* If the original judgment be reversed on writ of error, the forthcoming bond and judgment thereon are *ipso facto* made void, without a judgment of quashal; *Hoy v. Couch*, 5 H. 188. After reversal, the rights of the parties stand exactly as they were before its rendition, at least as to all matters which transpired before its rendition. Whatever specific thing has been taken in execution and not sold, is to be restored, and a writ of restitution will issue for that purpose; *Harris v. Newman*, 5 H. 654. But the reversal will not invalidate a sheriff's sale made under it, before reversal, to a *bona fide* purchaser; *Natchez Insurance Co. v. Helm*, 13 S. & M. 182.

73a. *Same: Where there is an agreement.* If, in a contest between several judgment creditors in the Circuit Court in relation to the application of money in the hands of the sheriff, the creditors whose claims are postponed, signify an intention to appeal or sue out a writ of error, and it be thereupon agreed, between all the parties, that the sheriff shall loan out the money for the benefit of the party who shall succeed in the litigation; then, if the creditor whose claim was preferred in the Circuit Court, receive the money from the sheriff in payment of his judgment, he will be compelled to refund it, if on determination of the writ of error, his claim shall not be sustained, although he received the money before the writ of error was sued out, and whilst the judgment in his favor was good and unreversed; *Gray v. Edwards*, 1 G. 218.

74. *Erroneous to one is erroneous to all.* If a judgment be erroneous as to one defendant, as for want of notice to him, it is erroneous as to all; it cannot be severed; *Demoss v. Cump*, 5 H. 516; *Ayres v. Baileu*, 5 H. 688; *Graves v. Williams*, 2 S. & M. 286. See *vide* HIGH COURT, 189, 199.

75. *Erroneous on its face.* If a judgment on its face recite a state of facts which show it to be erroneous, the High Court will so declare it without a bill of exceptions; *Com'l Bk of Manchester v. Coroner of Yazoo Co.*, 6 H. 530.

X. Revivor of Judgments.

See *REVIVOR*, 2, 8 to 13. *SCIRE FACIAS*, 2, 6, 8, 9, 10, 11, 12, *et seq.*

76. *Form of judgment.* A judgment on *scire facias* to revive a judgment, should be an award of execution, and not *quod recuperet*; *Locke v. Brady*, 1 G. 21.

See *SCIRE FACIAS*, 26. *REVIVOR*, 25.

XI. Satisfaction and Payment of Judgments.

See *EXECUTION*, 51 to 68.

77. *Payment to clerk.* Payment of a judgment to the clerk of the Circuit Court in which it is rendered, is no satisfaction of it; *Lewis v. Johnson*, W. 260; S. P., *Matthews v. Montgomery*, 3 C. 150.

See *CIRCUIT CLERK*, 1.

78. *Where condemnation of property a satisfaction.* Where a creditor succeeds in condemning to the payment of his judgment, money in the hands of the sheriff, collected for the debtor, such condemnation is *pro tanto* a satisfaction of the judgment, whether the creditor receive the money from the sheriff or not, unless the creditor, immediately after obtaining the condemnation, re-vest the debtor with the right to demand and to recover from the sheriff the money so collected; *Skinner v. Jayne*, 2 C. 567.

79. *Payment by sheriff.* The payment by a sheriff of an execution, which he has become liable to pay, by virtue of a failure to return it according to law, is a satisfaction of the judgment, and does not operate as a transfer of the plaintiff's right to the sheriff. Such a transaction is not within the operation of the statute, which provides, that when the sheriff shall pay a judgment rendered against him for a failure to return an execution, the plaintiff's right in the original judgment shall vest in him; *Rollins v. Thompson*, 13 S. & M. 522; *Morris v. Lake*, 9 S. & M. 521.

80. *Bond under valuation and forthcoming bond law.* The forfeiture of a bond given under the valuation law, by even a part of the defendants, is a satisfaction of the judgment, and a discharge of the other defendants not joining in the bond; *Davis v. Hoopes*, 4 G. 174. The rule is the same where a forthcoming bond is given and forfeited; *Stewart v. Fuqua*, W. 175. And if the forthcoming bond be quashed by a void judgment (after return term), the judgment is still satisfied, and an execution on it will be void; *Moody v. Harper*, 6 C. 615. See *FORTHCOMING BOND*, 32, 32a.

81. *Presumption of payment.* No presumption of the payment of a judgment arises from a failure to issue an execution, until after the lapse of a year and a day from its rendition; and the judgment creditor within that time seeking to compel the defendant (an administrator) to give new security, need not allege that the judgment is unpaid; *Meyer v. Dorrance*, 3 G. 263.

XII. Lien of Judgments.

See *FEDERAL COURTS*, 7, 10.

1. Nature of the Lien.

82. *Is not a right of property.* The general lien of a judgment does not *per se* constitute a right of property, but it confers a right to levy to the exclusion of adverse interests subsequently acquired; and when a levy is made it relates back to the date of the judgment (or the commencement of the lien) and cuts out intermediate encumbrances. Subject to this, the debtor may sell the property, or it may be levied on by any other creditor, who is entitled to hold it against every other person, except such judgment creditor, and even against him, unless he consummate his title by a levy and sale under his judgment; *Com'l Bk of Manchester v. Coroner of Yazoo Co.*, 6 H. 530; *Walton v. Hargroves*, 42 M. 18. The lien is neither *jus in re*, nor *jus ad rem*; it is not a property in the thing (on which it exists), nor does it constitute a right of action for the thing; it is a mere charge on the thing, which can only be enforced by taking it in execution. And hence, a purchaser of personal property, for a valuable consideration, on which a judgment lien exists, if he remove the property, so that it cannot be seized under the execution, is not responsible for its value to the judgment creditor. The rule which makes such a purchaser liable to a party having a lien on the property bought, is applicable only where the creditor has a direct technical trust in the property, and where the parties are special trustees, and hold the property as such; *Dzier v. Lewis*, 5 C. 579.

2. The Extent of the Lien.

A. ITS EXTENT, SO FAR AS RELATES TO THE NATURE OF THE PROPERTY OF DEFENDANT.

83. *No lien on choses in action.* A judgment is a lien only on that property of the defendant which can be seized and sold under execution, and hence, is no lien on choses in action; *Black v. McMurtry*, W. 389. Nor on a growing crop of defendant; a levy on it is prohibited by law, and if it be sold by the debtor before it is gathered, the buyer will take it in preference to a judgment against the debtor; *Planters' Bank v. Walker*, 3 S. & M. 409. It is not a lien on equities of redemption of the mortgagor; *Marlow v. Johnson*, 2 G. 128; *S. P., Thornhill v. Gilmer*, 4 S. & M. 153; *Baldwin v. Jenkins*, 1 C. 206; *Wolfe v. Dowell*, 13 S. & M. 103; *Boarman v. Callett*, lb. 149; *Henry v. Fullerton*, lb. 731; *Cantzon v. Dorr*, 5 C. 251. Nor on any equitable estate of the defendant; *Coleman v. Rives*, 2 C. 634; *Hogan v. Burnett*, 8 G. 617. Unless it be a complete equity; *Wolfe v. Dowell*, *supra*. And a judgment against an administrator is no lien on the realty; *Langston v. Abney*, 43 M. 161. But courts of equity will regard and treat them as liens on equities, and enforce them accordingly, by placing the judgment creditor in the place of the judgment debtor in regard to the equity; *Roach v. Bennett*, 2 C. 98. But it is now held that under the Act of 1857 (Rev. Code 308, art. 12), equities of redemption and incomplete equities are subject to sale under execution for

any debt of the mortgagor, except the debt secured by the mortgage; *Carpenter v. Bowen*, 42 M. 28.

See EXECUTION, 31.

83a. *Lien on land held by certificate of entry.* A judgment is a lien on land before the issuance of the patent, and whilst held by the purchaser from the United States, under a certificate of entry only; *Huntington v. Allen*, 43 M. 654.

B. ITS EXTENT TERRITORIALLY.

84. *Lien all over the State, under Act of 1824.* Under this act a judgment was a lien on the defendant's property not only in the county in which it was rendered, but in every other county in the State; *Com'l & R. R. Bk v. Helderburn*, 6 H. 536. But since the passage of the Act of 1841, the rule is different; judgments are no longer liens out of the counties in which they are rendered, or in which they are enrolled; and therefore if property be situated in a different county, where there is no enrolment of any judgment, and there be several judgments against the debtor, the execution from that judgment which is first received by the sheriff and first levied, will have priority over all others, without reference to the date of the judgments; *Gresham v. Roberts*, 2 S. & M. 471. And no lien in such cases, arises until the levy; *Huntington v. Allen*, 44 M. 654. But where the lien has once attached upon personalty, its removal to another county, without the consent of the plaintiff, cannot defeat the lien, the removal being a fraud upon the rights of the creditor; *Chilton v. Cox*, 7 S. & M. 791; *Stevens v. Mangum*, 5 C. 481.

85. *Restricting old liens, unless judgment enrolled.* The Act of 1841, taking away the lien of existing judgments, except in those counties wherein the plaintiff shall file an abstract of his judgment by 1st day of July, 1841, is constitutional; and on failure of the plaintiff to comply, the lien is lost; *Tarpley v. Hamer*, 9 S. & M. 310.

C. ITS EXTENT AS REGARDS PURCHASERS FROM THE DEFENDANT.

86. *No lien against second purchaser.* Under the enrolment law of 1844 (H. C. 892, § 8), the lien of a judgment extends only to the property of the defendant whilst it is owned by him or by a purchaser from him. It does not bind the property where there has been a resale to a sub or remote purchaser; *Stevens v. Mangum*, 5 C. 481. Whether this is the rule under the Act of 1857; *Quære?* It probably is.

3. Enrolment Law of 1844.

87. *Its effect on liens of prior judgment.* By the enrolment law of the 24th February, 1844, all judgments rendered prior to its passage, if enrolled by 1st July of that year, were to preserve their liens as they then existed, from their respective dates, in the same way as if no enrolment had been required; *Wyatt v. Beatty*, 10 S. & M. 463. And under that act all prior judgments which have not been enrolled, according to the provisions thereof, have lost their liens, and those enrolled after

the time limited by that act, become liens again only from the date of their enrolment; and this is the rule, though the omission to enrol is not the fault of the plaintiff, but results partly from the omission and neglect of the clerk to obey the plaintiff's instruction to enrol the judgment, and for which the plaintiff has paid him his lawful fees; but in such case the clerk will be liable for the damages, besides the penalty of \$500 prescribed by the statute; *Planters' Bank of Tennessee v. Conger*, 12 S. & M. 527.

88. *Same: Expiration of lien by lapse of two years: Limitation Law of 1844.* By the limitation law of 24th February, 1844, § 13, it was provided that the lien of all judgments theretofore rendered, should expire within two years from the passage of the act. Before the two years expired, to wit, on 19th February, 1846, the Legislature passed another act, which provides that the said 13th section shall not be so construed as to affect the right or impair the lien of any judgment, where the plaintiff or other persons interested, have been prevented from levying the execution, by virtue of a preceding levy under an execution emanating from a junior judgment, and where the officer levying the junior execution fails, refuses or neglects to sell the property levied on, by the 24th February, 1846: *Held*, 1st, that this last act having been passed before the bar to the lien had become complete under the first act, it would have the effect of a Legislative exception to the first act, and would be as effectual as if embodied in it; 2d, that proceedings under the junior execution, which did not prevent the levy of the older execution, would not prevent the bar of the lien of the older execution; 3d, that a levy by a United States marshal, on property of the defendant, which was claimed by another and which by agreement of all the parties was allowed to remain in the marshal's hands, the claimant not giving bond, did not prevent the levy on it of other executions against the defendant, as the marshal, after the agreement, was to be considered as in possession as bailee and not as marshal, and that on the determination of the claim against the claimant, the issue of the *distringas* to enforce that judgment, did not prevent the levy; 4th, whether the said 13th section of the limitation act, fixing the limitation at two years, or the enrolment law passed on the same day, which fixes the limitation at five years, shall prevail; *Quære?* But the subsequent recognition of the 13th section by the Act of 1846, gave it force over the enrolment law; *Planters' Bank v. Black*, 11 S. & M. 43.

89. *Same.* Under the said 13th section of the limitation act of 1844, the lien of all judgments rendered prior thereto, ceased within two years from the passage of that act, whether the judgments are enrolled or not. At the expiration of that period, the lien ceases, even as to property levied on under the judgment, but not sold within that time. So that, if there be a judgment against the defendant, rendered since that act, whose lien has not expired, it will be the duty of the

sheriff selling the property under the levy, to apply it to the junior judgment, the lien of which is valid; *Rupert v. Dantzler*, 12 S. & M. 697; *S. P. Emanuel v. Burnett*, 12 S. & M. 473. And if the sale be under several judgments rendered prior to the act of 1844, and under one rendered since that time, the last will be first satisfied, and the surplus, if any, will go to the others according to their priority in being levied; *Heizer v. Fisher*, 13 S. & M. 672. And so if the property has been levied on and sold under a junior judgment within the two years, and a levy is made on it under a judgment prior to the act, and of prior lien, and the sale is not made under this last judgment within the two years, its lien will be lost and the sale under the junior judgment will confer a good title; *Beirne v. Mower*, 13 S. & M. 427. And this rule is applied equally to personal and real property of the defendant; *Beirne v. Mower*, *supra*. And the lien expires with the two years, notwithstanding the levy was made within that time, and a sale was prevented by injunction; *Kilpatrick v. Byrne*, 3 C. 571. But these Acts of 1844, do not apply to prior judgments rendered in favor of the State, or in favor of a trustee for the State, for in that respect, they are mere statutes of limitation, which do not affect the State; *Josselyn v. Stone & Matthes*, 6 C. 753.

90. *Sheriff's sale under enrolment law of 1844, is good against all liens.* Under the enrolment law of 1844 (H. C. 891), all sales of property of a judgment debtor under execution are made for the benefit of the creditor having the oldest lien, and the purchaser takes it discharged absolutely of all judgment liens and it is the duty of the sheriff or marshal, making the sale, to apply the money to the oldest lien; in such case, the lien which is lost on the property, attaches to the proceeds of the sale. If the sale be made under a judgment in the United States court, having a junior lien, and by agreement between the plaintiff and the purchaser, the money is not paid to the marshal, but the purchaser's notes are taken by the creditor, then a creditor having an older judgment lien, may have the note applied to his benefit, and the purchaser himself being threatened with a levy on the property bought by him, under the older judgment, may interplead the plaintiff in the judgment under which he bought, and the one threatening the levy, and have the threatened levy enjoined, and the notes applied to the older judgment; *Brown v. Bacon*, 5 C. 589. See **SHERIFF AND SHERIFF'S SALE**, 84.

91. *Sale by constable under Act of 1844.* A constable is not bound to examine the judgment roll of his county before appropriating money made by him under an execution in his hands; *Hightower v. Taylor*, 6 C. 389.

92. *Acts of 1857 and 1824, as to appropriating proceeds of sales.* There was no provision in the Act of 1824, requiring the sheriff to appropriate money arising from proceeds of sales under execution, to any execution not levied on the property.

Under the Act of 1857, there is no provision requiring the sheriff to consult the judgment roll, and appropriate money to the oldest enrolled judgment. The act provides that judgments shall have priority, according to the order of their enrolment, and then proceeds as follows: "But the priority of liens provided for in this article, shall not extend to judgment creditors who fail, neglect, or refuse to sue out execution for the satisfaction of his, her or their judgments, until a junior judgment creditor has, by due diligence, caused his execution to be levied on the property of the defendant; but in all such cases, the sale by the sheriff or other officer, shall vest the title of the defendant or defendants in the purchaser, and the proceeds of such sale shall be applied to the satisfaction of the junior judgment creditor."

Provided, That before said junior judgment creditor shall cause a levy to be made, he shall give notice to older creditors in execution, that unless they proceed to levy within ten days, he will proceed to levy; in that case, he shall have a preference under his levy."

Under this statute, the purchaser, under a junior judgment, will take the property absolved from the older lien, whether the notice has been given or not. And the proceeds of the sale under a junior judgment, will go to the older judgment, both being duly enrolled, where at the time of the sale, executions from both were in the sheriff's hands, and only the junior one levied, unless the creditor has been guilty of some act of negligence which would postpone his lien; *M. & O. R. Co. v. Trotter*, 7 G. 416.

See *post*, 970.

93. *Not necessary to enrol decree foreclosing a mortgage.* It is not necessary to enrol a decree foreclosing a mortgage, in order to preserve the lien of the mortgagee; the decree in such case creates no lien, but is a mere step to enforce the rights created by the mortgage, and is not within the act; *Planters' Bank of Tennessee v. Conger*, 12 S. & M. 527.

94. *Form of entry on the roll as to parties' names.* In the entry of a judgment on the judgment roll, it is not necessary to the validity of the lien thereby created as against the defendant, whose name is inserted on the roll, that the names of the other defendants on the judgment should be also entered. The entry is sufficient, if it shows a judgment against the person in reference to whom information is sought, by an inspection of the roll. Nor in such case is it necessary that great precision should be used in the entry of the name of the plaintiff in the judgment. If the entry be sufficient to refer the inquirer to the records, and to show that it is the same judgment found on the records, it is all that is required; *Josselyn v. Stone & Matthews*, 6 C. 753.

4. Liens generally, under the Act of 1824.

A. WHEN THE LIEN COMMENCES.

95. *From date of judgment.* Under the

Act of 1824, judgments are a lien on all the property of the defendant, wherever situated in the State, and from the date of their rendition; *Burney v. Boyett*, 1 H. 39; *Com'l B'k of Manchester v. Helderburn*, 6 H. 536; *Andrews v. Wilkes*, 1b. 554.

B. TWO JUDGMENTS OF SAME DATE.

96. *First entry has priority.* Where two judgments are entered on the same day against the same defendant, that has a prior lien which is first entered; *Biggam v. Merritt*, W. 430; *Smith v. Ship*, 1 H. 234; *contra*, *Burney v. Boyett*, 1 H. 39, which was overruled by *Smith v. Ship*, *supra*. And the rule is the same under the enrolment law of 1857; *Reed v. Haviland*, 9 G. 323, where it is held, that if two judgments be entered against the same defendant on the same day, that which is first entered and first enrolled, has a prior lien.

C. LOSS OF PRIORITY OF LIEN OF OLDEST JUDGMENT.

See *EXECUTIONS*, 42a, *et seq.*

97. *Diligence required: Negligence: Fraud of plaintiff.* The lien of a judgment, under the Act of 1824, is a mere security for the debt, to be pursued with diligence and good faith. If a prior execution creditor voluntarily suspends his execution until a junior execution shall be levied, he will lose his priority; and the proceeds of the levy and sale under the junior execution, will go to its satisfaction; *Michie v. Planters' Bk*, 4 H. 130. But the lien can only be defeated by some act of the senior creditor, deemed fraudulent as to the other creditors. Hence an injunction preventing a levy, though it suspends, does not destroy or postpone the lien, and when it is dissolved, the lien is restored with all its incidents; *Smith v. Everly*, 4 H. 178. The lien will not be postponed to a junior execution first levied, unless there was an agreement to stay proceedings under the senior judgment, or gross negligence in levying the execution. It is difficult to lay down a rule as to how much passive negligence is necessary to postpone the lien; but if the execution be issued and put in the hands of the sheriff, it will not be postponed merely because a junior creditor pointed out to the sheriff property, and caused his execution to be levied on it first; *Robinson v. Green*, 6 H. 223; *S. P., Lucas v. Stewart*, 3 S. & M. 231. And mere delay in suing out the execution, which does not amount to fraud, will not postpone the lien; *Foute v. Campbell*, 7 H. 377; *Doe v. Ingersoll*, 11 S. & M. 249; *S. P., Grand Gulf B'k v. Henderson*, 5 H. 292. There must be some positive act of omission or commission on the part of the plaintiff; the failure of the sheriff will not affect him; *Lucas v. Stewart*, 3 S. & M. 231. (See *post*, 109, as to sheriff's failure.) See *ante*, 92.

97a. *Loss of lien under the Act of 1857: Case in judgment.* The plaintiff obtained judgment on 8th of September, 1860, which was duly enrolled; and sued out execution

which, however, was superseded by writ of error. The writ of error was dismissed, but at what time did not appear; the plaintiff died in 1864, and as the writ of error may have been dismissed just before his death, no negligence is shown in his lifetime. In November, 1866, an administrator was appointed, and he caused the judgment to be revived in his name, at the next term, to wit: on 16th March, 1867. On 13th September, 1860, a junior judgment was rendered against the same defendant, which was also duly enrolled; an execution was issued on the junior judgment, returnable at March term 1867, and on 4th February, 1867, it was levied on land, which was sold 16th March, 1867, the day of the revival of the senior judgment: *Held* that the proceeds of the sale went to the older judgment; that there had been no laches in the lifetime of plaintiff, or after the appointment of his administrator; that no laches could be imputed between the plaintiff's death and the appointment of his administrator; and that the junior execution was not entitled to the proceeds, because the plaintiff had not given, and could not give, the notice to the senior creditor to levy, as required by the Act of 1857 (see *ante*, 92); *Dibble v. Norton*, 44 M. 158.

98 *Loss of priority of lien: Difference between stay of execution and negligence.* There is a difference between a stay of execution and a mere delay in suing it out. The former is the positive act of the plaintiff, interposed to prevent a levy; the latter, is a mere failure to act. A mere delay in suing out an execution does not interfere with the lien, unless it be under such circumstances as would warrant an inference of fraud—a design to protect the debtor from other judgments. It is impossible to lay down any rule as to the length of the delay which would be fraudulent. Each case must be determined upon its own particular circumstances. If it appear that when the delay commenced, a considerable payment on the execution was made to the sheriff, this will be a circumstance to rebut fraud in the subsequent delay. If the delay be continued until a levy and sale are both made under a junior execution, the lien will be postponed, but if a levy only is made before the delay ceases, it will not have that effect; *Foute v. Campbell*, 7 H. 377.

99 *Effect of expiration of delay, before rendition of a junior judgment.* The lien of a judgment is not lost or postponed by a stay of execution, which expires before the rendition of the junior judgment. The reason why the lien is postponed by a stay of execution is, that such a rule is necessary to protect other judgment creditors from fictitious liens, and to prevent a judgment creditor from using his lien to protect the defendant, to the prejudice of other judgment creditors; and hence, cannot apply when there are no judgment creditors whose rights can be prejudiced; *Foute v. Campbell*, 7 H. 377.

100 *Agreement for delay not acted on.* A mere agreement, though valid, between the

plaintiff and defendant, to suspend the execution, if not acted on, will not postpone the lien to a junior judgment. And in a contest between the plaintiff and a junior judgment creditor in such a case, the issuance of an execution and a sale under it, in violation of the agreement, will be presumed to have been done with the debtor's consent; *Jones v. Bailey*, 5 H. 564.

101 *Endorsement of sheriff as evidence of agreement to stay execution.* The endorsement on an execution by the sheriff, "stayed by order of plaintiff," is evidence only that that particular execution is stayed till the return term. It is not evidence of an order for a continuous stay, and will not be so construed, even where there is a failure to issue an *alias* execution for two years, and until after a junior execution has been actually levied; *Foute v. Campbell*, 7 H. 377. Such a return, even when confirmed by the testimony of the sheriff, is not evidence competent to show the laches of the plaintiff so as to postpone his lien; *Talbert v. Melton*, 9 S. & M. 9. See *post*, 109.

102 *Judgment rendered with stay of execution.* Judgments under the Act of 1824, rendered with a stay of execution entered on the minutes, are a lien from their date, and the lien is not lost by a sale under a junior execution during this stay; *Pickett v. Doe*, 5 S. & M. 470.

103 *Delay and stay of execution postpone, but do not destroy lien.* A stay of execution, when validly made, does not destroy, but only postpones the lien to that of a junior judgment. Where, therefore, the junior judgments are paid off and satisfied, the lien is restored, and a sale under it will confer title over a sale made under a satisfied judgment; *Doe v. Ingers*, 11 S. & M. 249.

104 *Lien postponed to one judgment and not to another.* A prior judgment may have lost its superior lien as against a particular judgment, without losing it as to all other junior judgments; and hence, a decision that its lien is to be postponed to the lien of a particular junior judgment, is no evidence that it is to be postponed to any other judgment; *Pickett v. Doe*, 5 S. & M. 470.

105 *Effect of two judgments losing their liens as between the two.* In a contest in respect to priority of liens of two judgments, where both have been stayed, so as to subject them to postponement to junior judgments, the senior judgment creditor will prevail, each having been guilty of neglect in staying his execution. The law postpones a senior judgment lien for neglect in enforcing it, only in favor of a junior judgment, in respect to which there has been no laches; *Martin v. Lofland*, 8 S. & M. 352; *S. P.* in S. C., 10 S. & M. 317.

106 *Effect of valuation law on lien.* The lien of a judgment whose execution has been stayed by the valuation law, is not affected thereby; *Pickens v. Marlow*, 2 S. & M. 428.

107 *Effect of declaration of insolvency.* A declaration of insolvency of the estate made by an administrator, does not affect the

lien of a judgment rendered against the intestate, where the execution was sued out and levied in his lifetime. Nor, it would seem, would it affect the lien where the judgment only was rendered in his lifetime—no steps being taken then to have execution. The rule is different where the judgment is against the administrator; *Dye's Administrator v. Bartlett*, 7 H. 224. But in this last case, if the creditor has levied on personalty before the declaration of insolvency, he is entitled to appropriate it to the exclusion of the other creditors; *Bass v. Heard*, 4 G. 131; *Trotter v. Parker*, 9 G. 473.

107a. *Lien not affected by injunction.* The lien of a judgment enjoined remains unaffected, and will hold property sold under a junior judgment during the injunction; *Lynn v. Gridly*, W. 548. And if the injunction by a junior mortgagor be kept in force till the judgment lien has expired, he will not be entitled to the property in preference to the judgment so enjoined; *Work v. Harper*, 2 G. 107.

See EXECUTION, 46.

D. ACTION OF ATTORNEY IN POSTPONING LIEN.

108. *Has no power to stay execution.* An attorney at law has no power, without special authority for that purpose, to destroy his client's lien by a stay of execution; and when the marshal or sheriff has returned an execution "stayed by plaintiff's attorney," it will not be presumed in a controversy respecting the lien of the judgment, that he had the special authority to stay the execution; but the party affirming the authority must prevail; and such return, also, will be held to refer to the attorney of record; *Doe v. Ingersoll*, 11 S. & M. 249 (citing *Dunn v. Newman*, 7 H. 582; *Clark v. Kingsland*, 1 S. & M. 248; *Keller v. Scott*, 2 id. 81; *Garvin v. Lowry*, 7 id. 24). And where an execution was so returned by the sheriff, and the plaintiff did not sue out another for six months, though the stay was without authority, it was held that the delay was not such evidence of fraud as would prejudice the plaintiff's lien, especially as he was a non-resident, and it did not appear when he first heard of the stay; *Doe v. Ingersoll*, 11 S. & M. 249.

E. ACTION OF SHERIFF TO POSTPONE LIEN.

109. *The negligence must be plaintiff's, not the sheriff's.* The lien of an older judgment will not be postponed except by some positive act of omission or commission of plaintiff himself; the act or negligence of the sheriff will not affect it. Thus, if he has regularly issued out his execution, and the sheriff has failed to find property, he will not be postponed to a junior creditor, who has pointed out property to the sheriff; *Lucas v. Stewart*, 3 S. & M. 231; *Robinson v. Green*, 6 H. 223. And so the failure of the sheriff to levy for several terms, without plaintiff's consent, will not postpone his lien; *Grand Gulf Bk v. Henderson*, 5 H. 292; S. P., *Tulbert v. Melton*, 9 S. & M. 9. Nor by the

act of the sheriff in buying and selling under a junior judgment; *Andrews v. Wilkes*, 6 H. 554. See *ante*, 101.

5. Sales under Junior Judgments, under Act of 1824.—The Proceeds.—Their effect on the lien.—Sales under several Executions.

110. *Effect of sale under junior, and under several executions: Sale under does not affect lien.* A sale under a junior judgment may be made, and the proceeds will go to its judgment; but the lien of the older judgment will not thereby be affected, and the property is subject to levy and sale again under that judgment; *Commercial Bank of Manchester v. Coroner of Yazoo Co.*, 6 H. 530; *Commercial and R. R. Bk v. Helderburn*, 6 H. 536; *Goode v. Mason's Executors*, 6 H. 543; *Bibb v. Jones*, 7 H. 397; S. P., *Anderson v. Wilkes*, 6 H. 554; *Walker v. McDowell*, 4 S. & M. 118; *Pickett v. Doe*, 5 S. & M. 470; *Calmes v. Ford*, 6 S. & M. 190; *Talbert v. Melton*, 9 S. & M. 9; *Robinson v. Green*, 6 H. 223. But where several judgments are levied, and a sale made under all, the proceeds will be applied according to their priority in date, for in that case the property sold is divested of the lien of all the judgments; *Commercial Bk of Manchester v. Coroner of Yazoo Co.*, 6 H. 530; *Commercial & R. R. Bk v. Helderburn*, 6 H. 536; *Smith v. Everly*, 4 H. 178; *Carleton v. Osgood*, 6 H. 285. Nor is the rule changed by the fact of the levy of the junior execution first, and the giving of an indemnifying bond by that creditor, the elder being subsequently levied, and an indemnifying bond being also given by that plaintiff. Nor will the lien of the elder be waived if an *alias* be issued on it to another county, and a levy then made, which is afterwards released; *Jennings v. Dennis*, 6 S. & M. 379.

But to give effect to the rule applying the proceeds to the oldest, where the sale is under several executions, and divesting the liens of all, where the sale is under all, the sale must be made under the oldest as well as under the others—a levy merely of the oldest will not do. Hence, if there be a levy of all, and no sale, and then a *venditio exponas* issue on the junior, and a sale advertised and made under it, the lien of the elder will not be divested though before and at the sale, the sheriff had a *venditio* emanating from it in his hands, but made no sale under it; *Commercial & R. R. Bk v. Helderburn*, 6 H. 536; S. P., *Bibb v. Jones*, 7 H. 397. And so where property (real and personal) was levied on under a junior execution, and advertised for sale, and on the day of sale, and after the legal hour for the commencement of the sale had arrived, an execution from an older judgment was put into the hands of the sheriff, but the sale was made under the junior execution; it was held that the junior execution was entitled to the money, but the property was still liable to the older judgment; *Calmes v. Ford*, 6 S. & M. 190. See SHERIFF AND SHERIFF'S SALE, 81, *et seq.*

6. Lien of Satisfied Executions.

111. *Lien destroyed by payment.* The lien of a judgment is destroyed by payment; and if a sale under a satisfied execution, were good for any purpose to a *bona fide* purchaser, the lien will not exist to protect the purchaser's rights against other liens accruing between the date of the judgment and the sale: *Doe v. Ingersoll*, 11 S. & M. 249; *Banks v. Evans*, 10 S. & M. 35; *Rollins v. Thompson*, 13 S. & M. 522.

See EXECUTION, 48.

7. Lien on Property acquired after the Rendition of the Judgment.

112. *Lien only commences from date of its acquisition.* The Act of 1824 (H. & H. 621), provides "that in all cases the property of the defendant shall be bound and liable to any judgment that may be entered up, from the time of entering such judgment." This act gives a lien on the defendant's property, which he owned at that time, from the date of the judgment; but as to after acquired property, the lien could only commence from the date of its acquisition; and if at that time there be several judgments against the defendant, the lien of all as to that property, will commence at the same time, and the older judgment will have no priority over the junior. But whether the Act of 1844, requiring the sheriff to examine the judgment roll when he sells property, and to apply the proceeds to the oldest judgment, would change this rule or not; *Quere? Moody v. Harper*, 3 C. 484. Judgments rendered before the date of the acquisition of property, would be a superior lien on that property, to a judgment rendered after acquisition; S. C., 6 C. 615. Both under the Act of 1824, and the Rev. Code of 1847, judgments and decrees are a lien on property acquired by the defendants after their rendition; *Jenkins v. Gowen*, 8 G. 444.

8. Judgment Lien binds only Actual Interest of the Debtor.

113. *Does not conclude equities of other parties on the property.* A judgment lien is considered in equity as attaching to the defendant's property, subject to the equities of other parties; it binds only the actual interest of the debtor in the property; *Simmons v. North*, 3 S. & M. 67; *Money v. Dorsey*, 7 S. & M. 15; *Hoy v. Taliaferro*, 8 S. & M. 727. Thus, the lien does not attach to land which has been mortgaged before the date of the judgment, and by mistake in the description left out of the mortgage, so as to prevent a court of equity from correcting the mistake, and causing a conveyance of the land omitted, clear of the lien; *Simmons v. North, supra*. And so the lien does not, as against the vendee, bind land which the debtor, before the rendition of the judgment, has sold by title bond, and received a part of the purchase money. The judgment creditor takes exactly the interest of the judgment debtor, and no more, except in cases of fraud. He cannot

claim the protection of a *bona fide* purchaser for value; *Money v. Dorsey*, 7 S. & M. 15; *Hoy v. Taliaferro*, 8 S. & M. 727. Yet in *Baine v. Williams*, 10 S. & M. 113, it was said, that it seemed, where land had been sold, and a judgment afterwards rendered against the vendee, and after this, the vendor took a mortgage to secure the purchase money, which was unpaid at the date of the judgment, the lien of the judgment will prevail. And in *Taylor v. Strong*, 10 S. & M. 63, it was made a *quere*, how far the vendor's lien will prevail against a judgment against the vendee before his purchase. But in *Walton v. Hargroves*, 42 M. 18, it was decided, that the judgment creditor took under his judgment, all that belonged to the debtor, and nothing more; that he stands in the place of the debtor when he purchases under the judgment, and takes the property subject to every liability under which the debtor himself held it; and that the vendor's lien would therefore be preferred to a judgment against the vendee, although the deed declared that the consideration was paid. And in that case, an injunction, at the instance of the vendor, was granted against the sale of the land, under the execution.

See DEED, 45, as to effect of want of registration of a deed as to purchaser at execution sale; also VENDOR AND VENDEE, 64. REGISTRATION, 45, 46, 53. SHERIFF AND SHERIFF'S SALE, 129, 130, 131.

In *Walker v. Gilbert*, 7 S. & M. 456, it was held, that a judgment against a vendor did not bind land which he had previously sold, and the deed was not recorded, where the vendee was in possession when the judgment was rendered.

9. Lien of Affirmed Judgments.

114. *Lien of old judgment not affected by affirmance.* The lien of a judgment is not affected by the rendition in the High Court of a judgment of affirmance, and a judgment against the principal and sureties on the supersedeas bond for the original judgment and damages; the lien still exists from the date of the original judgment; *Planters' Bank v. Calvit*, 3 S. & M. 143; *Kilpatrick v. Dye's Admin'r*, 4 S. & M. 289; *Montgomery v. McGimpsey*, 7 S. & M. 554. And if a mortgage be given between the original judgment and the affirmance, and the property be sold under the judgment, the purchaser takes it clear of the mortgage, and the mortgagee has no claim against the purchaser for the amount even of the damages in the High Court, which were satisfied by the sale. The mortgagee's claim, if any for that, is against the creditor; *Montgomery v. McGimpsey*, 7 S. & M. 557.

10. Lien of Judgments rendered by Justices of the Peace.

115. *No lien till enrolled.* Under the Act of 1844, a judgment rendered by a justice of the peace is no lien till enrolled, and the lien then commences from the date of the enrolment and not from the rendition of the judgment; *Stevens v. Mangum*, 5 C. 481; S. P., *Brian v. Davidson*, 3 C. 213.

11. Lien of Judgments in Federal Courts.

115a. *Lien regulated by State law.* Judgments rendered in the United States courts held in this State, are within the provisions of the enrolment law of 1844 (and 1857), and they have no lien unless they be enrolled in the county in which the defendant's property is situated (citing *Tarpley v. Hamer*, 9 S. & M. 310; *Bonnaffee v. Fisk*, 13 id. 682); *Brown v. Bacon*, 5 C. 589. And it is the duty of the sheriff on examining the judgment roll, in order to apply the money arising from the sale of property under execution, to apply it to a judgment in the United States Court there enrolled, if that be the oldest on the roll. Whether this would be the rule if the decision of the Supreme Court of the United States in *Massengill v. Downs*, 7 H., S. C., R. 760, holding that the enrolment law of 1844 did not apply to Federal judgments, was regarded as authority: *Quære?*

The lien of such judgments are regulated by the laws of the State; *Andrews v. Wilkes*, 6 H. 554.

12. Miscellaneous as to Judgment Liens.

116. *Enrolment is notice.* A judgment lien duly enrolled, is notice to a vendor of the defendant of its existence, in a controversy between the assignee of the purchase money and the vendee, so as to prevent the latter from setting up the lien as a defect in the title, which he cannot do when he has notice; *Wiggins v. McGimpsey*, 13 S. & M. 532.

117. *Marshaling liens of judgments.* Where a judgment binds several distinct estates or parcels of property, an alienee of the property has the right to compel the creditor to levy first on the part not aliened; and if there be several alienations, then the alienees have the right to cause the judgment to be satisfied out of the respective estates aliened in the inverse order of alienation—the last aliened being the first subject. But in a bill by the alienee against the creditor to enforce the equity, he must *point out* and show in his bill, that there is other property liable before that for which he claims exemption: *Agricultural Bank v. Patten*, 8 S. & M. 357. And this principle is applicable where the alienee is a purchaser at execution sale under a junior judgment, and seeks to compel the satisfaction of the older judgment out of other property in the hands of the debtor when he bought; *Rollins v. Thompson*, 13 S. & M. 522.

118. *Limitation of lien as to purchasers.* The enrolment law of 1844, provides, that "all liens of judgment, &c., shall cease and determine against purchasers and creditors of the debtor, unless the same be enforced by execution, within five years from the date of entry and enrolment of the same on the judgment rolls." Under this statute, the lien ceases at the end of five years only as to *bona fide* purchasers; and hence, the statute is no obstacle to the sale of land after the expiration of the five years when there has been a sale by the judgment debtor, which is merely colorable; *Fowler v. McCartney*, 5 C. 509.

118a. *Lien created by levy.* The lien created by a levy of an execution is not defeated by the subsequent enrolment of another judgment; the former lien exists in full force independent of the enrolment act from the date of the levy; *Botters v. Edrington*, 1 G. 580.

XIII. Miscellaneous.

119. *Judgment on negative pregnant.* A judgment on a verdict rendered upon an issue joined on a negative pregnant, will be entered, if the verdict show in whose favor the entry should be made; *Carmichael v. Browder*, 4 H. 431.

120. *Difference between judgment on the minutes and in final record.* Where there is a difference between the judgment as entered on the minutes of the court, and as contained in the final record, made up by the clerk, the former constitutes the true record in law; the latter is but a copy, and the mere act of the clerk; whilst the former is the act of the court; *Dennis v. Heath*, 11 S. & M. 206; *S. P., Cloughton v. Black*, 2 C. 185. See PROBATE COURT, 181.

121. *Judgment creates no new debt.* The merger of a debt in a judgment does not change its substantial nature, nor impart to it legal efficacy when it had not sufficient ground to support it in its original form. The essential qualities of a judgment are not, that it creates a new debt, entirely distinct and separate from the original debt on which it is founded, and absolved from its original consideration; but in its being *prima facie* a conclusion of any defence which might have been made to the action in which it was rendered, and in its capacity to be enforced by execution. And hence, it may always be impeached in equity, if the party can show a sufficient reason for not making his defence at an earlier stage of the transaction; *McDonald v. Ingraham & Read*, 1 G. 389.

122. *Actions on judgments.* In an action on a judgment rendered against partners, it is immaterial that they are not described as partners, since the first judgment bound them as individuals as well as partners; and the judgment in that action, though rendered against them as individuals, binds also their partnership property; *Stephens v. Roby*, 5 C. 744.

123. *Same: Plea of nul tiel record.* A party sued on the record of a judgment, cannot show satisfaction under the plea of *nul tiel record*; *Ib.*

124. *Same: Costs of transcript.* The costs of the transcript of the record of a judgment, is properly recoverable as damages in a suit on the judgment, but if not embraced in the verdict, it will be no ground for setting aside the judgment that the cost is embraced in it; *Ib.*

125. *Same: Proof of error in transcript.* The record of a judgment must be tried by itself; it imports absolute verity, and if a party desire to contradict it, he must rely alone upon the record for that purpose; and if he desire to contradict the correctness of

a duly certified transcript of the record, he must introduce as his evidence, a certified transcript of the entire record of the judgment as entered in the court, or directed by the court to be entered. He cannot do so by getting a certified copy of that part of the record which he alleges to be wrong in the transcript offered by the other party, nor by the testimony of the clerk, showing that a part is wrong in the transcript furnished the other party, and giving a correction of it in his deposition; *Mandeville v. Stockatt*, 6 C. 398.

126. *Action by citizen under Act of 1842.* In an action under the Act of 1842, allowing citizens of the State to bring suits upon bills and notes, without an attorney and without a declaration, by merely filing the instrument sued on, it is not necessary that the record should show affirmatively that the plaintiff is a citizen, or that he is the *bona fide* holder of the paper sued on. If there be service of process on the defendant, these conditions, on which the suit was authorized, will be presumed to have been complied with, unless the record show the contrary; *Grinstead v. Foute*, 4 C. 476. See *ante*, 29 to 32.

127. *Judgment embraces the interest.* A judgment for a sum of money embraces the legal incident, the right to recover interest for the further detention of the debt; and hence, a surety on an injunction bond, given to restrain a collection of the judgment, is bound by his covenant, "to pay the sum of money specified in the judgment," to discharge not only the principal, but the interest accruing on the judgment; *Weatherby v. Shackelford*, 8 G. 559.

128. *Judgment must be on issue of law or fact.* The pleadings in a cause must evolve an issue of law or fact before a judgment can be rendered; the evidence of the existence of such pleadings, is their appearance among the files. The statement of the clerk that they have been filed and lost, is not sufficient evidence of their existence to authorize a judgment; *Armstrong v. Burton*, 42 M. 506.

129. *Verdict essential to judgment.* Where issue of fact has been joined, a verdict is essential to a judgment, and if the record do not properly show a verdict, the judgment will be erroneous; *Gray v. Thomas*, 12 S. & M. 111.

130. *Interest on judgments.* Judgments bear the same rate of interest as the debts on which they are founded, and if no rate of interest be specified in the judgment, whatever may be the rate of the cause of action, it will bear interest at six per cent.; and hence, if the judgment be founded on two debts—one bearing ten per cent. interest, and one six per cent. and be for the aggregate amount of both, without specifying any rate of interest, it will all bear six per cent., and therefore no ground of complaint to defendant; *McCutchen v. Doherty*, 44 M. 419.

131. *Judgments obtained by fraud.* See *FRAUDS, &c.*, 24.

132. *Judgments must be on the minutes.* See *PROBATE COURT*, 181. *Ante*, 71, 72.

Judgments of Sister States.

See *EVIDENCE*, 108 to 113a.

1. *Plea setting up want of notice.* A plea to an action on a judgment of a sister State, setting up want of service of notice of the suit on the defendant, is good, and if the plaintiff relies on a voluntary appearance, he should reply to it; *Wright v. Weisenger*, 5 S. & M. 210.

2. *Averment as to law in the declaration.* In a suit on a judgment from a sister State, which was rendered against several parties, upon service made on one alone, in pursuance of the law of that State, it is unnecessary to aver in the declaration the existence of such law, if objection be made on that account, it will then be time enough to produce it; *Stephens v. Roby*, 5 C. 744.

3. *Recital in judgment as to appearance.* A recital in a judgment that "this day came the parties by their attorneys," is by the law of Alabama, a good appearance by the defendant, and makes the judgment binding on him without service of process; and under the Constitution of the United States, and the Act of Congress, such judgment will be good in the other States of the Union; *Wright v. Weisenger*, 5 S. & M. 210.

See *JUDGMENT*, 8. *PROBATE COURT*, 47, 195.

4. *Validity of judgments of sister States.* Judgments of sister States of the Union, and domestic judgments stand on the same footing as to their validity. In either case the jurisdiction of the court rendering the judgment can be inquired into, and in both the statements of the second as to jurisdictional facts, are conclusive; *Müller v. Ewing*, 8 S. & M. 421.

5. *Effect of Act of Congress on.* The several States of the Union are each sovereign and independent, and their relations are those of foreign States in close friendship, in regard to all matters not surrendered to the general government, and but for the act of Congress, the judgments in each would be regarded in the other States as foreign judgments; *Dorsey v. Maury*, 10 S. & M. 298.

See *EVIDENCE*, 109.

6. *Judgments of Federal Courts.* The judgments rendered in Federal courts (except those held in the States in which the judgments are offered in evidence), are to be regarded, so far as relates to their force and validity, in the other States, as rendered in the State courts; *Id.*

7. *Judgment in sister States not sufficient to support bill to subject equitable assets.* A judgment rendered in a sister State is not sufficient to enable the creditor to maintain a bill in this State to set aside a fraudulent assignment, and to subject the equitable assets of the debtor to the payment of his debt. There must be a judgment here and return of *nulla bona*; *Farned v. Harris*, 11 S. & M. 366.

8. *Setting aside judgment in another State.* A judgment of a sister State rendered on a note, in favor of an assignee thereof, is conclusive as to the right of the assignee to the debt, and the assignment cannot be set aside

in the Chancery Court of this State on a foreign attachment bill upon the ground that it was fraudulent as to creditors, the assignee not being a citizen of the State, and not voluntarily submitting himself to the jurisdiction of the court. For if such a decree were rendered, it would be no protection to the judgment debtor, who might, nevertheless, be compelled to pay the judgment in the other State to the assignee; *Sims v. Talbert*, C. 487.

Jurisdiction.

1. *Rights and jurisdiction of States.* See CONSTITUTIONAL LAW, 105, 110. *Post*, 10.

2. *As to power of a court in one State to set aside judgment in another State,* see JUDGMENTS OF SISTER STATES, 8.

3. *As to the jurisdiction of the several courts,* see CHANCERY, sub-division Jurisdiction. CIRCUIT COURT, HIGH COURT, sub-division Jurisdiction. PROBATE COURT, sub-division Jurisdiction. BOARD OF POLICE. JUSTICE OF THE PEACE.

4. *As to necessity for courts to have jurisdiction,* see JUDGMENT, sub-division Jurisdiction.

5. *Jurisdiction must be observed.* Where a court has no jurisdiction, or where an inferior court has jurisdiction but is bound to adopt certain jurisdictional forms, and it deviates from them, the proceedings are *coram non jure* and void; and this principle is applicable to the proceedings of the County Court in ordering a new road to be laid out, and if the jury do not review the road, as required by statute, the order establishing the road is void; *Stockelt v. Nicholson*, W. 75.

6. *Difference between courts of special and limited jurisdiction.* The only difference between courts of general and courts of special and limited jurisdiction is, that in the former jurisdiction is presumed till the contrary appears; in the latter it must be affirmatively shown; *Byrd's Case*, 1 H. 163. But the rule requiring jurisdictional facts to appear in the record for courts of limited and special jurisdiction, applies only to the subject matter and not to the person; *Cason v. Cason*, 2 G. 578. After the fact of jurisdiction has been established over the subject matter and the person, by the record, then all presumptions arise in favor of the judgments of courts of special and limited jurisdiction, which are applied to courts of original and general jurisdiction; *Scott v. Porter*, 44 M. 364.

See JUDGMENT, 9, 10.

7. *Probate Court.* The power of the Probate Court to grant letters of administration with the will annexed, is a limited authority, and the record must show a case giving the jurisdiction, or the appointment will be void; *Vick v. Mayor of Vicksburg*, 1 H. 379; S. P., *Root v. McFerrin*, 8 G. 17.

See PROBATE COURT, sub-division Jurisdiction.

8. *Want of jurisdiction: How objected to: Waiver.* Where there is an entire want of jurisdiction over the subject matter, the ob-

jection can be raised at any time, even in the High Court, after judgment in the court below; it is only in cases of concurrent jurisdiction that the want of jurisdiction, must necessarily be raised by demurrer or plea, or be considered as waived; *Green v. Creighton*, 10 S. & M. 159; S. P., *Lester v. Harris*, 41 M. 668. Where the want of jurisdiction is as to the subject matter, there can be no waiver; *Yalabusha Co. v. Carhry*, 3 S. & M. 529; *Buckingham v. Bailey*, 4 S. & M. 538; *Bell v. Tombigbee R. R. Co.*, Id. 549; *Holloman v. Holloman*, 4 S. & M. 559. The waiver gives jurisdiction over the person only, where the defect arises from want of service of process or other personal privilege, and then the waiver must be explicit; *Buckingham v. Baily*, *supra*; *Bell v. Tombigbee R. R. Co.*, *supra*; *Peters v. Finney*, 12 S. & M. 449.

9. *Jurisdiction once obtained never lost.* A court having once lawfully obtained jurisdiction, does not afterwards lose it by any change in the parties. Hence, when suit was brought against several joint defendants on a note, in a county where one of them resided, and after service of process on all, the plaintiff dismissed his suit as to that defendant residing in the county where the suit was brought, and whose residence gave the court jurisdiction when the action was commenced, it was held that the court of that county, having lawfully acquired jurisdiction, did not lose it by the dismissal; *Read v. Renaud*, 6 S. & M. 79; *Bk of Vicksburg v. Jennings*, 5 H. 425.

See CIRCUIT COURT, 25. PROCESS, 6. VENUE, 1.

10. *State has no power to enforce a maritime lien.* The State courts have no power to enforce a maritime lien, by a proceeding *in rem* nor have State Legislatures a right to create such liens. But a maritime lien does not arise on a contract for materials and supplies furnished to a vessel in her home port; and in respect to such contracts it is competent for the Legislature to create such liens as they deem proper, and to prescribe remedies for their enforcement, even by a proceeding *in rem*; *Dever v. Steamboat Hope*, 42 M. 715.

11. *Jurisdiction of Circuit Court.* This court has jurisdiction to consolidate two or more cases, taken by appeal from a justice of the peace, when the parties and sureties are the same, though they amount in the aggregate to more than \$500; *Ammons v. Whitehead*, 2 G. 99.

12. *Proof of jurisdictional facts.* See EVIDENCE, 366. JUDGMENT, 7 to 12. PROBATE COURT, 46a to 47.

Jury.

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I. Constitutional Rules on Trial by Jury.

See CONSTITUTIONAL LAW, 54 to 61.

1. *It is not the trial but the right to trial by jury secured.* By the 28th section of the 1st article of the constitution. it is declared that "the right of trial by jury shall remain inviolate." This provision was intended to secure the right to the trial by jury, and not the actual trial, and hence the right may, in a civil case, like any other right, be waived; *Lewis v. Garrett's Adm'r*, 5 H. 434.

2. *What kind of a jury is secured.* The number of twelve jurors, as known at the common law, is contemplated by the constitution in that clause securing the right of trial by jury. The Legislature cannot change, substantially, the panel or jury, as it was known at the common law, but it may prescribe the qualifications of the persons composing it; *Byrd's Case*, 1 H. 163. The constitution refers to the common law for the composition of the jury, and the number must be twelve in a criminal case, and the record must affirmatively show it; *Carpenter's Case*, 4 H. 163.

3. *Power of the Legislature.* The statute which limits the number of challenges of the prisoner to twelve, is not unconstitutional; *Dowling's Case*, 5 S. & M. 664. Nor does the Act of 1836, which takes away the challenge to the array, except in capital cases, for partiality or corruption in the officer summoning the jury, and which further enacts that no regular venire shall be quashed for any cause, impair the right of trial by jury; *Hare's Case*, 4 H. 187.

4. *Same.* The trial by jury as secured by the constitution, is a trial by twelve free and lawful men who are not of kin to either party, and are impartial between them; any legislation which points out the mode of arriving at this result, though changing the common law rule on the same point, but not changing it in any of its essential ingredients, is constitutional; *Dowling's Case*, 5 S. & M. 664.

5. *The record must show a jury of twelve persons.* The record must show affirmatively that the jury was composed of twelve persons, or the judgment will be reversed; *Bone v. McGinley*, 7 H. 671; *Tilman v. Ailes*, 5 S. & M. 373; but if the record show the jury was composed of more than twelve, the verdict will, nevertheless, be good; *Tilman v. Ailes*, *supra*. If the record show that "a jury" passed on the issue, it will be construed to mean a legal jury of twelve persons, unless the record show the contrary; it is not necessary that the individual names of the jury should be set out; *Redus v. Wofford*, 4 S. & M. 579. See *ante*, 2.

6. *Dispensing with jury.* The Circuit Court, in the exercise of its supervisory power over its own process and officers, may, without the intervention of a jury, hear proof and determine the legality of a sheriff's return on process. In such a case it may grant or refuse a trial by jury in its discretion; *Anderson v. Carlisle*, 7 H. 408. Yet in proceeding by motion before the court, a jury should be

called to settle litigated questions of fact, if desired (citing *Woodward v. May*, 4 H. 389; *Smith v. Smith*, 1 H. 102); *Scott v. Nichols*, 5 C. 94. See CONSTITUTIONAL LAW, 54, 51.

II. Qualifications of Jurors as to Age, Citizenship, &c.

7. *Statute on the subject.* The statute prescribes as qualifications of a juror, that he should be a citizen of the United States, a householder or freeholder in the county, and under sixty and over twenty-one years of age. The qualifications of jurors on the regular and special venire are the same. The juror must be either a householder or freeholder in the county, but no length of citizenship is required; *Byrd's Case*, 1 H. 163. But to constitute him a freeholder, he need not have a freehold in the county where he resides; if he own a freehold interest in land any where in the State, he is a competent juror in the county of his residence. And he need not have the legal title to the land to constitute him a freeholder. If he have a title bond for the conveyance of land, in fee, on payment of the purchase money, and is in possession under it, he is a freeholder, though the purchase money is not paid; *N. O. J. & G. N. R. R. Co. v. Hemphil*, 6 G. 17. If, however, a juror who is over sixty years of age, sit on the jury without objection, the verdict will not for that cause be vitiated; *William's Case*, 8 G. 407. And the fact that one of the jury was not a householder or freeholder, does not vitiate the verdict; objection to a juror on that ground, comes too late after verdict, even in a capital case, where the juror upon his examination by the judge before he was accepted, under a mistake, answered that he was a householder or freeholder (citing *Williams' Case*, *supra*); *Frank's Case*, 10 G. 705. See *post*, 15, 16. As to right of the Legislature to prescribe the qualifications of a juror, see *ante*, 2.

7a. *Qualifications under constitution of 1870.* Under the present constitution all property qualification for jury service is abolished; *Head's Case*, 44 M. 731.

III. Competency of Jurors in respect to Prejudice or Bias.

8. *Juror should be impartial: General rule.* A juror should be *omni exceptione major*; he should be entirely exempt from every influence calculated to produce the slightest bias towards either party, and with no motive to find a verdict for one or the other, save a sense of duty and justice; *Ferriday v. Selser*, 4 H. 506. The sanctity of a trial by jury requires that the jurors should be impartial and unbiassed; *Childress v. Ford*, 10 S. & M. 25. If there be a reasonable ground to believe that a juror will act under undue influence, he should be rejected; *McGuire's Case*, 8 G. 369. See *vide Josephine's Case*, *post*, 14.

9. *Same.* In this case the court considered

at length the law on the subject of the impartiality of jurors, and reached the conclusion that no rule of universal application could be laid down; that it is the duty of the court to see that an impartial jury is empanelled and composed of men above all exception; that the great value of the trial by jury consists in its fairness and impartiality, and the right of trial by such a jury is secured by the constitution; that a juror is impartial when his mind is not inclined to either side, and he is partial if it has taken a direction in favor of either; that this direction may be so slight as to be no impediment to arriving at a just conclusion, or it may be so strong as to prevent the judgment from having fair scope. In the one case, he would be competent, and in the other, not. That his competency must depend on the nature and character of the opinion, and not on the source from which it is derived, nor on the fact that it has been concealed or expressed. And that the belief of a juror that he can do justice between the parties, can have but little influence in determining his competency. But that circumstances may exist, as of very great notoriety in the transaction, or very general concern felt in relation to it, which would render a relaxation of the rule necessary; but the relaxation when allowed should go no further than necessity demanded, and that the nearer the approach to absolute freedom from preconceived opinions, the nearer is the approach to the perfection of the system of trial by jury; *Sam's Case*, 13 S. & M. 189.

10. *Instances explanatory of the rule.* An insolvent debtor made a conveyance of his property, and it was attacked as fraudulent as to his creditors: *Held*, that a person who was surety for the insolvent, was incompetent to try that issue, and especially when he declared that he thought he was unfit; *Ferriday v. Selser*, 4 H. 506. And so it is a valid objection to a juror, that he stands indicted and untried for an offence similar to that charged against the prisoner; *McGuire's Case*, 8 G. 369. And a grand juror who found the bill of indictment, is incompetent even to try an issue on the prisoner's plea in abatement to it; *Beason's Case*, 5 G. 602.

11. *Other instances: Hypothetical opinions.* A hypothetical opinion, formed from rumor, which is subject to be changed by evidence on the trial, does not disqualify the person holding it from acting as a juror; *Flower's Case*, W. 318; *Johnson's Case*, W. 392. (*Sed vide ante* 9, and *post*, 12.) And in a misdemeanor case, a juror on his *voir dire* answered that he had not formed or expressed an opinion as to the prisoner's guilt or innocence, but that he had heard the testimony in another case just tried for the same act, alleged as criminal in this indictment, and that it had produced an impression on his mind as to the guilt or innocence of the prisoner in this case, the witnesses in the other case having spoken of the defendant's connection with that case; that it would require testimony to remove the impression; but that he believed that he could impartially

decide between the State and the defendant, and that he had no settled or fixed opinion: *Held*, that he was competent, but the court stated that it might be different in a capital case; *Noe's Case*, 4 H. 330. (*Sed vide ante*, 9, *post*, 12.) So, a juror who has formed an opinion from rumor, but says his mind is free to act on the testimony, is competent; *King's Case*, 5 H. 730. But in a later case, it was held that a juror was not competent who had formed an opinion as to the guilt or innocence of the accused which it would require testimony to remove, though he had no fixed bias on his mind for or against the prisoner; *Alfred's Case*, 8 G. 296. And now it is the settled rule, that if a juror have any opinion on his mind as to the prisoner's guilt or innocence, which it would require testimony to remove, he is not impartial, and is incompetent. Thus, in a capital case, two jurors were challenged for cause by the prisoner, one stated on his *voir dire* he had formed an opinion from rumors he had heard, and the other, he had formed an opinion from having heard the arguments of counsel on the trial of an accomplice—the witnesses being the same as in this case; each stated that the thought it would require some testimony to remove from his mind the impression thus made, and each thought he could decide the case free from bias: *Held*, that they were not impartial, and therefore not competent, it not being shown that there was such notoriety in the case, as to render the formation of a jury strictly and technically impartial, impossible; *Sam's Case*, 13 S. & M. 189. See *ante*, 9.

But the impression which disqualifies, must be an impression in relation to the guilt or innocence of the accused, and not an impression in relation to the nature of the transaction on which the charge against the accused is based. Thus, a person who has not formed or expressed an opinion in relation to the guilt or innocence of the prisoner, who is charged with murder, but has an impression on his mind, formed from rumor in relation to the killing, which it would require evidence to remove, is impartial and competent as a juror; *Ogles' Case*, 4 G. 383.

12. *Other instances: Opinion from rumor.* It seems to be generally conceded (say the court) that an opinion formed from common rumor does not disqualify a juror; but this is a departure from strict principle, which secures to a prisoner the right to be tried by a jury, perfectly free from previous impressions; but the departure, if necessary in certain cases of notoriety, should be avoided wherever it is possible. But if the juror has formed an opinion from what he has heard some one say that the witnesses had told, he is disqualified, though he has heard none of the witnesses himself; and this is so, though he state on his *voir dire*, that his opinion was such as would not influence his verdict, but that he would be governed by the evidence; *Nelm's Case*, 13 S. & M. 500.

13. *Other instances: Opinion from rumor disqualifies.* A person who has formed an

opinion from common rumor, as to the guilt or innocence of the accused, which it would require evidence to remove, is not an impartial and competent juror to try him, although the juror declare that he felt as free to act in the matter as if he had heard nothing about the case, and if the prisoner object on that ground, it will be error to require him to challenge him peremptorily; *Cotton's Case*, 2 G. 504 (citing *Nelm's Case*, *supra*). See *post*, 21.

14. *The bias must be in relation to the point in issue.* Where the issue to be tried under an indictment for murder, is on the special plea of the defendant, setting up a former acquittal, it is not proper in interrogating a person summoned as a juror, as to his competency, to ask him if he has formed or expressed an opinion as to the guilt or innocence of the prisoner, of the crime charged in the indictment. His examination should extend only to his bias or prejudice in respect to the issue to be submitted to him; and to his personal bias or animosity, good or ill-will to the prisoner; *Josephine's Case*, 10 G. 613. See *vide Ford's Case*, and *McGuire's Case*, *ante*, 8.

15. *Competency as affected by conscientious scruples as to punishment.* A juror was examined as to his qualifications, and accepted by both the State and the prisoner, in a trial for murder. After taking his seat, he voluntarily declared (not having been examined on that point) that he was conscientiously opposed to capital punishment, and that he could not conscientiously take the oath of a juror in that case, thereupon, the court, without a challenge of the juror by the State, excused the juror: *Held*, that it was the duty of the court to see that a fair and impartial jury, free from all exception, was empanelled, and that in the exercise of this duty, the court, at any time before evidence given, might set aside a juror who might be discovered to be incompetent, and that the action of the court was correct; *Lewis' Case*, 9 S. & M. 115.

16. *Same: Nature of the scruple.* A person who, on his *voir dire*, states that he has conscientious scruples against the infliction of capital punishment, and that such scruples would bias his judgment as a juror, is not impartial and indifferent between the State and the prisoner, and is therefore incompetent to act as a juror, where the verdict might be followed by the infliction of the punishment of death. But conscientious scruples in relation to capital punishment, which would not influence the mind of the juror, but would leave him entirely free to find a verdict according to the evidence, are no disqualifications to his serving in a capital case; and hence, since no other means exist for ascertaining what influence such scruples would have on the mind of the juror, but his own statements, if he, upon examination, declare that he had such scruples, "and that it would be against his conscience to render a verdict by which a party would be subjected to the punishment of death, but that he

thought he could do justice as between the State and the accused," he will be competent (*Handy, J. dissented*) (citing *Lewis' Case*, *ante*, 15); *Williams' Case*, 3 G. 389.

16a. *Effect of prejudice not discovered till after verdict: Waiver.* A new trial will be granted if it be proven that a juror, who had answered on his *voir dire* that he had no opinion, had previously expressed an opinion unfavorable to the prisoner; *Cody's Case*, 3 H. 27; *Sam's Case*, 2 G. 480. And in a civil case, where all the jurors had been examined, and had answered satisfactorily as to their impartiality, the verdict was set aside, though clearly according to the law and evidence, upon proof that one of the jurors had frequently expressed an opinion against the losing party, and upon that party's affidavit of his want of knowledge of such prejudice; *Childress v. Ford*, 10 S. & M. 25. But in such a case, if it appear that the witness making the proof was disbelieved by the Circuit Court, the High Court will not interfere; *Sam's Case*, *supra*. But the law affords every person charged with crime an opportunity of inquiring into the qualifications and competency of the jurors who are to try him, and if he fail to make such inquiry, and thereby an incompetent person becomes a member of the jury, he will be held to have waived the objection, and he cannot, therefore, after conviction, insist upon a new trial for the incompetency of a juror and of his ignorance of such incompetency at the time of the trial: *George's Case*, 10 G. 570; S. P., *Williams' Case*, 8 G. 407. See *ante*, 7.

IV. Formation of the Jury.

For drawing, serving, and objections to special venire, see CRIMINAL LAW, sub-division, Special Venire.

17. *Duty of the court in empanelling a jury.* As a general rule, both in civil and criminal cases, it is the duty of the court to empanel a competent and impartial jury, and for this purpose, the court may propound to the jurors returned, not only such questions as may be necessary to ascertain their competency (as to citizenship and the like), but in its discretion may also examine them in relation to their impartiality, prejudice or bias; *Powers v. Presgroves*, 9 G. 227; S. P., *Gilliam v. Brown*, 43 M. 641. But where no challenge is made, it is within the discretion of the judge whether he will permit the parties to interrogate a juror as to his partiality or prejudice; *Ib.* It is the duty of the court in a capital case, to see that an impartial jury is empanelled, and in the discharge of this duty may interrogate a juror as to his fairness, or the contrary, before he is tendered to or challenged by either party, and if found incompetent, may reject him. This course is commended by its fairness and tendency to secure a fair and impartial jury; *Marsh's Case*, 1 G. 627; S. P., *Lewis' Case*, 9 S. & M. 115; *Sam's Case*, 13 ib. 189; *ante*, 9. And the court may, without challenge from either party, set aside a partial and prejudiced juror, at

any time before evidence is given; *McGuire's Case*, 8 G. 369; *Gilliam v. Brown*, 43 M. 641; S. P., *Lewis' Case*, for which, see *ante*, 15. And if the State challenge a juror for cause, the court may, in the discharge of this duty, examine him as to his impartiality, and if found competent, may tender him to the prisoner, though the prisoner, when the challenge was made, gave his consent that it be sustained; *McCarty's Case*, 4 C. 299. The action of the court in the discharge of this duty is subject to a large discretion, and will not be reversed, unless in violation of law, or a gross injury be shown; *Head's Case*, 44 M. 731.

18. *Challenge of a juror: Practice.* The proper mode of challenging a juror, is for the party objecting, to specify distinctly the cause of the challenge, so that an issue in law or in fact may be joined, and that it may be known whether it is for principal cause, or favor, and that the mode of trial may be determined; and if this be not done, the challenge is incomplete, and may be disregarded by the court, who is not bound to allow any examination into the fairness and partiality of a juror, unless he is properly challenged; *Powers v. Presgroves*, 9 G. 227. A juror must be sworn as such and challenged before he can be interrogated as to his competency; *King's Case*, 5 H. 730. The district attorney may (where the court will allow it), after a person produced as a juror has been examined by the judge, and held competent and turned over to him, examine the proposed juror further as to his competency, and if on such examination he be found incompetent, the district attorney may challenge him for cause; *William's Case*, 3 G. 389.

19. *Challenge to the array.* A challenge to the array relates to the acts of the sheriff, or other officer summoning the jury, and should charge him with a particular default or partiality in arraying the panel. The want of qualification in a juror placed on the panel, is no ground to challenge the array; *Woodside's Case*, 2 H. 655. By the Act of 1836, no challenge to the array is allowed, except for corruption in the officer summoning the jury; *Thomas' Case*, 5 H. 20; *King's Case*, Id. 730; this act is constitutional; *Hare's Case*, 4 H. 187; *ante*, 4.

20. *Limit of the challenges.* The statute which limits the number of challenges of the prisoner in a capital case to twelve, is constitutional; *Dowling's Case*, 5 S. & M. 664.

21. *Improper overruling challenge: When peremptory challenges not exhausted.* If an incompetent juror be held competent and he be then challenged peremptorily, it will be no ground for setting aside the verdict, if it do not appear that that party exhausted his peremptory challenges; *Ferriday v. Selser*, 4 H. 506. This rule is recognized by Judge Fisher in the opinion in *Oyle's Case*, 4 G. 383. But in *Cotton's Case*, *an'e*, 13, it was held error to require the prisoner to challenge peremptorily an incompetent juror. But the rule in *Ferriday v. Selser* was sustained in *Gilliam v. Brown*, 43 M. 641.

22. *Excusing a juror by the court: Right to compel attendance of all summoned.* The accused in a capital case, has a right to select the jury by which he is to be tried, out of the special *venire* summoned and in attendance, so far as it is practicable for him to do so, by exercising his right of selection, peremptory challenge and challenge for cause. Hence, the court has no power to excuse a juror in attendance from serving, if he be found competent, on the ground that the juror's wife is sick, and that he desires to be with her; and if one of the *venire* be so excused without the prisoner's consent, it will vitiate the verdict, and be ground for a new trial; *Bole's Case*, 13 S. & M. 398; S. P. in S. C., 2 C. 445.

But this right of the prisoner to select the jury from the whole *venire*, is not impaired where the court, finding one or more of the special *venire* absent and not answering to their names, proceeds with the call of the others against the prisoner's consent. If the whole *venire* in attendance were exhausted before a jury be empanelled, then, probably, it would be the duty of the court, as a general rule, to grant the prisoner's application for an attachment against the absentees, and require their attendance, so that the jury might be selected from them. But even then, there might be circumstances which would justify the court in refusing to delay the trial until the presence of the absentees could be attained; *Bole's Case*, 2 C. 445. And so it will not be error if John W. be returned on the *venire*, as summoned, and James W., who was in fact summoned, answer to the name, for the court to refuse to suspend the call until John W., who was absent, could be produced; *Bole's Case*, *supra*.

23. *Summoning disqualified person on special venire.* And if the sheriff summon persons on the *venire* who have not the legal qualifications of jurors, it will not be error, nor ground for quashing it; nor will it prevent the court from selecting a jury from those who are competent and in attendance; *Ib.*

24. *Power of court to order a venire.* The regular panel, drawn and empanelled as required by law, do not constitute exclusively the panel for the trial of criminal cases, for the Circuit Court, having the powers of a court of oyer and terminer and general jail delivery, has all the incidental powers necessary for enforcing its jurisdiction, and it may therefore, independent of the statute, issue a *venire*, when necessary, for any number, returnable to that term; *Shaffer's Case*, 1 H. 238; S. P., *Woodside's Case*, 2 H. 655.

25. *After exhausting special venire.* After the exhaustion of the special *venire*, the jury is to be selected, in a capital case, from the regular panel, but the prisoner is not entitled to a copy of the panel before proceeding with the selection of the remainder of the jury; *McCarty's Case*, 4 C. 299.

26. *Division of county into districts.* The Legislature of this State has the constitutional power to provide for a division of a

county into two districts, and the holding of a Circuit Court in each; and where this is done, it may also be provided that the grand and petit jurors for each district, shall be selected from that district alone in which the court is held, in which they are required to serve, and not from the whole body of the county; *Alfred's Case*, 8 G. 296.

27. *Dismissing sheriff from summoning tales jurors.* The act of the court in dismissing the sheriff from the duty of summoning tales jurors in a criminal case, for the alleged reason of his gross ignorance, and the assigning of that duty to the deputy of the sheriff, is void. And because it is void, it will not be error, since the summoning by the deputy is the same thing as the summoning by the sheriff himself; *Kelly & Little's Case*, 3 S. & M. 518.

27a. *Statutes on empanelling merely directory.* By Rev. Code of 1857, p. 613, art. 250, the courts are instructed to regard all the modes of selecting, empanelling and summoning all jurors, as directory merely. After they are selected and empanelled and sworn, though it be in an irregular and informal manner, they are deemed legal and competent; *Head's Case*, 44 M. 731.

V. Swearing of Jury.

28. *Jury not sworn in each case.* It is not the practice in this State to swear the jury in each case, but to swear the regular jurors for the week and the tales men for the day; *Pierce v. Tate*, 5 C. 283.

29. *Must be sworn to try issue.* The record must show that the jury were sworn to try the issue; if it shows they were sworn to try "causes," it will be error (citing *Beall v. Campbell*, 1 H. 24; *Wolfe v. Martin*, 1b 30; *Irvin v. Jones*, 1b 497; *Holt v. Mills* 4 S. & M. 110); *Buck v. Moseley*, 2 C. 170; S. P., *Hogue v. Lewellen*, 42 M. 302. They are sworn for the week, and for the day, to try issues, and to execute writs of inquiry, and if, in making up the record of the judgment and verdict on a writ of inquiry, the clerk recite they were sworn to try the issue, there being no issue, it will be a clerical error, and will not vitiate the verdict; *Hewett v. Cobb*, 40 M. 61. And an oath administered to the jury "well and truly to try the issue joined between the parties," is according to the universal practice in civil cases, and sufficient; *Pierce v. Tate*, 5 C. 283; *Windham v. Williams*, 5 C. 313. And if the record show that the jury were sworn to try the issue, where there were two or more issues submitted, it will be good; *Montgomery v. Tillotson*, 1 H. 215. And if the record show that the "jury were empanelled and sworn to sit as jurors in this case" it will be presumed they were legally sworn; *Furniss v. Meredith*, 43 M. 302.

30. *Record as to oath of jury.* It must appear affirmatively from the record that the jury were sworn; *Irvine v. Jones*, 1 H. 497. The mere recital that "they find upon their oaths," will not do; *Holt v. Mills*, 4 S. & M.

110; *Beall v. Campbell*, 1 H. 24. And so, if the record shows they found "as a jury upon oath;" *Wolfe v. Martin*, 1 H. 30. Where the record shows the jury were sworn, it will be presumed that they were properly sworn, unless the contrary may clearly appear; *Pierce v. Tate*, 6 C. 283; *Windham v. Williams*, 5 id. 313.

The record must show that the jury was sworn, but it is not necessary, nor even according to the practice, that the contents of the oath shall be set out. The fact that they were sworn appearing in the record, it will be presumed they were sworn properly, unless a bill of exceptions be taken, showing the contrary. It is not the duty of the clerk, on making up the record, to set out the oath of the jury, but merely to state the fact that they were sworn. If the clerk undertake to set out the oath, where the court is of general jurisdiction, his action will be unofficial, and no evidence of the oath actually administered to the jury, and will not destroy the legal presumption that the jury was properly sworn (citing on this point of the clerk's certificate, *Barfield v. Impson*, 1 S. & M. 326; *Abbott v. Hackman*, 2 id. 510; *Officers of Court v. Bank of Port Gibson*, 4 id. 431). And hence, if objections are to be made to the oath administered to the jury, a bill of exceptions must be taken, setting out the oath; *Dyson's Case*, 4 C. 362; S. P., *Hewett v. Cobb*, 40 M. 61.

And so, if the sheriff return on the writ, on a proceeding to condemn land for the building a railroad, that the jury "were empanelled and sworn according to law," to discharge their duties, it will be sufficient; *N. O. J. & G. N. R. R. Co. v. Hemphill*, 6 G. 17.

VI. Misconduct of Jury and Bailiffs—Exposure to Improper Influences.

31. *Compromise verdict.* The verdict of a jury, produced by each one of them—immediately on their retirement and without deliberation—setting down the sum he is willing to find, and these being added together, then dividing the aggregate thus produced by twelve, is bad, and will be set aside; *Parham v. Harney*, 6 S. & M. 55.

32. *Separation of the jury.* If a juror, without permission of the court, separate from his fellows before the verdict is returned, it is good ground for a new trial, though he were attended by a sworn bailiff; *Offit v. Vick*, W. 99.

If one of the jury, without being attended by an officer, separate from the others, for two or three minutes, and pass out of the court room, through a crowd of bystanders, whereby an opportunity was offered for tampering with him, this will vitiate the verdict, and his testimony will not be allowed to show that no such tampering took place (citing *Bole's Case*, 13 S. & M. 398; *Hare's Case*, 4 H. 187); *Organ's Case*, 4 C. 78.

And, in a criminal case, a juror who has been elected, must remain under the charge

of a sworn officer, before as well as after he is sworn. To permit jurors, after their election, to disperse without the consent of the prisoner, is error; *McQuillen's Case*, 8 S. & M. 587. And in a capital case, the prisoner's consent will not cure the error occasioned by a separation of the jury; *Wood's Case*, 43 M. 364.

33. *Exposure to improper influence: The rule.* If the jury, or any one of them, were so circumstanced that the purity of the verdict might have been affected, it will be set aside; if it could not have been affected, it will be good. A verdict on which doubts rest, cannot be good; *Hare's Case*, 4 H. 187; *Ned & Taylor's Case*, 4 G. 364; *Wood's Case*, 43 M. 364. Where facts are established which show that the jury on the trial of a felony, were exposed to improper influences, which might have produced the verdict, the presumption of law is against the purity of the verdict; but it will not be set aside if it appears by opposing evidence that such influence failed to have any effect on the jury; *Pope & Jacobs' Case*, 7 G. 121; *McCann's Case*, 9 S. & M. 465; *Caleb's Case*, 10 G. 721. (For instances of this, see *post*, 35 to 39.) The trial by jury should be preserved from all extraneous influences; confidence in the administration of justice, can only be preserved by removing even the shadow of a suspicion from those in whose hands it is placed; *Lewis' Case*, 9 S. & M. 115; S. P., *Wood's Case*, 43 M. 364.

34. *Illustrations of the rule: Admitting to them unsworn persons.* A person who was not a sworn officer, was permitted to go into the room where the jury were deliberating on their verdict, and to have charge of them for eight or ten minutes, when the sworn bailiff was absent: *Held* to be error, and good ground for a new trial; *Hare's Case*, 4 H. 187. So, if a barber be admitted to shave some of the jurors, and be allowed to be with the jury in the absence of the officer for a few minutes, it will be good ground for a new trial; *Bole's Case*, 13 S. & M. 398. See *Pope & Jacobs' Case*, *post*, 38.

35. *Same: Jury under charge of an unsworn officer.* A new trial was granted in this case, because the jury were for a considerable length of time after their retirement, in charge of a person who had been designated by the sheriff for that purpose, but who had not been sworn; the court holding that they must be under the charge either of a properly sworn officer of court, or bailiff sworn for that purpose; and that where an exposure to an improper influence is shown, it will be presumed that the influence had its effect, unless the contrary is shown; *McCann's Case*, 9 S. & M. 465.

36. *Conversing with unsworn person.* One of the jurors during the argument of prisoner's counsel, was engaged in conversation, and in carrying on a written correspondence with a person not on the jury. The juror's affidavit was permitted to be read, to show that the conversation and correspondence was wholly about a different matter, and

did not relate to the trial: *Held*, that this conduct was highly reprehensible, and deserved punishment; that the trial by jury should be preserved from all extraneous influences, and that confidence in the administration of justice can only be preserved, by removing even the shadow of a suspicion from those in whose hands it is intrusted; but as a new trial was granted on other grounds, it was not determined whether this conduct was sufficient to set aside the verdict; *Lewis' Case*, 9 S. & M. 115.

37. *Same.* One of the jury, pending the trial, being at the window of the court room, called to a person in the street, and asked him to request his (the juror's) wife to send him his supper, to which the person thus addressed, replied that he would; and the supper was sent as requested; and the persons who brought it came into the room where the jury were kept, but were not permitted to deliver it to the juror, the bailiff receiving it from their hands and delivering it to the juror. The officer also kept the persons bringing the supper on the opposite side of the room, sixty feet from the jury, whilst the supper was being eaten. The officer also testified, that nothing passed between the juror and the person in the street, except what is above stated; and that to his knowledge the jury conversed with no one. It was held, that there was no improper tampering with, or sinister influence brought to bear on, the jury, and there was no cause for setting aside the verdict; *Ned & Taylor's Case*, 4 G. 364.

38. *Same: Communication between the officer and the jury.* A verdict of conviction in a felony case, will not be set aside because the bailiff in charge of the jury, after they had retired from the court to consider of their verdict, made an improper and illegal communication to them, if the communication be of such a character, that it could not have operated prejudicially to the accused. Hence, if the bailiff say to them, that they shall not have meat or drink until they have agreed, it will be no ground for setting aside the conviction; *Pope & Jacob's Case*, 7 G. 121. But if the officer make an improper communication to them, calculated to influence their verdict, as if he say in their presence: "this is a worse case than Dyson's," or "that public opinion is against the accused," the verdict will be set aside; *Nelms' Case*, 13 S. & M. 500.

39. *Same: The jury eating at a public table.* After the jury in a capital case had retired, they were taken from the jury room by consent of the prisoner, to a public hotel, to get refreshments, and to remain there until they had agreed; they dined there, at a public table, an officer sitting between them and the other guests. A barber was admitted to their room to shave some of them, and remained there more than an hour; and for a few minutes, without the presence of the officer having them in charge. There was no proof of tampering with the jury by any person; on the contrary, the bailiff testified that he heard no one speak to them on the

subject of the trial, though the barber might have whispered to them, or delivered to them written communications on the subject, without his knowledge: *Held*, that the prisoner was entitled to a new trial; that to entitle him to this, it was not necessary that he should show the verdict to be corrupt; that it was enough that the common law rule, which prohibits the jury from being exposed to the liability of being communicated with by any one, was violated (citing *Hare's Case*, ante, 33, 31); *Bole's Case*, 13 S. & M. 393.

37. *Same: Eating at public table: Playing cards: Intoxicating drinks.* The jury in a capital case were permitted to take their meals at a public table at a hotel. A private room was furnished them adjoining the room in which they deliberated, and into that they were allowed to go separately and take intoxicating drinks; the officer in charge of them went to sleep at 10 o'clock P. M., and allowed the jury to remain all night without an officer, awake, and in a room not locked up; and they were permitted to have and use playing cards, liquors and a fiddle, all the night: *Held*, the verdict must be set aside; *Rigg's Case*, 4 C. 51.

As to intoxicating liquors, see further, post, 39.

38. *Same: Eating at public table.* The jury during the trial of a capital case, which lasted four days, lodged in a room at a public hotel separate from the other guests; they ate their meals at the table with the guests of the hotel, an officer being stationed between the jury and the other guests; they were served at the table by the landlord and his servants; they were under the vigilant watch and supervision of two sworn officers; they could easily hear the conversation going on at the table, but neither the officers, nor the landlord, nor the other witnesses examined, heard the case mentioned in the hearing of the jury: *Held*, that as the jury were always kept together and under the supervision of a sworn officer, it is not to be presumed that any undue influence was exercised over them; and that the mode in which they were fed, though an irregularity, was not sufficient to set aside the verdict (citing *Hare's Case*, ante, 33, 34); Fisher, J., dissented; *Browning's Case*, 4 G. 47.

And so where the jury was taken by the bailiffs to a room 300 yards from the court house, to deliberate on their verdict, and both the bailiffs swore that no person had any communication with them during the time, it was held this was no ground for a new trial; *Caleb's Case*, 10 G. 721.

39. *Same: Use of intoxicating drinks.* The introduction by the bailiff, of intoxicating liquors in a sufficient quantity to produce drunkenness, into the room where the jury in a felony case are deliberating upon their verdict, is illegal and improper and if nothing more appears, the verdict will be set aside, upon the ground that the jury were thereby exposed to an improper influence. But if it also appear, that such liquor was used by only one of the jury, who was sick, and that

he was not intoxicated thereby, the presumption which would otherwise exist against the purity of the verdict, is rebutted, and it will not be disturbed; *Pope & Jacobs' Case*, 7 G. 121.

VII. Competency of Jurors to Impeach or Sustain their Verdict.

See EVIDENCE, 254 to 257.

40. *Incompetent to impeach his own verdict.* A juror is an incompetent witness to impeach his own verdict, by showing that he did not fairly assent to it, as when he states that he only assented to the verdict upon the ground that a recommendation to the mercy of the court was signed by the jury, which he believed would have a great influence with the court; *Friar's Case*, 3 H. 422; he is not competent to show his own misconduct, or that of his fellows; *Nelson's Case*, 13 S. & M. 500; *Rigg's Case*, 4 C. 51; *Prussell v. Knowles*, 4 H. 90; but he is competent to show the misconduct of the officer in charge of them, even to the extent of impeaching the verdict; the jury can prove that the officer made improper communications to them (Clayton, J., dissented); *Nelson's Case*, 13 S. & M. 500.

Nor is a juror competent to sustain his verdict, by showing that when he separated from his fellows no improper influence was used on him; *Organ's Case*, 4 C. 78; S. P., *Pope & Jacobs' Case*, 7 G. 121.

Whether the testimony of jurors summoned to assess the damages resulting to the owner of land from the location of a railroad thereon, is competent to impeach their verdict, by showing that they acted on improper principles; *Quære? N. O. J. & G. N. R. R. Co. v. McBride*, 9 G. 32.

VIII. Miscellaneous.

41. *Return of service of venire.* The return of the sheriff that he has served the prisoner with a copy of the venire, is conclusive, and cannot be questioned collaterally; *Woodside's Case*, 2 H. 655.

42. *Jury not judges of the law in a criminal case.* In a criminal case the jury are not the judges of the law, notwithstanding their verdict, when the general issue is pleaded, is necessarily compounded of both law and fact; yet the court must respond as to the law, and the jury as to the facts; *Williams' Case*, 3 G. 389.

43. *May return sealed verdict to the clerk, by consent.* By the assent of the parties and the direction of the court, the jury (even in a felony case) may return a sealed verdict to the clerk, and then separate before it is open and read; but the jury, it seems, should be present when the verdict is read, and they may then assent or dissent to it, and the prisoner should then have an opportunity of polling them; *Friar's Case*, 3 H. 422.

44. *Correction of verdict by jury.* In a trespass case against several defendants, the jury found a verdict against all, and separated; most of them had left the court room,

one, however, was present, and the counsel for the plaintiffs arose and stated to the court, that he had learned from one of the jury that there was a mistake in the verdict, and that the jury had not intended to find against Allen, who was dead, nor against McDonald. This suggestion was immediately sanctioned by the juror, who was present, and the court then directed the verdict to be changed according to this statement. Immediately after this, the whole panel came into court and confirmed the statement of the juror: *Held*, that the correction of the verdict was proper. *Prussell v. Knowles, et al.*, 4 H. 90.

See VERDICT. 8. 9. AMENDMENT. 26.

45. *Right of jury to take in their retirement, written evidence.* It is an evident mistake in point of law for the jury to take out with them, on their retirement to deliberate on the verdict, a deposition not read on the trial, and constitutes a strong reason for granting a new trial; *Taylor v. Sorsby, W. 97*. At common law, the jury could not take out with them evidence submitted in the cause, unless with the approbation of the court, and even then only letters patent and under seal; and the exemplification of the testimony of witnesses in chancery, if they be dead, but not writings without seal, unless by consent of parties. But our statutes allow the jury to carry out any papers read in evidence to them on the trial; and because they took out a paper not read in evidence by either party, a new trial was granted; *Offit v. Vick, W. 99*.

46. *Recalling witness by jury after their retirement.* If the jury, on their retirement, doubt as to the testimony of a witness, he may be recalled and examined as to his testimony in open court, but the jury are not allowed to have the witness before them to repeat his evidence, not in the presence of the court; *Offit v. Vick, W. 99*.

47. *Discharge of jury in a criminal case, without a verdict.* The jury in a felony case, not capital, may be discharged without the consent of the prisoner, if they are unable to agree, when the term of the court expires; and this may also be done in a capital case; *Moore's Case, W. 134; Josephine's Case, 10 G. 613*.

Justice of the Peace.

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I. Jurisdiction.

1. *Constitutional jurisdiction.* The constitution vests in justices of the peace jurisdiction in civil actions where the principal does not exceed \$50, and this grant carries with it all necessary powers to carry it into effect. Hence, a justice of the peace has jurisdiction of a debt against a corporation as well as a natural person; *Loomis v. Com'l Bank of Columbus, 4 H. 660*. Under the constitution of 1870, the jurisdiction of justices of the peace extends to all cases where the principal

in controversy does not exceed \$150; and by the Act of 1870, cases then pending in the Circuit Court, within the jurisdiction of justices of the peace, were transferred to a justice of the peace of the centre beat of the county; and after that time, the Circuit Court had no jurisdiction over them; *Randall v. Kline, 44 M. 313*.

A justice of the peace has jurisdiction where the principal does not exceed \$50, though, when the interest is added, the debt amounts to more; and it makes no difference in this respect that the debt bore one rate of interest from date to maturity, which would have made it exceed \$50, and another rate after maturity; the interest between the date and the maturity is no part of the principal; *Planters' Bank v. Coulson, 6 H. 395*. A plaintiff, however, cannot divide his account, though composed of various items, so as to bring it within the jurisdiction of a justice of the peace; *Grayson v. Williams, W. 298*.

Nor can a creditor, having two notes on a debtor, each under \$50, but both together exceeding that sum, at the same time bring suit on one before one justice of the peace, and suit on the other before another justice of the peace, for both justices together have only the jurisdiction of one; *Scofield v. Pensons, 4 C. 409*.

And the Circuit Court has no more jurisdiction on an appeal from a justice than he had, and in the above stated case, the cause was properly dismissed in the Circuit Court for want of jurisdiction; *Scofield v. Pensons, supra; Crapoo v. Grand Gulf, 9 S. & M. 205; Glass v. Moss, 1 H. 519*. But in *Ammons v. Whitehead, 2 G. 99*, it was held, that all the appeals—being three between same parties—from a justice of the peace's judgments, amounting to \$150, might be consolidated and tried together in the Circuit Court, and a single judgment rendered for the aggregate amount of all.

A claim for a larger sum than \$50, may be set up as an offset before a justice of the peace, provided the balance, after deducting plaintiff's debt, does not amount to more than \$50; *Glass v. Moss, 1 H. 519*.

Where a plaintiff has voluntarily entered a credit on his note, so as to bring it within the jurisdiction of a justice of the peace, and defendant insists on the want of jurisdiction arising from the fictitious character of the credit, he cannot afterwards, on being sued in the circuit, insist on the credit to defeat the jurisdiction of that court; *Herbert v. Spurlock, 4 C. 180*.

A justice of the peace can only entertain a suit at the instance of the overseer of a public road against a party obstructing the same, and for the costs of removing the obstruction, and for the statutory penalty, after the overseer has reported the matter to the Board of Police, and they have entered a judgment condemning the obstruction; *Hairston v. Francher, 7 S. & M. 249*.

II. Powers and Duties of Justice of the Peace.

2. *May act as notary public.* By the Act

of 1836. a justice of the peace may discharge the duties of a notary public; *Wilcox v. Mitchell*, 4 H. 272. And by virtue of such power, may take the acknowledgment of a deed conveying land lying outside of his county; *Dennistoun v. Potts*, 4 C. 13.

3. *Duty in relation to commitments.* A justice of the peace is not required (in 1843) to return the examination of a witness in a criminal case to the circuit clerk, nor to preserve it as a record in his own office; and where it is lost he may testify directly as to what the witness swore before him, and is not confined to a statement of what he recollects was in the deposition; *Pearce v. Furr*, 2 S. & M. 54.

4. *Has no power to take a deposition in Circuit or Probate Court.* A justice of the peace has no power to take a deposition to be used in the Circuit or Probate Court, without a commission issued to him for that purpose; *Ragan v. Cargill*, 2 C. 540.

5. *Power to execute process.* A justice of the peace has no general power to execute process, and can only do so even in cases in which, by law, he is authorized to act, when the process is directed to him; if directed to the sheriff, his execution of it will be void; *Arnold v. Wynn*, 4 C. 338.

III. Trial and Judgment.

6. *Judgment of justice of the peace merges the debt.* A judgment before a justice of the peace merges the debt on which it is rendered, and the record of the justice of the peace is the only proper evidence of the claim; *Standifer v. Bush*, 8 S. & M. 383.

7. *Judgment no lien unless enrolled.* Courts held by justices of the peace, though inferior and limited, are yet courts of record, and are within the enrolment act of 1844, requiring judgments of courts of record to be enrolled before they operate as liens; *Brian v. Davidson*, 3 C. 213; S. P., *Stevens v. Mangum*, 5 C. 481.

8. *Trial is on the merits.* A justice of the peace's court is not a common law court; in the trial of a suit in that court, the question is as to the indebtedness, without regard to form; *Stier v. Surget*, 10 S. & M. 154. And if the trial be for rent, the plaintiff alleging in his declaration, use and occupation by defendant, and an express promise to pay, and the proof show the express promise, but not the occupation, the variance is immaterial, as the case is tried on the merits, and the proof is sufficient to establish the defendant's liability; *Stier v. Surget*, *supra*. And on an appeal, the case will be tried on its merits without regard to form; *Ib*.

IV. Certiorari to revise Judgment of Justice of the Peace.

9. *Power of judge granting the writ.* The circuit judge granting the writ of certiorari to bring a case from a justice's court to the Circuit Court, has the sole power of deter-

mining its sufficiency; *Loomis v. Com'l Bk of Columbus*, 4 H. 660.

10. *Where the writ lies.* The writ is allowable only where it alleges that the judgment itself is illegal. It does not lie upon a petition which does not attack the judgment, but sets up matter which happened afterwards, discharging petitioner from liability thereon. The writ is barred after the lapse of twelve months from the rendition of the judgment; *Ewing v. Burton*, 5 H. 660.

11. *Defendant entitled to notice.* The defendant, in a proceeding by certiorari, is entitled to notice; *Copeland v. Pate*, 6 H. 275.

12. *Allowed to revise action of justice of the peace in taxing master with costs.* The judgment of a justice of the peace, taxing the master, owner, &c., of a slave convicted of larceny, with the costs of the prosecution, is to that extent subject to review in the Circuit Court by appeal or certiorari; *Atchison v. Potter*, 6 S. & M. 120.

13. *Dismissal of certiorari.* When the certiorari is dismissed, this leaves the judgment of the justice of the peace in full force; *Standifer v. Bush*, 8 S. & M. 383. See APPEAL, 30, et seq. certiorari.

V. Miscellaneous.

15. *Execution may issue to another county.* An execution may issue from a judgment of a justice of the peace to any county in which the defendant may reside; *Stevens v. Mangum*, 5 C. 481.

16. *Power to administer affidavit.* A justice of the peace has power to administer an affidavit to a petition for a writ of habeas corpus; *White's Case*, 1 S. & M. 149.

17. *Seal.* The common seal of a justice of the peace is a scroll, and his certificate to an acknowledgment of a deed conveying lands out of his county under this seal, is good; *Dennistoun v. Potts*, 4 C. 13. And the seal is good, if the scroll be appended to his name, without any words in the body of the instrument showing that it is a seal; *Wright v. Steamer Vesta*, 5 H. 152.

18. *Power to issue writ to condemn land.* The Legislature may confer on a justice of the peace the power to issue a warrant for a jury to assess damages to the owner of land occasioned by the location of a railroad on it; *Brown v. Beatty*, 5 G. 227.

Land.

See REAL ESTATE.

1. *Meaning of.* The term "land" embraces not only the soil, but its natural produce growing upon and affixed to it. Such things are a part and parcel of the realty, and pass by a grant of the land; and hence, a sale of growing timber is within the first section of the statute of frauds and void, unless in writing; *Harrell v. Miller*, 6 G. 700.

Land Laws of United States, relating to Public Lands.

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I. British and Spanish Grants.

1. Generally.

1. *British and Spanish grants north of 31st parallel of north latitude.* The boundary line between Georgia and West Florida was the 31st parallel of north latitude. But if the district between that line and a line drawn east from the mouth of the Yazoo river ever constituted a part of West Florida, whilst the latter was a British province, still a grant of land in that district, made by the British governor of West Florida in 1772, would be void, because by the proclamation of George III., made in 1763, creating the Province of West Florida as a colonial government, a grant of land in that district by the governor was prohibited until the Indian title was extinguished, which did not take place till 1777. And a grant of land in that district by the Spanish government would also be void, because the title of Spain never extended north of the 31st parallel; *Montgomery v. Ives*, 13 S. & M. 161. See *post*, 5.

2. *Same.* It was in the power of the crown of England to change the boundary line between the colonies of Georgia and West Florida, when both were British provinces. Judge Clayton does not decide whether the change was ever made from the 31st parallel to the mouth of the Yazoo river, but Judge Sharkey concludes that it was; *Ib.*

3. *Spanish order of survey.* A Spanish order of survey of land in West Florida, afterwards confirmed by the United States, when they acquired title, constitutes of itself a legal title without any patent from the United States; *Winn v. Cole*, W. 119. See *post*, 6, 13, 36a. 3-, 39.

4. *Revocation by Spain of grant by force.* If a government by mere act of power revoke a valid grant of land, and then give title to another, the courts will respect the title of the first grantee. Hence, where A. received a grant of land from the Spanish government, which was revoked by a mere arbitrary act of

power, and the land then granted to B., and then A. was driven from the country, and B.'s title confirmed by the board sitting under the Act of Congress, B. will be decreed to hold as trustee for A.; *Stark's Heirs v. Mather*, W. 181. A confirmation of the board is conclusive against the United States, but not as between individuals; *Winn v. Cole*, W. 119; *Ross v. Barland*, W. 489.

2. The Board of Commissioners for Examining these Titles.

5. *Effect of submitting claim to board: Estoppel.* A claimant of land situated between the 31^o of north latitude and a line drawn east from the mouth of the Yazoo river, filed his claim under a grant from the British governor of West Florida in 1772, before the board of commissioners appointed to carry into effect the cession of territory to the United States made by Georgia. *Held*, that this was an acknowledgment that his claim was subordinate to the act of Congress, and having once submitted his claim under that act, he could not afterwards be permitted to claim above it; *Montgomery v. Ives*, 13 S. & M. 161. See *ante*, 1, 2.

6. *Claimants under void grants: Effect of confirmation.* The plaintiff claimed under a void British grant, and the defendant claimed under a void Spanish grant; both were, however, submitted to and confirmed by the board of commissioners appointed under the act of Congress to carry into effect the cession made by Georgia: *Held*, that this confirmation did not relate back to the date of their respective grants, so as to cut out the younger grant; each grant derived its whole effect from the act of cession, and as both were of equal dignity in this respect, they conferred equal rights, and in such a case the defendant's possession would not be disturbed; *Ib.*

7. *Estoppel to claim in a different character.* A person petitioning for the confirmation of a British grant under the Act of Congress of 1803, represented himself as the only surviving heir and legal representative of the grantee: *Held*, that he could not afterwards claim as tenant by the courtesy, as husband of the grantee's heir, inasmuch as he had claimed the higher ground of heirship in himself; *Ib.*

8. *Proceedings before board not conclusive.* The proceedings of the board of commissioners are not conclusive as to the rights of individuals *inter essi*; *Winn v. Cole*, W. 119. But they do conclude the government; *Ross v. Barland*, W. 489. See *ante*, 4, and *post*, 14.

3. Confirmation of these Grants by Congress.

9. *Effect of.* The confirmation of a Spanish grant by Congress, relates back to the date of the grant; *Stark's Heirs v. Mather*, W. 18. And the performance of the conditions imposed in a Spanish grant on the grantee, is either dispensed with or admitted by a confirmation of it by Congress; *Winn v. Cole*, W. 119. See *post*, 21, 22.

See SPANISH GRANTS.

II. Pre-emption Laws.

1. Generally.

10. *Nature of the right.* The right of pre-emption granted to the actual settler by the Acts of 1830 and 1834, although a gratuity, constitutes as valid a right in the settler, as if it were based on a valuable consideration, and it creates an equity in favor of the settler, which excludes the rights of all others to purchase the land from the United States, for the time allowed by law to the settler to make his proof and entry, and this right can be lost only by the settler's failure to make his purchase within the time allowed by law; *McAfee v. Keirn*, 7 S. & M. 780.

The mere right of pre-emption, however, is not a title; the law allowing it is a mere proffer to certain persons that they may become purchasers in preference to all others, if they will comply with the conditions of the law; without payment or an offer to pay, the law confers no equity; it confers an equity only where the party has consented to accept the proffer by payment, and by claiming the benefit of the law in a proper manner and within the required time; *Grand Gulf Bk v. Bryan* 8 S. & M. 234.

11. *British claims not subject to.* Under the Act of Congress of 1803, lands claimed by the 1st and 2d sections of the act, or by virtue of a British grant, or the articles of the cession by Georgia, were not subject to pre-emption, so long as these claims continued unadjusted; but where a claim was adjudged bad, the land embraced in it was subject to pre-emption in the same manner as if no such claim had been made; *Grand Gulf Bk v. Bryan*, 8 S. & M. 234.

12. *Where the settlement is on two or more sections.* Where the settlement of a pre-emptor is on the corner of several sections of land, his right to pre-emption, which is but a mere right to buy, extends to that section in which is the greatest part of his improvements, and if he enter that regularly he cannot claim a pre-emption right on the other sections; *Carter v. Spencer*, 4 H. 42.

13. *Entry by another of pre-emption land without fraud.* Land to which there was a pre-emption claim, was entered by another (the affidavit that it was unoccupied being not required by the register of the land office), and a patent was afterwards issued to the purchaser without fraud on his part: *Held*, that his title was good; *Carter v. Spencer*, 4 H. 42.

But where the settler has fully complied with the law, and received a patent, his title is superior in a court of equity to any title acquired by mere entry, and a patent issued on that, though the last mentioned patent be older than the patent to the pre-emptor. A patent relates back to the inception of the title on which it is founded, and in a court of equity, he, who first made a legal appropriation of the land, is entitled to it; *McAfee v. Keirn*, 7 S. & M. 780. And the rule is the same where the controversy is between a pre-emptor, and a purchase made under the grant

to Jefferson College; *McAfee v. Keirn*, *supra*. See as to relation of patents, *post*, 21, 22, and *ante*, 6.

13a. *Pre-emptor must comply with the law.* Under the Act of 1834, to constitute a valid pre-emption claim, it must be shown that there was both settlement and cultivation of the land in 1833, and this proof must be made both to the register and receiver; one alone will not do. And in an action of ejectment, involving the validity of a pre-emption claim, the evidence in favor of the claim may be rejected if it do not tend to show both settlement and cultivation in 1833, and that proof of those facts were made before both the register and receiver; *Fulton v. McAfee*, 5 H. 751.

14. *Decision of board of commissioners on pre-emption right.* How far the decision of the commissioners appointed under the Act of Congress of 1803, allowing a pre-emption, is conclusive between individuals. *Quære?* It seems, however, it is conclusive, as against the United States government; *Grand Gulf Bk v. Bryan*, 8 S. & M. 234. See *ante*, 4, 8.

15. *Act of Congress of 1803: "Legal representatives" construed.* The term "legal representatives" used in the Act of Congress of 1803, allowing pre-emptions to the occupier and cultivator of public land, and "his legal representatives," does not mean "heirs" only, but also assignees and grantees of the settler, who in respect to the land granted, are the legal representatives of the grantor; *Grand Gulf Bk v. Bryan*, 8 S. & M. 234. But as to the right to assign pre-emptions under Act of 1822, 1830, see *post*, 10.

16. *Same: Controversy between heir and grantee: Case in judgment.* In a controversy between the heir of a pre-emptor, whose pre-emption had been confirmed under the Act of 1803, in favor of his "legal representatives" on the one hand, and a person claiming under a sale of the land, made by an administrator of the pre-emptor on the other; it appeared that a receipt had been given by the register of the land office in favor of the "legal representative" of the pre-emptor, after the sale made by the administrator, but there was no positive proof who made the payment, whether the heir, the administrator, or the purchaser for the latter. It was held, that the fact that the deed, from the administrator to the purchaser, and from the latter to his assignee was filed in the register's office, where the payment was made, was a strong circumstance to show that the filing was done to prove to the register the purchase and the purchaser's right to make payment for the pre-emption, as being the "legal representative" of the pre-emptor; the force of which circumstance was further strengthened by the facts that the claim was confirmed on the 22d December, 1806, in favor of the "legal representatives" of the pre-emptor, and on the next day the purchaser from the administrator sold it to his assignee; and eight days after this sale, the aforesaid payment was made to the register, and the deeds filed in his office; and

it was further strengthened by the facts, that the pre-emptor's estate had then been declared insolvent, and that therefore the administrator had no legal right to apply the assets of the estate to the payment of the money due the United States on the pre-emption, and that the heirs were infants of tender years, without guardian or assets, or relatives in the State. And the court noticed also the further fact, that the assignee and those claiming under him had held possession from 1809 till 1839, when this suit was brought. And from all these the court concluded that the payment was made by the assignee, and he was entitled to the pre-emption as "legal representative" of the original settler; *Grand Gulf Bank v. Bryan*, 8 S. & M. 234.

17. *Same*. The term "legal representative," as used in the said Act of 1803, is a latent ambiguity when there are both heirs and assignees of the pre-emptor, and he who asserts a right as plaintiff upon the ground that he is included in that term, must show that he is so included; *Ib*.

See EVIDENCE, 137 to 144.

18. *Same*: *Parol evidence to explain receiver's certificate*. The certificate of the receiver of the land office that a certain sum has been paid to him on a pre-emption claimed by the pre-emptor, is not conclusive; it may be shown by parol evidence that there is a mistake as to the payer, and that another in fact made the payment; *Ib*.

2. Assignment of Pre-emption Right.

19. *Assignment under Act of 1803*. In order to entitle one to a pre-emption under the Act of Congress of 1803, the claimant must have occupied and cultivated the land on the 23d March, of that year. This privilege is granted only to the occupier and cultivator, and does not pass to his assignee, so as to enable him to claim a pre-emption in his own name; it would, however, pass to him, so as to enable him to perfect the right, in the name of the assignor, for the assignee's benefit; *Grand Gulf Bk v. Bryan*, 8 S. & M. 234. See *ante*, 15, 16.

20. *Assignments under Acts of 1822 and 1830, void*. Under the Act of Congress of 22d June, 1822, any agreement by the pre-emptor to perfect his right and convey to another, is void, and a note given on that consideration is also void; *Brown v. Poin-dexter*, 10 S. & M. 596. The rule is the same under the pre-emption act of 1830, and in all subsequent acts, at least till 1838; *Glenn v. Thistle*, 1 C. 42; and so under the Act of 1841. And a person who has obtained such an assignment can enforce no right under it, even against a party who has obtained a patent by fraud; *Wilkerson v. Mayfield*, 5 C. 542.

III. Land Patents and Certificates of Entry.

1. Relation of Patent to Inception of Right.

21. *Relates back to beginning of title*. A patent issued under the Act of Congress of 3d March, 1803, donating the land embraced

in it, relates back to the act which constitutes the title, and the patent is the evidence of it. The act and the proceedings of the board of commissioners under it, confirming titles to land thereby donated, constitute perfect title in the original donee, and the patent must relate back to them, as the origin and foundation of title. And, in this point of view, a patent is admissible in evidence, though issued after the demise laid in the declaration, and after the death of the patentee; *Winn v. Cole*, W. 119. See *ante*, 3, 6, 13.

See RELATION.

22. *Same*. A junior patent on an older entry, will be superior in equity to a senior patent on a junior entry; for the patent relates back to the inception of the right; *McAfee v. Keirn*, 7 S. & M. 780. But the confirmation of a void patent or grant, does not relate back to the date of the grant or patent, so as to affect the rights of third parties; *Montgomery v. Ives*, 13 S. & M. 161.

2. The Force and Effect of a Patent.

23. *Is evidence of complete title*. A patent for land from the United States government, is evidence that all the legal pre-requisites necessary to its issuance, have been complied with, and if any irregularity in its issuance be alleged, it must be shown; *Bledsoe v. Little*, 4 H. 13; *Carter v. Spencer*, Id 42; *Surgett v. Little*, 2 C. 118; *Harris v. McKisack*, 5 G. 464; *Sweatt v. Corcoran*, 8 G. 513. And where issued to an assignee, or a sub-assignee, reciting on its face the assignment, it is evidence that the assignment was duly made; *Sweatt v. Corcoran*, *supra*. And so a patent issued to the assignee of an Indian reserver, is evidence of title in the assignee, against all persons except the Indian, or a person claiming under him, by a purchase duly approved; *Johnson v. Horne*, 3 G. 151. See *post*, 36a.

24. *Patent dated after death of patentee*. A patent to land received by the patentee in his lifetime is good, though dated subsequent to his death; and proof showing its reception by him, will show its delivery to him, in his lifetime, though dated afterwards; *Carter v. Blanton*, 4 G. 291.

25. *Patent to wrong person*. If the land officers issue a patent to the wrong person, the patentee will be a trustee for the person to whom the patent should have been issued; *Stark v. Mather*, W. 181.

3. Void Patent.

26. *Patent issued in violation of law, is void*. A patent issued in violation of law is void, and this may be shown in a court of law. Thus, a patent issued conveying land reserved to a Choctaw Indian, under the 14th article of the Dancing Rabbit Creek Treaty, is void. The reservee's title is good by the treaty, and cannot be defeated by any subsequent action of the officers of the government; *Hik-tuk-ho-mi v. Watts*, 7 S. & M. 363.

A void patent may be attacked at law; but if attacked for fraud, or sought to be

made subservient to a superior equity, this cannot be done at law. A patent at law will prevail over a prior entry; *Dixon v. Porter*, 1 C. 84; *Hester v. Kembrough*, 12 S. & M. 659; but the prior entry will prevail in equity; *Hester v. Kembrough. supra.*

27. *Effect of void patent.* Where the patent issued to one who has a lawful certificate of entry, is void for any cause, the patentee may rely upon his valid certificate of entry; *Carter v. Blanton*, 4 G. 291.

4. Assailing a Patent.

28. *Stranger cannot assail.* A stranger, without title, cannot assert the nullity of a patent obtained without fraud; *Winn v. Cole*, W. 119; nor will the courts at the instance of a mere volunteer inquire into a charge of fraud against a patentee; *Ross v. Barland*, W. 489.

29. *For what a patent can be impeached.* A patent can be impeached only for fraud or mistake; *Carter v. Spencer*, 4 H. 42; or for having been issued in violation of law; *Hikutuk-ho-mi v. Watts*, 7 S. & M. 363. It may be assailed in equity, upon the ground that it is issued on a later entry; *Hester v. Kembrough*, 12 S. & M. 659; or that it was issued to the wrong person; *Stark v. Mather*, W. 181. Whether it can be assailed at law for any cause; *Quære?* *Fulton v. McAfee*, 5 H. 751; but it may be assailed at law, where void for being issued in violation of law; *Dixon v. Porter*, 1 C. 84.

5. Certificate of Entry, and Conflict between that and Junior Patent.

30. *Title under certificate.* The statute (H. C. 859) which provides, "that all certificates issued in pursuance of any act of Congress, by any board of commissioners, register of the land office, &c., for any lands in this State, shall be taken and received as vesting a full and complete legal title in the person in whose favor the said certificate is granted, to the lands therein mentioned, and his, her, or their assigns, so far as to enable the holder of such certificate to maintain any action thereon, and the same shall be received in evidence as such in any court in this State." Under this, such a legal estate is vested in the grantee named in the certificate, and his assigns, as to make the land liable to sale under execution against such grantee or assignee; *Lindsey v. Henderson*, 5 C. 502; *S. P. Huntington v. Grantland*, 4 G. 453; *Martin v. Nash*, 2 G. 324; and if a void patent be issued to the grantee, this certificate will be evidence of title; *Carter v. Blanton*, 4 G. 291. Still, the certificate, notwithstanding this statute, only vests an equitable title; the legal fee remains in the United States until the patent issues; *Sweatt v. Corcoran*, 8 G. 513; it does not confer a complete legal title, and a junior patent will be superior to it at law, though not in equity; *Hester v. Kembrough*, 12 S. & M. 659; *Dixon v. Porter*, 1 C. 84; and if a judgment at law has been rendered in favor of the junior patentee, equity will relieve against it; *Hester v. Kembrough, supra.* See post, 36a. For

effect of certificate under grant to Jefferson College, see post, 51.

30a. A court of equity will give preference to a prior certificate of entry from the land office over a junior patent, because there the equities alone are considered: but at law, notwithstanding the statute of this State (see ante, 30), allowing such certificate to be evidence of the legal title in an action of ejectment, the patent must prevail, it not being in the power of the State to prescribe in what mode the United States shall part with their legal title; and the certificate being, under the statute, but a substitute for a better title, viz., the patent,—that, when produced, must prevail at law; *Dickinson v. Brown*, 9 S. & M. 130.

IV. Sales of Public Lands.

1. Generally.

31. *How sale made: Resale to another.* Under the Act of Congress of 1820, and the instructions of the land office department under it, a purchaser of public lands was required to apply to the register for a permit to enter the land, and this permit he was to hand to the receiver, and pay to him the price of the land, and the receiver was to issue duplicate receipts, and give one to the purchaser, and the other to the register: *Held*, that where the applicant to purchase had done these things, his claim to the land was made out, notwithstanding any subsequent failure of the register and receiver to do their duty by making proper entries on the land office books, and that such applicants' claim was good against a patent issued to a junior purchaser who had notice of his claim before purchasing; *Nelson v. Sims*, 1 C. 383.

31a. *Judicial knowledge of courts as to public sales of land.* The courts know judicially that there is a law requiring the President to issue proclamations directing an offer of the public lands for sale, but the courts cannot know judicially that a particular tract has never been offered for sale; *Bledsoe v. Little*, 4 H. 13.

32. *Boundaries of land sold.* The original surveys by which the government sold land to the purchaser, establishes the right of parties to the boundaries; no line which will vary these rights can be afterwards established without the consent of all the parties interested; *Mary v. Buskin*, 12 S. & M. 428.

See SURVEYING.

33. *What is a section of land.* A section of land is not 640 acres alone, but a sub-division of the public lands surveyed and marked out, with "boundary lines" by the United States surveyor, whether it embraces more or less than 640 acres. A grant of a section of land covers the whole section, though it embrace more than 640 acres; *Fulton v. McAfee*, 5 H. 751; *Kerr v. Kuykendall*, 44 M. 137.

2. Duties and Powers of United States Land Officers.

34. *Their duty to perfect, not obstruct vest d*

rights. It is the duty of the land office department to advance and perfect the rights of parties having vested interests in public land, and not to obstruct or vacate such rights. Congress cannot impair these vested rights, much less their subordinate officers; *Winn v. Cole* W. 119.

35. *Register and receiver may cancel certificate.* The court cannot say that the register and receiver of the land office, with the approbation of the commissioner of the general land office, have no power to cancel a certificate of entry. On the contrary, it is believed that such power is uniformly exercised; *Dickinson v. Brown*, 9 S. & M. 130.

36. *Power of register not special, but general.* The power of the register of the land office to issue a certificate of entry is not a special and limited one, but general; *Fulton v. McAfee*, 5 H. 751.

V. Miscellaneous.

1. Grant to Jefferson College.

36a. *No patent necessary to convey land to.* By an act of Congress, Jefferson College, in consideration of certain relinquishments to be made by it, was authorized to enter a specified number of "sections" of land in this State, and the college was authorized to assign this right of entry to others; and the act provided that upon the location and entry by the assignee, the register of the land office should give him a certificate, and that the title under it should be as valid and complete as if a patent had been issued therefor; *Held*, that the certificate so issued to the assignee of the right of entry of the college, was to be held and treated as a patent in all respects, and that it was evidence of the performance of all acts necessary to its issuance; that the title to the public domain could pass in any manner, prescribed by act of Congress, and that no patent was necessary; *Fulton v. McAfee*, 5 H. 751. See *ante*, 23.

37. *Conflict between Choctaw reservee and Jefferson College.* A junior patent predicated on a reservation to a Choctaw Indian, under the treaty of Dancing Rabbit Creek, is superior to a senior patent issue for the same land to Jefferson College; *McAfee v. Keirn*, 7 S. & M. 780.

2. Donation of Land by Congress.

38. *Donation of land by act of Congress.* The Act of Congress of 3d of March, 1803, and the proceedings of the board of commissioners under it, confirming the title to land thereby donated, constitute perfect title in the donee, which cannot be questioned by the government, much less by the heirs of the donee, and the patent afterwards issued to the heirs must relate back to the act and confirmation as the foundation of the title; and the heirs must take, in such case, by descent, and not by purchase; *Hackler's Heirs v. Cabel*, W. 91. See *ante*, 3.

3. Swamp and Overflowed Land donated by Congress to the State.

39. *Title to vested without patent.* The is-

suance of a patent to the State as provided for by the 2d section of the Act of Congress of the 28th September, 1850, donating the swamp and overflowed lands to this and other States, is not necessary to the vesting in the State the title of the lands thereby granted. The first section of the act grants to the State, at the date of its passage, all the swamp and overflowed lands lying within its limits, and the legal title to the same, vested then in the State, as fully as if the land had been specifically designated in the act by land office numbers; and a confirmation by the secretary of the interior of a list of such lands, made by a commissioner, appointed by the governor of the State, is a sufficient designation of the land embraced in the act; *Fore v. Williams*, 6 G. 533. But though the act grants title, it does not take effect on any particular piece of land until the ascertainment of the fact that it is overflowed, and its approval as such by the secretary of the interior, and if after the date of that act the United States sell land which is overflowed, and that land is designated by the commissioner of the State as overflowed land, but the secretary refuses to confirm the location as to that land, on account of the prior sale, no title will vest in the State; *Funsten v. Metcalf*, 40 M. 504. See SWAMP AND OVERFLOWED LAND.

4. Copies of Land Office Records as Evidence.

40. *Copy of map in land office, evidence.* A copy of the official map of the survey of public lands, in the office of the surveyor general, is admissible in evidence to show the identity and location of the land embraced in it, and the original surveys and field notes need not be introduced. And a certificate of the surveyor general that the map is a true copy of that part of the original map of the township on record in his office, and that the courses and distances are truly copied from the original survey on file in his office, is sufficient; *Surget v. Little*, 2 C. 118.

See EVIDENCE, 86, 93.

5. Patent by the State.

41. *Same:* A patent issued under the Act of 1852, sec. 15, ch. 16, is good if signed by the governor and sealed by the great seal of the State, without being signed by the secretary of State; *Exum v. Brister*, 6 G. 391.

Landlord and Tenant.

See DISTRESS. FIXTURES.

1. *Liability for rent without occupation.* Where there is an express promise to pay rent, the tenant is liable, whether he occupy the premises or not; *Stier v. Surget*, 10 S. & M. 154.

2. *Dispute of landlord's title.* And in such cases the tenant cannot defeat the collection of rent, nor any part of it by showing that the property, or any part of it, did not belong to the landlord; *Stier v. Surget*, 10 S. & M. 154. The tenant, except in a few special cases, cannot dispute his landlord's title;

Winston v. President, etc., of Franklin Academy, 6 C. 118; *Richardson v. Borden*, 42 M. 71. But this rule will not prevent a tenant who went into possession after a sale, at execution, as the tenant of defendant in execution, from denying, in an action of ejectment by the purchaser at the execution sale, that the purchaser got any interest whatever under the sale, by showing that the defendant in execution was tenant at sufferance to another whose title such defendant was estopped to deny; *Dennistoun v. Potts*, 4 C. 13. And this rule applies to the title as it existed at the time the lease was made, and does not prevent the tenant from showing any subsequent change in it, occurring either by operation of law, or by the act of the landlord himself. And he may, therefore, show, in an action by the landlord for rent, that since the date of the lease and before its expiration, the title of the landlord has been divested by a sale made under a decree foreclosing a mortgage executed by him; *Wolf v. Johnson*, 1 G. 513. See *post*, 6.

3. *Destruction of demised premises does not release from rent.* If the leased premises, by inevitable accident, not foreseen nor provided against in the contract of lease, become untenable before the term expires, the tenant must, nevertheless, pay the rent for the whole period; *Jemison v. McDaniel*, 3 C. 83.

4. *Same: Covenant to repair, meaning of.* "A man may be excused from a duty imposed on him by law, if he be disabled from performing it without any fault of his own; but where, by his own contract, he creates a charge on himself, he is bound to make it good, notwithstanding any accident, by inevitable necessity." And hence, a covenant by the lessee to keep the demised premises in repair, and at the end of the term to surrender them in as good condition as they were at the date of his lease, binds him to make good all damages to the premises by fire, although it occurred without fault on his part; *Abby v. Billups*, 6 G. 618.

5. *Sub-lessee bound by covenants of his lessor.* A party coming into possession under a lessee, is bound by the covenants in the lease of the original tenant. Hence, if the lease contain a stipulation to pay rent, and on failure, that the landlord may re-enter and hold the land, exempt and discharged from all claim of the tenant; and the latter assign to another, who fails to pay the rent, and after that removes the buildings thereon, the sub-lessee so removing the buildings will be liable to an action of trespass by the lessor, to recover damages therefor; *Winston v. President, &c., of Franklin Academy*, 6 C. 118.

6. *Tenant at will or sufferance.* Where one holds possession under a void deed from his vendor, his possession is not adverse to the vendor, but he is a tenant at sufferance or will to the vendor, and cannot be heard at law or equity to dispute the landlord's title (citing *Day v. Cochran*, 2 C. 261, and *Griffin v. Sheffield*, 9 G. 359); *Ezelle v. Parker*, 41

M. 520. See *ante*, 2. HUSBAND AND WIFE, 28 to 32.

7. *Landlord's lien for rent.* The landlord has not *per se* a lien for rent on the goods and chattels of his tenant on the demised premises, and previous to a seizure under an attachment for rent, the tenant may sell or encumber the same, notwithstanding the landlord's claim for rent. And this is not at all affected by the statute (Rev. Code, 531, art. 288), which prohibits judgment creditors of the tenant from taking the goods of the tenant on the demised premises under execution, without first paying to the landlord whatever rent may be owing, not exceeding the rent for one year; *Marye v. Dyche*, 42 M. 347; S. P., *Stamps v. Gilman*, 43 M. 456.

See DISTRESS, 1, 17.

The tenant may mortgage his goods, so as to give the mortgagee a claim superior to the landlord's; *Marye v. Dyche*, and *Stamps v. Gilman*, *supra*.

7a. *Action for use and occupation.* See ACTION, 33.

Land Patent.

See LAND LAWS OF THE UNITED STATES, 21, *et seq.*; and as to land patent issued by the State, see same title, 41.

Larceny.

See CRIMINAL LAW.

Laws of Sister States, and Foreign Laws.

See CONFLICT OF LAWS.

1. *Must be proven as a fact: Presumption as to.* Where the law of a sister State is relied on, it must be proven as a fact to the court; *Martin, Aiken & Co. v. Martin, Pleasants & Co.*, 1 S. & M. 176; *Routh v. Agricultural Bank*, 12 S. & M. 161; S. P., *Hemphill v. Bank of Ala.*, 6 S. & M. 44. (But this rule is now changed by statute, which requires the courts to take judicial cognizance of the laws of sister States; see Rev. Code of 1857, p. 516, art. 226.) And where there is no proof as to the foreign law, it will be presumed the same as the law of this State on the same point; *Routh v. Agricultural Bank*, *supra*. But this presumption will not be indulged so as to make a foreign contract illegal; and hence, if there be no proof of the usury laws of a State where the contract is made, it will not be presumed usurious, merely because it bears a higher rate of interest than our law; *Martin, Aiken & Co. v. Martin, Pleasants & Co.*, *supra*; *Henry v. Halsey*, 5 S. & M. 573.

2. *Foreign law regarded as a fact.* And the foreign law is so far to be regarded as a fact in transactions in this State, that if such law impose any restriction upon powers conferred according to our law by a letter of attorney, such restriction will not invalidate a contract made by the agent within the powers as they exist according to our law,

unless it be shown that the person transacting business with the agent had notice of the foreign law imposing the restrictions; *Routh v. Agricultural Bank*, 12 S. & M. 161. This rule does not seem to be changed by the statute (*ante*, 1), since that act requires the courts only, and not citizens, to know the laws of a sister State.

3. *Construction of laws of a sister State.* In construing the laws of a sister State, so far as they relate to the validity of acts done by the officers of that State, a presumption should be indulged in favor of the validity of such acts, rather than against them, when the courts of that State have not settled the question of their validity; *Dwight v. Richardson*, 12 S. & M. 325.

4. *Person of color must show law authorizing his emancipation.* When a person of color seeks to establish his freedom under a will made in a sister State, he must show the law authorizing his emancipation; *Sam v. Fore*, 12 S. & M. 413.

Lease.

See LANDLORD AND TENANT. DISTRESS.

Leaseholder.

See EXEMPT PROPERTY, 13.

Legacies.

See WILLS. REQUESTS TO CHILDREN.

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I. Payment of Legacies and Suits for their Recovery.

1. *When payable.* A general legacy is payable at the end of twelve months from the testator's death, unless otherwise provided in the will, and draws interest at six per cent. from that time till payment, whether payment be demanded or not; if the legacy be to a child, it draws interest from testator's death; *Wheeler v. Brem*, 4 G. 126.

As to interest on specific legacies, see *post*, 9, 10.

A legacy is payable at the end of twelve months, on the legatee's giving a refunding bond. If special reasons exist why it should not be paid, the executor must show them; and the legatee is entitled to a decree *de bonis testatoris*; *Packwood v. Elliott*, 43 M. 504.

2. *Where the suit must be brought.* As a general rule, a suit for the recovery of a legacy should be brought in the jurisdiction having cognizance of the probate of the will; but when the heir has gotten possession of the fund on which the legacy is chargeable, and removes to another State with it, he may be sued there for the legacy. A legacy given

by a will made in Louisiana, and charged on property situated there, cannot be collected out of property of the testator situated here, unless it be shown that the fund in Louisiana is insufficient; *Montgomery v. Milliken*, 5 S. & M. 251. PROBATE COURT, 36. CONFLICT OF LAWS, 21, *et seq.*

3. *Suit at law by specific legatee: Refunding bond.* A specific legatee is entitled to recover the legacy without giving a refunding bond, before the estate is finally settled, if it be shown affirmatively that there are no debts chargeable on the legacy; *Magee v. Gregg*, 11 S. & M. 70; S. P., *Magee v. Harrington*, 13 S. & M. 403. After the lapse of twelve months from the grant of letters, a general or specific legatee may sue for his legacy without the executor's assent, if there be no debts; *Dean v. Nunnally*, 7 G. 358. And a specific legatee may maintain his action at law to recover his legacy; and the proceeds of it, if the executor has sold it, under a power given in the will; *Young v. Cook*, 1 G. 320.

See PROBATE COURT, 119a. EXECUTOR AND ADMINISTRATOR, 261b, *et seq.* DESCENT AND DISTRIBUTION.

II. General, Specific and Demonstrative Legacies.

4. *What is a general legacy: Case in judgment.* The testator gave his brother "three-eighths of all my (his) estate;" he also gave several pecuniary legacies and one specific legacy, and the residue he gave to his nephews and nieces: *Held*, that the brother's legacy was not specific, and was not exonerated from the payment of debts, and that the brother's share was three-eighths of the estate after the payment of debts. Legacies are only specific when some particular chattel, or something of a particular class, is bequeathed; *Fisk v. McNiel*, 1 H. 535.

5. *What is a specific legacy.* Testator gave a slave to A. for life, then to revert to his gross estate, and then he gave S. & W. his estate: *Held*, that they were not, on the death of A., entitled to the slave as a specific legacy; *Minor v. Stewart*, 2 H. 912. See *ante*, 4.

6. *Construction as to specific legacy: Demonstrative.* Courts in general are averse to construing legacies to be specific. To authorize this construction, the intention in reference to the thing bequeathed must be clear. When a particular fund is referred to only as pointing out a convenient mode of payment, the legacy is considered as demonstrative; but if the gift is of the fund itself, in whole or in part, or is so charged upon it as to show an intent to burden it alone with the payment of the legacy, it is considered as specific; *Malone v. Mooring*, 40 M. 247.

7. *S. m.: General legacy.* A legacy of quantity is ordinarily a general legacy, but there are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for payment; and this is called a demonstrative

legacy, and it is so far general, that if the fund out of which it is payable, be called in or fail, the legatee will not be deprived of his legacy, but will be permitted to receive it out of the general assets; and it is so far specific, that it will not be liable to abate with general legacies, in case of a deficiency of assets, but will only abate with other legacies charged on the same fund; *1b*.

8. *Same: Case in judgment.* The testator by the fourth item of his will, gave his son John "negroes to the amount of \$3,350, negro men at \$800, and women at \$600, and smaller ones in proportion." By the fifth item he gave his daughters each "\$3,350, to be paid to them at the age of twenty or marriage: \$3,000 in negroes, to be valued the same as those given to my (his) son John in item four, and \$350 in money," and he also directed that the negroes given to the daughters should be in families, as many of them females as circumstances would admit; and that they should go to the daughters only for life, remainder to their children: *Held*, that those legacies were specific, and on the emancipation of the slaves, the legatees had no right to claim that they should be paid in money; *1b*.

9. *Specific legatee entitled to lien and interest.* In cases of specific legacies of stock, or a specific money security, or slaves, the interest or hire belongs to the legatee from the testator's death, although by the terms of the will, the legacy is not to be paid or delivered until a future day; *Dowd v. White*, 5 G. 510.

As to interest on general legacies, see *ante*, 1.

10. *Same: Case in judgment.* The testator by his will provided as follows: "I give to my two grandsons, J. and G., two slaves, F. and K., but they are to remain in possession of W. (one of the executors), for the term of fifteen years, and at the expiration of that time, to be divided between J. and G., as the said W. shall think reasonable and just." The legatees were orphans of tender age. By the residuary clause, it was provided "that all the rest and residue of the estate, not hereinbefore disposed of, should be sold for division among the legatees therein named": *Held*, 1. That an absolute gift of the slaves was made to J. and G. 2. That the hire of the slaves for the fifteen years they were to remain in W.'s possession, neither went to him nor into the residuum, but was the property of J. and G.; *1b*.

10a. *Statute of limitations.* A specific legacy is subject to the bar of the statute of limitations; *Young v. Cook*, 1 G. 320.

III. Vested, Contingent and Conditional Legacies.

11. *What is a vested legacy: Case in judgment.* The testator by his will, directed that all his property should be kept together by his executors till his only daughter arrived at full age or married, then to be equally divided between his wife and daughter; but if

the daughter died without issue, the whole to go to the wife. The daughter died before majority, and then the widow died, leaving a second husband surviving; *Held*, that the wife had a vested interest in the property during the marriage, and that the husband was entitled to it; *Scott v. James*, 3 H. 307.

12. *Same: Case in judgment.* The testator directed all his property to be kept together by his executors, until his youngest child became of age, but allowing each child to have his portion on arriving at his majority; that his plantation should be cultivated, and the profits, after supporting and educating the children, should be invested in other property, "as the wants of the plantation should require;" and that, when his youngest child arrived at full age, "an equal division of all his property, real and personal, should be given to each of his children and his wife, allowing her a child's part;" *Held*, that a vested estate was given to the widow and the children, to be enjoyed in severalty *in futuro*, and that, on the death of the wife before the youngest child became of age, her heirs were entitled to her share; *Held*, also, that the direction to keep the property together was material, and could be executed by the administrator with the will annexed; *Lowe v. Barnett*, 9 G. 329.

See EXECUTOR AND ADMINISTRATOR, 45a.

13. *Same: Case in judgment.* The will contained these clauses: "It is my will that all my property be kept together, for the purpose of raising my children, and that my wife keep the property together until they become of age or marry; each, on coming of age or marrying, to have an equal share, according to the valuation of my estate so left." "It is further my will, that my wife retain all my property, real and personal, for the purpose above named, until my children become of age or marry, or during her widowhood; and then, that the property so left be equally divided between her and the children: *Held*, that the children took a vested interest in the estate upon the death of the testator; and that neither by the first nor second clause was the widow's distributive share taken away; and that she had a vested interest in such share, whether she married or not (citing *Lowe v. Barnett*, *supra*); *Hancock v. Titus*, 10 G. 224.

14. *On condition subsequent: Case in judgment.* A will bequeathed slaves to B. upon condition that a specified sum of money should be paid annually to certain children named in the will, and that an additional sum should be paid them at their majority. B. assented to the legacy, and it was held that his estate was upon condition subsequent, and if he failed to comply, the estate would be forfeited and vest in the children to the extent that the legacy to them would be a charge on the slaves bequeathed to B.; *Beck v. Montgomery*, 7 H. 39.

14a. *Instance of vested legacy.* A devise unto John and William of "my late residence and farm: *Provided*, however, that the children who are now living with me, hold a

home on the same until otherwise provided for." vests an estate for life in the children living with the testator, determinable upon their being otherwise provided for; and in John and William a vested remainder in fee; *Williams v. Ratcliff*, 42 M. 145.

15. *Rule in relation to subsequent condition.* Where a will gives a present estate to a devisee or legatee, to be defeated on his failure to perform certain acts therein required of him, such performance is a condition subsequent; nor is this changed by the fact that the estate is limited ultimately to another on failure of the original devisee or legatee to perform the condition; *Cheairs v. Smith*, 8 G. 646.

16. *Security to legatee having a charge on legacy which is on condition subsequent.* In the case mentioned in 14. *ante*, the children having the charge on the legacy, are not entitled to have a security not provided in the will for its ultimate payment; and the court will not direct the legatee of the slaves to give security for the annual payment required of him by the will; *Beck v. Montgomery*, 7 H. 39.

17. *Void condition.* The general rule is that a bequest to a legatee upon a void condition, vests the legacy in the legatee, discharged of the condition; but if the legatee be a mere trustee to carry out the void condition, and it do not appear that the testator intended he should have any beneficial interest in the estate, then there is a resulting trust to the heir; *Cheairs v. Smith*, 8 G. 646; *S. P.*, *Weathersby v. Weathersby*, 13 S. & M. 685.

17a. *Not void for omission of a word.* A condition annexed to a devise, will not be declared void on account of the omission of a word or phrase, necessary to render the sentence complete and grammatically accurate, if the intention can be clearly ascertained from the words used; *West v. Moore*, 8 J. 114.

17b. *Condition precedent: Uncertainty: Case in judgment.* The testatrix by the second clause of her will, devised, "the whole of her estate, both real and personal, to her executors, for the use of her two children, P. and F., and subject to such charges as she should make thereon," giving the executors the power to sell any of the property in their discretion, and directing that the estate "should be kept together until her debts were paid." The fourth clause was as follows: "And as my son P. seems to be of a dissipated and extravagant disposition, it is my will that my executors do not allow him to spend anything more than for necessary food, clothing, and doctor's bill, while under twenty-one years of age; and, furthermore, if my son P. will go to college, and, by application, acquire a good practical education, and by good conduct and steady habits, until the age of twenty-four, that my estate be equally divided between my children; but if my son P. continue in his wild, extravagant, and dissipated habits, my daughter is to inherit all my estate, allowing my son P. \$300 per annum." By the fifth clause, she directed

that in the event of her daughter's marriage, her portion of the estate should be secured to her children, so that they might not come to want; and if she died without issue, her brother P. should inherit her estate; and if P. should marry, and die without issue, that "such property as he shall receive from my estate, shall be divided between his widow and my daughter F." And, finally, she declared as follows: "My last wish is, that though this my will be not written in strict legal phraseology, it may not be the cause of any litigation whatever, but be construed as intended, to keep my children from want by saving their property, so that they cannot squander it: *Held*, that the provision in reference to P.'s requiring an education, &c., was a condition to be performed within the time limited, before any interest in the property, beyond the \$300 a year, would vest in him. 2. That this condition was not void for uncertainty, and that if P. did not comply within the time limited, the whole estate would vest in F., subject to the charge of \$300 per annum, in favor of P.; *Id*.

IV. Residuary Legacy.

1. What is Embraced in the Residuum.

18. *Its extent.* A residuary bequest carries not only all that is not disposed of by the will, but all that is ill-disposed of, and all that turns out not to be disposed of, whether by a partial revocation of the will, lapse, or the will being void. Hence, slaves illegally attempted to be emancipated, go to the residuary legatee; *Vick v. McDaniel*, 3 H. 337; *S. P.*, *Morris v. Henderson*, 8 G. 492, and cases cited in *post*, 19.

19. *Same: Bequests for religious purposes: Statute.* By the common law, in a will of personalty, a general residuary bequest carries not only everything not disposed of, but everything that is ill-disposed of, or that by lapse, or any other casualty may fall into the residuum; while, in a devise of realty, such clause only carries the real estate not disposed of, nor attempted to be disposed of; *Barton v. King*, 41 M. 288; *Morris v. Henderson*, 8 G. 424. And this rule as to personalty bequeathed to religious purposes, is not changed by the statute (acts 55 and 56, p. 303, of the Rev. Code of 1857), which makes such bequests void, and declares that the heirs-at-law or distributees of the estate shall take such bequests as though no testamentary disposition had been made. These articles were not intended to interfere with the power of testamentary dispositions, further than to make the bequests specified void; *Barton v. King*, 41 M. 288. The same rule is declared in reference to the effect of the statute of 1842 (H. C. 539, § 11), in reference to bequests emancipating slaves; and it is held that the residuary legatee, and not the heir, is entitled to slaves illegally attempted to be emancipated by will; *Garnet v. Cowles*, 10 G. 60. And, in this last case, the contrary rule, announced in *Manning v. Read*, 1 G. 308, and afterwards recognized in *Lusk v. Lewis*, 3 G.

297. and *Lusk v. Lewis* 6 id. 401, is declared to be a mere *obiter dictum*.

20. *Exceptions: Case in judgment.* Property unbequeathed will not pass by the residuary clause of a will, which especially or by general words points out the sources of the residuary fund. Thus, where B. died testate, leaving two slaves undisposed of by his will, and the residuary clause, after directing the executor to sell certain lands, slaves, and the cotton, corn, cattle, horses, mules, &c., belonging to his estate, continued in these words: "The money arising from the sale of land, negroes, &c., &c., after paying my debts, and of the administration of my estate, shall be applied to the payment of the pecuniary legacies (provided for in a former part of the will), and if, after such payments, there shall be any money arising from such sale, remaining, I bequeath it, together with any other money I may have, to my daughters, M. and C.:" *Held*, that the two slaves aforesaid did not pass into the residuum, but went to the distributees under the law; and the fact that the executor had sold them, made no difference in this respect, and that the proceeds of the sale went as the slaves would have gone; *Barksdale v. Elam*, 6 G. 172.

20a. *Whether residuum of particular fund goes to heir or devisee.* Where lands are devised for a particular purpose, and there is an unexhausted residuum not necessary to carry out that purpose, and the will is silent as to what disposition is to be made of that residuum, it results to the heir; but where the whole legal interest in the land is given for a particular purpose, coupled with an intention to give the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it was intended to be given to him. And this is also the rule where the surplus arises, or is increased from the fact that a part of the particular purpose for which the devise was made, is illegal, and the application of the devise to it cannot be made. Hence, where a testator in Virginia, directed his lands in this State to be sold and the proceeds, so far as necessary, applied to removing and emancipating his slaves in Virginia, and in this State, and the surplus, if any, to go to the executor, he is entitled to that surplus, augmented as it may be, by his inability to remove and emancipate the slaves here; *Mahorner v. Hooe*, 9 S. & M. 247.

2. Residuum of Particular Fund and of Realty.

21. *Same.* The residuary legatee of a specific fund or a particular part of the estate, is only entitled to claim whatever may fall into the residuum of that particular fund or that part of the estate, and to nothing outside of it. Hence, when the testator directed his slaves to be emancipated, and directed all his other property to be sold, and after the payment of certain charges, gave the balance of that fund to a legatee, it was held that the slaves went to the heir, and not to the special residuary legatee; *Luckey v. Dykes*, 2 S. & M. 60.

22. *Residuary clause of realty.* A general residuary clause only carries the real estate which is not disposed of, nor attempted to be disposed of specifically by the will; *Morris v. Henderson*, 8 G. 492; *Barton v. King* (ante, 19), 41 M. 288.

23. *Term "property" passes realty.* The term "property" embraces both real and personal estate, and under it, when used in a residuary clause, realty not attempted to be disposed of specifically, will pass; *Morris v. Henderson*, 8 G. 492.

24. *Residuary clause of realty: Case in judgment.* The testator, in the introductory part of his will, enumerated what he termed the "principal" part of his estate; he then disposed of the property so enumerated, and also other property not mentioned, except in the clause disposing of it, and concluded his will as follows: "All else of my property and effects I will and bequeath to my son, E.:" *Held*, that under the last clause, the realty of the testator not mentioned or described in the will, passed to E.; *Id.*

3. What is Chargeable on the Residuum.

25. *Extent of the charge.* In the absence of any express direction in the will to the contrary, the payment of the testator's debts and the administration and funeral expenses, is chargeable on the residuum; and the residuary legatees have no right to call on the general and specific legatees to abate; but the residuary legacies may be exonerated from the payment of debts and expenses of administration, by a direction in the will to discharge them out of a particular part of the estate. A bequest of "all moneys and choses in action" of the testator, "which shall remain after the payment of his just debts" creates a charge upon the fund for the payment of debts, and exonerates the residuum from that burden, but not from the expenses of the funeral and administration of the estate, since they are no part of the debts of the testator; *Currie v. Murphy*, 6 G. 473.

V. Illegal Bequests.

26. *As to this*, see WILL, 81a to 87, and ante, 19.

VI. Ademption of Legacies and Satisfaction of Debt by Legacy.

27. *A legacy is prima facie a satisfaction of a debt of equal amount: Case in judgment.* In 1864, G. and D. entered into a marriage contract, by which it was stipulated that in case G., (the husband) should die before D., and before the net income of the joint property of G. and D., then placed in partnership for planting, should make the share of the wife, upon division, worth \$5000, the deficit should be made up from G.'s estate, and in consideration thereof D. renounced all right to any portion of G.'s estate. In the same year G. died, and by his will provided that "C. and M. should administer on his estate and pay all of his just debts,

and see that his contracts were fulfilled, and that his wife have a dowry of \$5000 in currency." The wife claimed \$5000 under the contract, and also \$5000 under the will: *Held*, that she could not recover both; that the legacy was intended in lieu of the jointure; but as it was evidently payable in Confederate currency, and the jointure was not, that the legacy was only a satisfaction of the jointure *pro tanto*, to the extent of its value when reduced to legal tender; *Gilliam v. Chancellor*, 43 M. 437.

28. *Rule on this subject.* A bequest or legacy to a creditor shall be presumed to be in payment and discharge of the debt, and not a gift. This rule is arbitrary, and often in conflict with the wishes of the testator, and for this reason the courts have allowed the admission of extrinsic testimony, such as the declarations of the testator, contemporaneous with the will and afterwards, to prove that the intent of the testator was the other way. But the admission of this kind of testimony has never been received with great favor; slight circumstances in the face of the will have been taken hold of to repel the presumption, such as the express declarations of the will that all debts will be paid, or words of similar import, or that the legacy is payable on a contingency, or is in some particular less beneficial than the debt, or where the legacy, though greater in amount, is payable at a future day; *Gilliam v. Brown*, 43 M. 641.

29. *Same: Case in judgment.* The will was, "I desire that my executors be prompt in the payment of all my debts. I give to my dear brother W. (who is now a prisoner of war), \$1500 in gold, to be paid to him promptly." The residue was given to his wife. The testator owed his brother a debt for a larger amount arising *ex deicto* rather than *ex contractu*, and it was for an unascertained amount, and was possibly payable in a different currency from gold. Parol testimony was admitted in the court below to show that the testator did not intend the legacy to be a satisfaction of the debt. The court say that it was the true intent of the will that the legacy was not such satisfaction, and the admission of the testimony, if illegal, as it tended to show what was otherwise apparent from the face of the will, was no error. And the court said further, that "it ought not to have been allowed in this case, nor in any other, where the nature of the claim and the terms of the will induced the legal conclusion that satisfaction does not exist; for to allow it would be for the useless purpose of repelling a presumption which does not arise;" *Ib.*

VI. Miscellaneous.

30. *Bequest in lieu of dower.* If there be any valuable consideration for a testamentary gift, it will be entitled to preference in payment over other general legacies which are mere bounties; a bequest to a widow in lieu of dower, is upon a valuable consideration, and entitled to preference over mere voluntary legacies; *Currie v. Murphy*, 6 G. 473.

31. *Investing legacy: Loss of the fund.* Where a testator gave a pecuniary legacy, and directed that the same be invested by the executor, and the annual interest paid to the legatee till his majority, and then the principal; and the investment was actually so made by the executor, but afterwards the security failed without the fault of the executor, it was held that the estate was exonerated, and that the loss must fall on the legatee; *Bodley v. McKinney*, 9 S. & M. 339.

32. *Title of distributee favored.* The title of the distributee taking by law, is as much favored in this State as the title of the heir by the common law, and it will require to divest his title, an express devise, or one arising by implication so strong that an intention to the contrary cannot be supposed; and, therefore, the title to the property devised will not be held to be in the executor, unless there be an express devise to him, or unless he be charged with some duty in reference to it, which requires that he have title. And in the last case, his title will be only such as is necessary for him to have in order to discharge the trust imposed by the will; *Sturdevant v. Neill*, 5 C. 157.

33. *Legacy to children.* Unless a contrary intention appears on the face of the will, the rule is, that where a gift is made to the children of several persons, as a gift to the children of A., and to the children of B., or a gift to children of A. and B., they take *per capita*, and not *per stirpes*; *Nichols v. Denny*, 8 G. 59.

34. *Gift to children after particular estate.* Where a particular estate is carved out with a gift over to the children of the particular tenant, or to the children of any other person, the gift embraces not only the objects living at the testator's death, but also all who may subsequently come into existence prior to the period of distribution; *Ib.*

Legal Tender.

See MONEY.

Legislative Journals.

1. *Effect of as evidence.* The journals of the two Houses of the Legislature are memorials of their proceedings, but they do not import absolute verity, and are not conclusive of the facts stated in them; *Green v. Weller*, 3 G. 650, per Handy, J. Smith, C. J., contra.

Legislative Power.

See CONSTITUTIONAL LAW.

Legislative Rolls.

1. *Rolls are a record.* The enrolled acts of the Legislature, attested by the presiding officers of the two houses, and approved by the governor, and deposited in the office of the secretary of State, like the Parliament rolls in England, are records, and import absolute and uncontrollable verity, and are absolutely conclusive of the due enactment of

the statutes contained in them; *Green v. Weller*, 3 G. 650; *Swann v. Buck*, 40 M. 268.

Levee Laws.

1. *Levee Act of 1839: Lien under.* The statute of 1839 (H. & H. 465), providing for the construction of levees on the Mississippi river, directs that the levee shall be made or repaired by contract, whenever the riparian proprietor shall refuse to do so, and it imposes the costs of making or repairing as a charge on the land and as a lien; but it requires the contract to be let to the lowest bidder, and that the levee inspector of that district, shall give a certificate to the contractor of the amount due before a lien shall attach. Hence, if the levee inspector himself, after letting out the contract to the lowest bidder, do the work himself, fearing the contractor will not comply with his agreement to build or repair the levee, and without making such certificate, file a bill to enforce his lien, he will fail, both on the ground that the work was not done by contract nor let to the lowest bidder, and on the further ground that he has no certificate; *Skipwith v. Dodd*, 2 C. 487.

2. *Construction of Levee Act of 20th February, 1850.* This act for the erection of a levee on the Mississippi river in Issaquena county, provides for a uniform tax of ten cents an acre, on all lands subject to taxation, lying on or within ten miles of the Mississippi river, in said county, and a uniform tax of five cents per acre, on all lands in said county which lie beyond ten miles from the river; *Williams v. Cammack*, 5 C. 209.

See CONSTITUTIONAL LAW, 36. 40 to 43.

3. *Absolute deed under sale for levee taxes.* So much of the Act of 30th November, 1850 (Session Laws, p. 38), as authorizes the tax collector to make an absolute deed for land sold for the collection of levee taxes, is repealed by the Act of 1st March, 1854 (Session Laws, p. 114); and an absolute deed made after the last act is void; *Morris v. Henderson*, 8 G. 492. And so under the Act of 1858, the right of redemption in two years, exists as well where individuals are purchasers, as where the land is sold to the levee board; *Heard v. Walton*, 10 G. 188.

4. *Act of 1858.* The Levee Act of 2d December, 1858, is constitutional; *Alcorn v. Hamer*, 9 G. 652.

See CONSTITUTIONAL LAW, 40 to 43.

Levy.

See SHERIFF. EXECUTION.

Lex Fori.

See CONFLICT OF LAWS.

Lex Rei Sitæ.

See CONFLICT OF LAWS.

Libel.

See SLANDER.

1. *Construction of.* The court will construe fictitious names and disguises, used in a libel, in their popular sense, as understood by the people. Hence when the libellous matter is published of "*Goody Two Shoes*," the indictment may allege that the prosecutrix, Nancy Irvine, was referred to by that name; *Chace's Case*, W. 384.

2. *What is a libel.* Everything written of another holding him up to scorn and ridicule, and calculated to provoke a breach of the peace, is a libel; *Torrance v. Hurst*, W. 403.

3. *Confidential letter.* A letter written confidentially, under the impression that its statements are well founded, if the writer was acting *bona fide* with the view to the interest of himself or the person to whom it is written; though it contains matter which would otherwise be libellous, is protected as a confidential communication and is not a libel; *Ib.*

4. *Presumption of malice.* Malice is presumed from the publication of a libel, unless the facts appearing in the publication itself, and connected with the charges made against the plaintiff repel this presumption; *Binns v. Stokes*, 5 C. 239.

5. *Belief of the Community as matter of mitigation.* If the defendant has merely uttered or published a report which has already been circulated, in regard to the plaintiff, and which the community generally credited, the defendant having had nothing to do with its origination, he may show this in mitigation of damages. But he cannot show that the community generally believed that the charge or the libel is true, if it appears that he originated it; *Binns v. Stokes*, 5 C. 239.

6. *Character of plaintiff.* The general character of plaintiff in an action of libel, is always a fair subject of inquiry; *Ib.*

Lien.

For lien of judgment, see JUDGMENTS, 82 to 118.

For a lien of attachment, see ATTACHMENT, 60, *et seq.*

For vendor's lien, see VENDOR AND VENDOR, sub-division, Vendor's Lien, 74 *et seq.*

For mechanic's lien, see that title.

1. *Nature of a lien: Distinction between that and a mere priority of payment.* The right of prior payment does not of itself constitute a lien. A lien is a qualified right, which in a given case may be exercised over the property of another. It attaches to the subjects of property, and follows them in their transmission to others. Priority of payment is a preference in the appropriation of the proceeds of the debtor's property; and if before it is attached, there is a *bona fide* transfer of the property, the right will be lost. Hence, the 17th section of the Revenue Act of 1841, which provided that the taxes imposed by the act should be preferred to all payments, executions and encumbrances, and liens of any description whatsoever, did not create a lien on the property of tax payer for the taxes assessed to him; and the transfer by him of his property be-

fore a levy on it by the tax collector, defeated the priority of payment secured to the State by the said 17th section; *Anderson v. Staie*, 1 C. 459. Possession actual or constructive, or the right of possession in the person asserting a lien to personalty, is necessary to its existence; *Stewart v. Flowers*, 44 M. 513.

As to the nature of a judgment lien, see JUDGMENT, 82.

2. *Lien merges in legal title.* A prior equity generally sinks or merges in a subsequently acquired legal title, unless there be some declared intent to prevent it, or some beneficial purpose to the holder, not inconsistent with the rights of others, which keeps the lien alive. A court of equity will keep alive an encumbrance or consider it extinguished, as will best serve the purpose of justice, and the actual and just intention of the party if the intent be innocent and injurious to no one; but where a party buys encumbered property, and agrees as a part of the purchase money to pay off an encumbrance on it, and does actually do so, it seems the encumbrance is thereby extinguished, and cannot be afterwards set up and kept alive for the purchaser's protection, so as to cut out junior encumbrancers (who are, however, prior to the purchaser), where no such intention was manifested at the time of the payment of the encumbrance; *Lewis v. Starke*, 10 S. & M. 120.

3. *Same: Case in judgment.* M. gave S. a mortgage on slaves to indemnify him for certain accommodation acceptances for M., which were held by B., and also for one acceptance which S. had already paid, and for which after payment S. took M.'s note. B., the holder of the acceptances, was indebted to a bank, and by an agreement between him and the bank and M., these acceptances were surrendered by the bank to M., and in lieu thereof, M. gave his note directly to the bank, and also gave a mortgage to the bank on the same slaves to secure these notes. After this, S., who was the accommodation acceptor, and who had paid one bill and taken a note therefor, which he had endorsed to another, bought the slaves from M., and agreed in payment therefor, to take up M.'s notes to the bank, which he did, by giving his own note. These slaves were then levied on, under execution against M., junior to the original mortgage in favor of S., but older than the mortgage to the bank and the sale to S.; and S. filed the bill to enjoin the sale, upon the ground that he had purchased the slaves with the debt for which they had been originally mortgaged to him; but relief was denied, the court holding that these transactions were an extinguishment of the prior and original mortgage to S.; or if not, that the right to the equity of the first mortgage was in the bank, the holder of the notes of S., which had been substituted for the notes of M., and that that equity, whatever it might be, could only be set up by the bank; *Ib.*

4. *Change of form of security does not affect lien.* As a general rule, a mere change

in the form of the evidence of indebtedness will not operate to discharge a lien given to secure the debt, unless it be apparent that the parties intended to extinguish the lien. While the debt exists the lien remains; *Ib.*

5. *Lien of purchaser at executor's sale.* When an executor's sale of realty is set aside for fraud between the executor and the purchaser, the bidder will be entitled to retain a lien on the land for the amount which he has paid, and which went to extinguish a mortgage on the land; *Grant v. Lloyd*, 12 S. & M. 191.

See EXECUTOR AND ADMINISTRATOR, 342, 368, 368a.

For vendee's lien on rescission, see VENDOR AND VENDEE, 111 to 115.

5a. *Lien of purchaser at sale fraudulent as to creditors.* See FRAUDULENT ASSIGNMENT, 80. FRAUDS, &c., 28. VENDOR AND VENDEE, 206.

6. *Lien for plantation supplies.* A person who sells plantation supplies, has no lien from that fact alone, on the plantation and slaves; *Garland v. Hull*, 13 S. & M. 76.

7. *Lien of tenant for life.* Where a tenant for life pays off an encumbrance on the whole estate, the remainderman is bound to contribute his due share, and the tenant for life has a lien on the whole estate for the advance; *Peck v. Glass*, 6 H. 195.

8. *Lien where bequest is made on the subsequent condition to pay a legacy.* When there is a bequest of slaves, on the condition subsequent that certain money bequeathed should be paid to the legatee of the money, the pecuniary bequest is a charge and lien on the slaves so bequeathed; but the pecuniary legatee is not entitled to have personal security for its payment; *Beck v. Montgomery*, 7 H. 39.

9. *Lien on sale by a commissioner in chancery.* Whether on a sale of realty on a credit, made by a commissioner in chancery, under a decree foreclosing a mortgage on the land, a lien for the purchase money, similar to the vendor's lien, exists, without an express direction in the decree to that effect; *Quære? Tooley v. Gridley*, 3 S. & M. 493.

For vendor's lien, see VENDOR AND VENDEE, sub-division Vendor's Lien, 74, *et seq.*

10. *Proceedings to enforce statutory lien on administrator's sale.* A proceeding to enforce the statutory lien arising on a sale of realty by an administrator, is not a proceeding on the note given for the purchase money, but a proceeding on the lien itself, and if the note be renewed, and a different consideration expressed in it, whereby for any reason it could not be used in evidence in the suit, the lien may be enforced without it; *Elliott v. Connell*, 5 S. & M. 91.

For statutory lien on sales by executors and administrators, see EXECUTOR AND ADMINISTRATOR, 349 to 356, 375 to 380.

11. *For attorney's lien*, see ATTORNEY AT LAW, 36, *et seq.*

12. *As to partner's lien*, see PARTNERSHIP, 49 to 59, and *Andrews v. Mann*, 2 G. 322; *Cabaniss v. Clark*, 2 G. 423.

13. *Warehouseman's lien.* A warehouseman cannot retain the goods of the principal for a debt of the agent, and if he do so, and the amount of his charges which are a proper lien, be offered, and he refuse to accept them, unless the other is paid, the offer will be a sufficient tender, without an actual production of the money; *Wesling v. Noonan*, 2 G. 599.

14. *Lien on personality for money advanced.* Money advanced by one party to another to enable the latter to erect a steam mill and apparatus, creates a debt from the party borrowing, but is not a lien on the mill; *Weathersby v. Sleeper*, 42 M. 732.

Life Estate,

See LIMITATION OF ESTATES.

1. *Power of sale will not enlarge.* A power of sale attached to an express life estate, will not enlarge the estate into a fee; *Dean v. Nunnally*, 7 G. 358; *S. P. Andrews v. Brumfield*, 3 G. 107; *Rail v. Dotson*, 14 S. & M. 176.

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I. Nature of the Bar of the Statute and Power of Legislature over it.

1. The Bar is a Vested Right.

1. *Bar once attached a vested right.* The bar created by the statute of limitations, where it attaches, is as effectual as payment or any other defence, and when once vested cannot be taken away by legislative action without the defendant's consent; and hence the repeal of a statute of limitations does not revive a cause of action which had become barred under it before its repeal; *Davis v. Minor*, 1 H. 183.

2. Power of the Legislature.

2. *Power of Legislature to pass statute of limitations as to existing causes of action.* The Legislature may pass acts of limitation to operate on existing causes of action, but some reasonable time after the passage of the statute should be allowed for the institution of suits, before the bar attaches, but if the act passed be silent as to any intention to

allow such time, a construction will not be adopted which would cut off all remedy; *West Feliciana Railroad Co. v. Stockett*, 13 S. & M. 395. And for the last reason, the twelfth section of the act of limitations of 1844, which prohibited the bringing of suits against executors and administrators after the lapse of four years from the date of their qualification, was held to apply only where the appointments were made after the passage of the act; S. C., 13 S. & M. 395.

3. *Same: Limitation acts apply only to the remedy.* It is well settled that statutes of limitation pertain to the remedy only, and not to the essence of the contract, and that it is within the power of the Legislature to regulate the remedy and modes of procedure in relation to past as well as future contracts, subject only to the restriction, that it cannot take away all remedy upon an existing contract, nor impose on its enforcement new burdens and restrictions which materially impair its value (citing *Bronson v. Kenzie*, 1 How. U. S. R. 311; *McCracken v. Hayward*, 2 id. 608). And hence, it is also held, that the State Legislature may shorten the period of the limitations of actions, and change existing rules of evidence and judicial procedure, and prescribe new ones as to past as well as to future rights of action; provided, that in changing the period of limitation or rules of evidence, they do not deprive the party of all remedy, or make it impossible for him to establish his right; *Briscoe v. Anketell*, 6 C. 361; S. P., *Carothers v. Hurley*, 41 M. 71.

4. *Same: Application of the rule: Case in judgment.* The Act of Limitations of 1844, H. C. 832, § 16, provides that "No new promise or acknowledgment, express or implied, shall operate to revive at law any action or cause of action from the bar and limitations contained in the provisions of this act, unless such promise or acknowledgment be in writing and signed by the party to be charged thereby: *Provided*, That the promise or acknowledgment to save the bar may be made without writing, if it be proven that the very claim sued on was presented and acknowledged to be due and unpaid." This section will be applied to promises and acknowledgments made before the passage of this act, which were then good and valid to save the bar, but are not now, in all cases, where the original cause of action, independent of such new promise or acknowledgment, was not barred when the act was passed, and would not be, for a reasonable time thereafter, in which suit could be brought, and in this case one year was held not to be an unreasonably short time; *Briscoe v. Anketell*, 6 C. 361. But the Legislature has no power to pass an act of limitations to operate on a suit commenced and pending when the act was passed; *Garrett v. Beaumont*, 2 C. 377. See *post*, 9.

II. Construction of old and new Acts containing different Provisions for Limitation of Actions.

5. Where new act shortens period of limitation, and old act is repealed.

Where a new act of limitation is passed shortening the limitations prescribed in the old act, such construction will be given to it as is consistent with the obvious intention of the Legislature, so that longer limitations on existing causes of action than those prescribed in the old act, will not be allowed, although the old act is expressly repealed. It will be construed as not repealed as to existing causes of action, which would sooner become barred under it than under the new act; *Davis v. Minor*, 1 H. 183.

6. *Defendant may rely upon both acts.* The 18th section of the Act of Limitations of 1844, H. C. 830, declares "that the periods of limitation established by this act shall commence running from the date of the passage thereof, and that all acts and parts of acts conflicting with and contrary to the provisions of this act, be and are hereby repealed. *Provided, however*, that such repeal shall not be construed to revive any cause of action which has been barred by any of said acts, nor shall the passage of the act stop the running of the limitations contained in any other act, when the same may have commenced before the passage hereof." *Held*, that this section means, that where a cause of action existed prior to the passage of the Act of 1844, the remedy to enforce the same would be barred by the lapse of the same length of time, commencing from the date of the act, which that act prescribes for the bringing of a suit in a similar case, where the cause of action accrued after its passage; and that a defendant had the right to rely, when sued on a cause of action existing when it passed, upon the Act of 1844, and also upon any previous statute of limitations which had then commenced running in his favor; *Waul v. Kirkman*, 3 C. 609; S. P., *Kilcrease v. Shelby*, 1 C. 161; *Buckingham v. Riggs*, 5 C. 751; *Harper v. Tapley*, 6 G. 506; *Benson v. Stewart*, 1 G. 49; *Brown v. Wilcox*, 14 S. & M. 127; *post*, 8.

7. *Act of 1844 applies to mortgages made before its passage.* The Act of Limitations of 1844 applies to mortgages executed and forfeited before its passage; and in such cases the periods of limitation commence to run from the date of the act; *Benson v. Stewart*, 1 G. 49.

8. *Same: Limitations on judgments commence from date of the act.* Statutes must not be construed to have a retrospective operation, unless such appears to be clearly the intention of the Legislature. Hence, so much of the Act of Limitations of 1844, as provides that no execution shall issue on a judgment after seven years from the date of the issuance of the last execution, will not be held to apply to a case where the last execution issued before the passage of the act; but in such case the limitation will commence to run from the passage of the act; *Brown v. Wilcox*, 14 S. & M. 127.

9. *Effect of Act of 1857 on antecedent causes of action.* By the express terms of the Act of Limitations of 1857, the old statutes

on that subject were continued in force as to all rights of entry and causes of action accruing before its passage; and that act can only apply to such antecedent causes of action when the periods prescribed by it for barring such causes have elapsed after the date of its passage. The old acts were also continued in force as to such causes of action; and where the bar of the old acts are relied on, then the savings from the bar contained in the old acts are also applicable; and hence a new promise, good under the Act of 1844, would be good, when offered in evidence, after 1857, to save the bar of the Act of 1844, though not in writing, as required by the Act of 1857; *Caruthers v. Hurley*, 41 M. 71. See *ante*, 4.

III. The Time the Statute Commences to Run.

10. *Where debtor dies.* If the debt were due at the time of the debtor's death, the statute having commenced to run, will not be suspended during the period intervening the death and the appointment of an administrator; but if the debt were not due when the debtor died, the statute will not commence to run till the appointment of an administrator. And in either case the statute will be suspended during the nine months immediately succeeding the appointment, in which the administrator cannot be sued; *Abbott v. McElroy*, 10 S. & M. 100. See *post*, 16a. 100

11. *Generally.* The statute of limitations commences to run, from the day on which the creditor might first have commenced an action, for the recovery of his debt; *Johnson v. Pyles*, 11 S. & M. 189.

12. *As against a remainderman.* The statute of limitations will not commence to run against a remainderman, until the determination of the particular estate, and where the particular estate is determinable on the death of any person, and there is no positive proof of the date of the death, but the presumption arising from absence for seven years without being heard from, is relied on to show his death, then the statute will not commence to run till the expiration of the seven years; *Gibson v. Jayne*, 8 G. 164.

13. *As against the recovery of attorney's fees: Case in judgment.* An attorney sued for his fees, in "recovering a judgment" for the defendant, the date of which judgment was more than six years before the commencement of the suit. The statute of limitations was pleaded, and it was shown that after the judgment was rendered, it was enjoined, and the injunction was not disposed of till within six years before suit was commenced: *Held*, that the debt was barred, it not appearing that the employment extended farther than to recover the judgment, nor that the attorney had been employed to collect the money, nor to defend the injunction, in which event the employment might have been considered as one continuing transaction; *Johnson v. Pyles*, 11 S. & M. 189.

14. *In trover cases.* The statute commences to run against an action of trover from the time of the conversion (whether the plaintiff knew of the conversion or not, if no fraud was used to conceal it); and hence, where the conversion arises from buying property from a person rightfully in possession, but with no authority to sell, the statute commences from the date of the sale; *Johnson v. White*, 13 S. & M. 584.

15. *Against maker of fraudulent representation as to title.* A right of action accrues to the purchaser of a chattel, against a third person, for false and fraudulent representations, made by the latter in relation to the title, at the date of the representations; and hence the statute of limitations will commence running from that time, and not from the date of the judgment of eviction. But if there be any relation of trust and confidence existing between the purchaser and such third person at the time of the sale, by which it was the duty of the latter to disclose the true state of the title, then the statute will commence running only from the date of the discovery of the fraud (citing *Buckner & Stanton v. Calcote*, 6 C. 432); *Wilson v. Ivy*, 3 G. 233.

16. *As to existing causes, when new act of limitations is passed, see ante*, 6.

16a. *When it commences generally.* The statute does not commence to run until there is a party in *esse* capable of being sued. Therefore, the Act of 1844, barring suits on foreign judgments rendered after two years from its passage, did not commence running where the debtor was then dead, until after the appointment of his administrator; *Branch Bank of Alabama v. Windham*, 2 G. 317. See *ante*, 10; *post*, 100.

IV. What is a Commencement of a Suit to Stop the Statute.

17. *Filing of bill of equity commences the suit: The rule at law.* The filing of a bill in equity is the commencement of the suit, so far as the statute of limitations is concerned. To create a *lis pendens*, however, as against a sub-purchaser, there must be actual service of process; *Bacon v. Gardner*, 1 C. 60; S. P., *Allen v. Mandaville*, 4 C. 397. But at law the filing of the suit does not commence the action. It is the placing of the writ in the hands of the sheriff that stops the statute; *Lamkin v. Nye*, 43 M. 241.

18. *As against a party brought in by an amended bill: Mortgagor and mortgagee.* If the mortgagee file his bill in equity against the mortgagor, to foreclose within the period allowed by the statute of limitations, the bar of the statute is saved, even as against a purchaser from the mortgagee, who is in possession and who was not made a party to the suit, by amendment, until after the lapse of time prescribed by the statute. The commencement of the suit against the mortgagor in such a case, is a sufficient assertion of the mortgagee's title against the purchaser; *Benson v. Stewart*, 1 G. 49.

19. *Same: Where a party is a purchaser.*

But where a bill was filed by the owner of a slave to recover possession, and it appeared that the defendant was not in possession of the slave when the suit was commenced, nor afterwards; and an amended bill was filed against another party who had sold the slave to the original defendant, and under a resale to him, was in possession before the original suit was commenced, it was held, that the statute of limitations would not stop running against the last defendant by the filing of the original bill, and that the bar would attach if the prescribed period of adverse possession had elapsed before the filing of the amended bill; *Brown v. Goolsby*, 5 G. 437.

V. The Statute once set in motion never stops: Exceptions.

See *post*, sub-division Exceptions, 101, *et seq.*

20. *The general rule.* As a general rule, when the statute of limitations once commences to run, its operation is not suspended by any subsequent disability. The death of the creditor will not stop the running; *McCoy v. Nichols*; S. P., *Abbott v. McElroy*, 10 S. & M. 100. Nor will the subsequent coverture of the plaintiff, nor the infancy of any subsequent parties becoming interested; *Stephenson's Heirs v. McReary*, 12 S. & M. 9. Nor the want of administration on the estate of the debtor; *Byrd v. Byrd*, 6 C. 144. If the creditor, however, die before the debt is due, and therefore before the statute commences to run, it will not commence to run until the appointment of an administrator; *Abbott v. McElroy*, 10 S. & M. 100; S. P., *Branch Bank of Alabama v. Windham*, digested in *ante*, 16a.

21. *Exceptions.* But if the disability grow out of some positive provision of the statute, the time during which it continues should be excepted; and therefore the period of nine months after the appointment of an administrator, during which the statute prohibits the bringing of any action against him, is excluded from the computation of the term prescribed by the statute; *Dowell v. Webber*, 2 S. & M. 452; S. P., *Abbott v. McElroy*, 10 S. & M. 100; *Jennings v. Love*, 2 C. 249; *Barringer v. Boyd*, 5 C. 473. See *post*, 138.

VI. Statute does not run against the Government.

22. *The rule and instances.* The statute of limitations will not run against the State, nor the United States. It begins to run as to land once held by the government, only from the time when the government has parted with its title; *Bledsoe v. Little*, 4 H. 13. It will not run against the claim of the State as a creditor; and the rule applies when the claim is against a decedent's estate; and its collection is attempted to be defeated because it was not presented to the administrator within the time prescribed by law. And in such case, if the suit be brought in the name of the governor of the State, as the succes-

sor of another governor, to whom the note sued on is made payable, it will be presumed, without further proof, that the claim belongs to the State; *Parmilee v. McNutt*, 1 S. & M. 179. The sinking fund is the property of the State, and a suit to collect it, in the name of the commissioners of the sinking fund, is not subject to the statutory bar; *Hill v. Josselyn*, 13 S. & M. 597.

23. *Same: Enrolment law: Act of limitations of 1844.* The statute of limitations does not apply to the State unless it be clear and indisputable, from the statute, that the State was intended to be included. That portion of the limitation and enrolment acts of 1844, which limits the liens of judgments theretofore rendered, are statutes of limitation, and hence do not apply to judgments rendered in favor of the State; *Josselyn v. Stone & Matthews*, 6 C. 753; S. P., *Joiner v. State*, 1 C. 500.

24. *Act of 1857 applies to the State.* By art. 25, p. 402, of the Rev. Code of 1857, the statute of limitations was applied to the State and counties in the same manner as to individuals.

VII. Foreign Statutes of Limitations.

25. *Not pleadable: But good where they confer title.* The statute of limitations of one State, is not, as a general rule, technically pleadable in another, yet, where such statute not only bars the remedy, but vests the property in the possessor, such title, so acquired, will be protected in every other State; *Fears v. Skyes*, 6 G. 633; S. P., *Mosby v. Williams*, 5 H. 520; *Hamilton v. Cooper*, W. 542. And the title so acquired may be set up by a plea of the statute, with an averment of the title thus vested; *Hamilton v. Cooper*, W. 542.

26. *Statute of limitations of Tennessee.* The statute of limitations of the State of Tennessee, which vests an absolute title to personalty when held for five years, applies only to adverse possession, and not to the possession of a bailee recognizing the title of his bailor, even in a contest between the bailor and the creditors of the bailee; *Mosby v. Williams*, 5 H. 520.

27. *Statute of Alabama.* By the laws of Alabama, the adverse possession of a slave for six years, not only bars the remedy for its recovery, but vests the title in the adverse possessor; nor does it change the rule in such a case, that the plaintiff or claimant is a non-resident; *Fears v. Sykes*, 6 G. 633. And a title so acquired by a *bona fide* purchaser, will not be affected by the fraud of his vendor in procuring the possession originally, and in subsequently concealing from the true owner, the place where the property is situated; *Fears v. Sykes*, *supra*.

VIII. One Year allowed after Arrest of Judgment, &c.,

28. *The year is a privilege to plaintiff.*

That provision of the statute which allows one year and no more, in which a plaintiff whose judgment has been reversed, or arrested after verdict, may bring a new action, is a privilege granted to the plaintiff, and does not of itself operate as a bar to a new action, when it has expired. It was intended to give to the plaintiff whose claim was barred by the general statute, one year in which to commence a new suit. It cannot be made the subject of a plea of the statute, but is a good replication where the plea of the general statute has been interposed; *Lang v. Fatherree*, 7 S. & M. 404.

29. *Extent of the exception: Parties must be the same.* A similar exception in the English statute of limitations, has been held to embrace, also, cases where the bar of the statute attached pending the suit, and the same was abated by the death of the plaintiff, or the marriage of a *femme sole* plaintiff; and in these cases, a year was allowed the executor and the married woman, to institute a new suit. But if this exception would be allowed in this State, it would not embrace a case where a bank had instituted a suit, and had then assigned the claim, and pending the suit in the name of the bank, the statute bar had become complete, and the suit was then abated by the dissolution of the bank on *quo warranto* proceedings; in such case, the assignee would not be allowed a year in which to bring a new action, for he was not a party to the old suit, and is not the representative of the dissolved bank; *Ingraham v. Regan*, 1 C. 213. See *post*, 31.

30. *Same.* The exception does not apply where the new suit is brought by parties, in substance and in form different from those in the first action. Hence, where the first suit was in the name of A., B. & C., as partners, under the style of A., B. & Co., and the last in the name of A., B. & D., as partners, under the same style of A., B. & Co., for the use of C., the exception does not apply so as to save the bar; *Ross v. Sims*, 5 C. 359.

31. *The exception is strictly construed.* The exception will be construed so as to embrace no case not plainly embraced in it. Hence, a suit brought within one year after the *abatement* of a former suit on the same cause of action, by the death of the defendant, is not within the statute, which allows the one year only, where there has been an *arrest or reversal* of a judgment rendered in favor of the plaintiff; *Crane v. French*, 9 G. 503. See *ante*, 29.

32. *Same: Applies in equity.* A new bill in equity, brought within one year after the reversal by the court of a decree rendered in favor of complainant in the Chancery Court, is within the exception; and it makes no difference in this respect, that the former bill was dismissed by the High Court, because the Chancery Court had no jurisdiction to render the decree, on account of the former bill having been dismissed for want of prosecution in that court, and illegally reinstated; *Weathersby v. Weathersby*, 2 G. 662.

IX. The Statute applied to Mortgages and Vendors' Liens.

1. Where the Debt is Barred but not the Mortgage.

33. *Mortgage not barred because the debt is.* A mortgage is a separate and distinct security from the note secured by it; and if the note be barred by the statute of limitations, it does not follow that the right to foreclose the mortgage is also barred. The mortgagee is still entitled to foreclosure, unless the remedy on the mortgage is also barred; *Miller v. Helm*, 2 S. & M. 687; S. P., *Trotter v. Erwin*, 5 C. 772; *Berry v. Bacon*, 6 C. 318; *Nevitt v. Bacon*, 3 G. 212; *Wilkinson v. Flowers*, 8 G. 579. And the presumption of payment arising from the bar of the statute, will not apply as against a bill to foreclose a mortgage, merely on the ground that the debt secured by the mortgage is barred; *Wilkinson v. Flowers*, *supra*. But by the Act of 1857, Rev. Code, p. 399, art. 4, it is provided that where the debt is barred, the mortgage is barred; and if the mortgagee obtain possession, the bill to redeem must be brought within ten years from that date; *Ib.*, p. 399, art. 3.

34. *Vendor's lien lost when the debt is barred.* But the rule is different in case of a vendor's lien, for that is but a secret equity, incident to the debt, having no form or existence separate from the debt; and hence, when the debt is barred, the lien is lost; *Trotter v. Erwin*, 5 C. 772; S. P., *Littlejohn v. Gordon*, 3 G. 235. And in this case, the right of the vendor to subject the land to the payment of the purchase money, was said, *arguendo*, to be barred with the note, where the vendor had only given a bond to convey title, on the payment of the purchase money, and no distinction was taken between that case and the one where a deed had been made. But the court did not decide the point, holding that the note itself was not barred on account of the absence of the defendant from the State, and on that ground ordered a sale of the land; *Trotter v. Erwin*, 5 C. 772.

2. The Barring of a Bill to foreclose a Mortgage.

35. *When statute commences to run.* The statute of limitations commences to run against a bill to foreclose a mortgage from the time the condition is broken; *McLean v. Ragsdale*, 2 G. 701; S. P., *Nevitt v. Bacon*, 3 G. 212; *Wilkinson v. Flowers*, 8 G. 579.

36. *The breaking of the condition: Instances.* The condition of a mortgage given to indemnify a surety against loss or damage arising from the payment of the debt, is not broken until actual payment by the surety, and his right to foreclose does not accrue until that time; *McLean v. Ragsdale*, 2 G. 710.

37. *The period required to bar a bill to foreclose.* The right to foreclose a mortgage on land (the debt being barred), is barred by the lapse of that period, after condition broken which is prescribed by law for the bringing of an action of ejectment, and where the property mortgaged is personal, then by the lapse of

that period prescribed by law for the bringing of an action to recover it; *Nevitt v. Bacon*, 3 G. 212; *Wilkinson v. Flowers*, 8 G. 579.

3. The Barring of a Bill to Redeem.

38. *Commences with adverse possession.* The statute of limitations will commence running against the right of the mortgagor to redeem whenever, the mortgagee, with notice to the mortgagor, asserts absolute title in himself, to the mortgaged property in his possession; *Kohlheim v. Harrison*, 5 G. 457.

39. *Adverse possession: Instance.* If the mortgagee, in possession of the mortgaged property, devise the same as his estate, it is an assertion of title adverse to the claim of the mortgagor to redeem; and in the absence of all showing to the contrary, the probate of the will in the county in which the mortgagor resides, is notice to him of such adverse claim. And the statute of limitations will commence running against a bill to redeem, from the probate of the will; *Ib.*

40. *When adverse possession commences: Instance.* Where by the terms of the mortgage, the mortgagee is to take and keep possession of the mortgaged property, and apply the rents and profits to the payment of the mortgage debt until it is fully satisfied from that source, his possession will not become adverse so as to put in operation the statute of limitations against the mortgagor, until the debt is fully paid by the rents and profits; *Anding v. Davis*, 9 G. 574.

4. Assignment of Mortgage Barred by Statute.

40a. *Same:* The assignee of a mortgage barred by the statute of limitations at the time of the assignment, if he afterwards gets possession of the land, cannot set the mortgage up to defeat an action of ejectment brought by a person who was in the adverse possession of the land when the assignment was made; *Hanna v. Renfro*, 3 G. 125.

See as to the bar of the lien of a mortgage, *post*, 76.

X. The Adverse Possession.

See ADVERSE POSSESSION.

40b. *Possession not adverse constitutes no bar.* The ground upon which the statute of limitations rests, when applied to an action of ejectment, is, that the defendant has had the open and notorious possession of the land in dispute, for the period limited by the act. The plaintiff's right of action accrues when the adverse possession begins, and not before, and the law, because of his presumed knowledge of the adverse possession, and his acquiescence therein, bars him of his remedy as well as of his right. Hence, it is not shown by a declaration in ejectment, which merely states that the plaintiff has been out of possession for the term limited by the act, that the bar has attached, it not appearing when the adverse possession commenced; *Tu-h-Ho-Fo-Tulby v. Barr*, 41 M. 52 (citing *Ellis v. Murray*, 6 C. 129; *Adams v. Guice*, 1 G. 397;

Shearer v. Winston, 4 G. 149; *Tegarden v. Carpenter*, 7 G. 404; *Nixon v. Porter*, 9 G. 401); *S. P. Shirley v. Conway*, 44 M. 434.

41. *Adverse possession confers title.* The 3d section of the act limiting actions, passed in 1844, enacts that an actual adverse possession of ten years, shall "vest a full and complete title in the possessor." This section is not intended to prescribe any bar for any remedy for the recovery of land, but to fix a period by which an adverse possession for the time limited shall vest a title. Upon such adverse possession, the plaintiff can recover, without showing any other title; *Ellis v. Murray*, 6 C. 129; *Shearer v. Winston*, 4 G. 149; *Ford v. Wilson*, 6 G. 490. And an adverse possession of personalty, for the time limited for its recovery, confers title; *Clark v. Slaughter*, 5 G. 65. And the rule is the same in Alabama; *Fears v. Sykes*, 6 G. 633.

42. *Bailee's possession not adverse.* A parol gift of a slave, by the laws of North Carolina, is void as a gift, and is, in law, only a bailment, and the statute of limitations will not commence running against the title of the donor, until the donee set up an adverse claim of title. A sale of the slave by the donee, is an assertion of adverse title, both as to the slave sold and as to her issue born subsequent to the gift, and the statute will commence running from that time, whether the donor knew of it or not; *Hall v. Dickey*, 3 G. 208; *S. P., Crump v. Mitchell*, 5 G. 449.

42a. *What is adverse possession.* A mere claim of title, unaccompanied by possession, gives no right of action to the party against whom it is asserted. It is the occupation, with the intent to claim against the true owner, which renders the entry and possession adverse, and puts in operation the statute of limitations. A disseisin and adverse holding is an actual, visible and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or constructive claim, arising from the circumstance of the appropriation showing an intent to hold against the true owner; *Magee v. Magee*, 8 G. 138.

43. *Presumption as to possession: Case in judgment.* Where the statute is relied on to defeat the right of the true owner, every presumption is to be indulged in his favor, but the jury are, nevertheless, entitled to indulge natural presumptions arising from the evidence against him. Hence, when the defendant's ancestor had held the land for twenty five years, and had made valuable improvements, and cultivated the soil, and after his death his heirs had held possession for seven years before suit was brought, it was held that the jury were justified, in the absence of all proof that the plaintiff had asserted title within these periods, in holding the possession adverse; *Ib.*

See ADVERSE POSSESSION, 6.

43a. *Possession under parol sale.* The open and notorious and exclusive possession of land for twenty-five years, commencing under a parol agreement of sale, and a payment of the purchase money, and the erection of

permanent and valuable improvements, greatly exceeding in worth the value of the unimproved land, clearly constitutes an adverse holding, and vests the title in the possessor; *Ib.*

43d. *Question of law and fact.* What constitutes an adverse holding, is a question of law, but the intent of the possessor, which is always material, is a question for the jury; *Ib.*

See ADVERSE POSSESSION, 1. 2.

4e. *Presumption arising from quantity of land occupied.* When knowledge, on the part of the owner, of the adverse holding is sought to be established by the presumption arising from the nature and character of the possession, the quantity or proportion of the land actually occupied becomes material. If the whole tract is occupied by a party asserting an adverse claim, the presumption is violent that the owner has knowledge of the adverse character of the claim, but when, on a boundary line between the owner and the adverse claimant, the possession of the latter has been but of a small quantity—a narrow strip along the boundary line, which may as well be attributed to accident and mistake as to design—a knowledge on the part of the owner of the adverse claim will not be presumed; *Alexander v. Polk*, 10 G. 737.

XI. Trusts, as affected by the Statute.

1. Implied Trusts are Barred, except in Cases of Fraud.

43f. *The statute runs against implied trusts.* The statute of limitations runs against trusts raised by implication of law; *Murdock v. Hughes*, 7 S. & M. 219; *Livermore v. Johnson*, 5 C. 284; *Prewett v. Buckingham*, 6 C. 92; *Edwards v. Ingraham*, 2 G. 272.

44. *Same: Instances.* A widow, in 1818, purchased a slave in her own name using money belonging to her children in payment of the slave. She married again, and in 1825 her husband gave the slave to the children of the second marriage; and in 1833, all the first children arrived at full age, and in 1841 filed a bill to recover the slave: *Held*, they were barred by the statute; *Murdock v. Hughes*, 7 S. & M. 219. And so where one received notes from an agent in payment of the agent's private liability to him, knowing that the agent had no title to the notes, he is a trustee for the owner of the notes and liable to him for the proceeds; but the trust is implied and not direct, and therefore liable to the bar of the statute; *Livermore v. Johnson*, 5 C. 284. And the rule is the same, where the trust was implied in its inception, and the trustee afterwards gave a written acknowledgment of the trust; for this does not change the trust into a direct and technical trust; and in such case, the possession of the trustee will still continue to be adverse to the *cestui que trust*; *Prewett v. Buckingham*, 6 C. 92.

45. *Effect of frauds on implied trusts.* But in cases of implied trusts, if the trustee

be guilty of fraud, by which the *cestui que trust* is kept in ignorance of his rights, until the period prescribed by the statute for asserting them has elapsed, the statute will not commence to run, until he has discovered the fraud and his rights, or until he has had opportunity to do so. Thus, where C., as agent for complainants, sold their land and transferred their notes to J., to indemnify the latter as his surety, he having notice of the ownership of the notes; it was held that J. thereby became trustee for complainants; and that as they resided in a distant State, and had no notice of the fraud committed by J., in taking the notes with full notice of complainants' title, nor opportunity to discover it, the statute did not commence to run against their claim on J. for the proceeds collected by him, until they had discovered the fraud; *Livermore v. Johnson*, 5 C. 284.

46. *Same.* And in such a case it makes no difference that the fraud was not directed against the complainants individually; for if it were directed against the agent's creditors generally, it would prevent the running of the statute until it was discovered; and hence, if it appear that J. had no notice of complainants' rights when he took the notes, but there being a large surplus after indemnifying J., which he was to hold in secret trust for C., in order to defeat C.'s creditors, this will be a fraud which will prevent the running of the statute; *Ib.* See *post*, 49.

47. *Plea of the statute in such a case.* Where it appears from the bill that the defendant has been guilty of a concealed fraud, which was not discovered until within six years (the period of limitation) before the bringing of this suit, the defendant's plea of the statute of limitations must be accompanied by an answer specifically denying the fraud charged, or it must be averred that the discovery of the fraud was made more than six years before the commencement of the suit; *Ib.*

See further on the subject of fraud stopping the running of the statute, *post*, subdivision Fraud, 103, *et seq.*

2. Express and Continuing Trusts, how affected by the Statute.

48. *Same.* The statute of limitations does not generally run against express trusts; but in cases of that sort it will commence to run from the time the trustee abandons the fiduciary relation and asserts an adversary claim; *Murdock v. Hughes*, 7 S. & M. 219. See *ante*, 40, 41, 42.

49. *Same: Instances.* In cases of direct technical trusts, the statute of limitation will not run against the *cestui que trust* in favor of the trustee; such a trust exists between the administrator and the distributees of an estate, but it is otherwise as between the distributees and a purchaser of personal property from the administrator; *Jordan v. McKenzie*, 1 G. 32. But the statute will run in favor of an executor against the claim of a specific legatee; and if fraudulent concealment be relied on to defeat the bar, it must be

such that could not have been discovered by ordinary diligence. If the record of the court in which the will is probated, affords the necessary evidence of the legatee's rights, the statute will run, notwithstanding the fraud; *Young v. Cook*, 1 G. 320. It will not run against the claim of a distributee, if at all, until after final settlement; *Roberts v. Roberts*, 5 G. 322. But it will run as soon as that relation is dissolved; and a final settlement of the estate by the executor is a dissolution of the trust relation; *Young v. Cook*, *supra*. And a third party receiving the trust funds from the trustee, with a promise to account for them, is not entitled to the benefit of the statute; *Gay v. Edwards*, 1 G. 218. See *post*, 56. See EXECUTOR AND ADMINISTRATOR, 265.

50. *Will not run against a continuing trust: Instance.* The statute will not run against a continuing trust. Stock subscribed in a bank and unpaid is a continuing trust for the benefit of the creditors of the bank; and against the claim of a judgment creditor, with return of *nulla bona* on his execution against the bank, who seeks to subject unpaid stock to his debt, the stockholder cannot interpose the bar of the statute, at least as long as the bank keeps up its organization as such; *Hayne v. Bullard*, 1 C. 88.

50a. *Same: An instance.* P. conveyed land and slaves to M., who had agreed to pay certain debts for P., with the understanding that M. was to hold the property until he was reimbursed by the profits. This arrangement continued for seven years, when an account was taken, and P. was indebted to M. in the sum of \$8000. By agreement of all parties, D. then took possession, as agent of M., under the same trust, and D. died, and the trust and possession were conferred on C.; *Held*, that all these were continuing trusts, and the statute did not apply; *Pinson v. McGehee*, 44 M. 229.

51. *Same: Another instance.* The trust created by the purchase at execution sale of the land of the judgment debtor, under an agreement with him to purchase and hold it for his benefit, is a continuing trust, and not within the operation of the statute, until the trust is ended; *Soggins v. Heard*, 2 G. 426.

52. *Against trustee in favor of beneficiary.* A *cestui que trust*, entitled under the deed to possession for life, does not hold adversely to the trustee during the life estate; nor do those holding under the *cestui que trust*, though they hold wrongfully and in violation of the object of the trust; for those claiming the estate of the *cestui que trust* cannot, any more than he, set up an adverse possession against the trustee during the life of the *cestui que trust*. Hence, the statute will not run against the claim of the trustee to recover from the alienee of the beneficiary; *Buller v. Spann*, 5 C. 234.

3. Cases held not to be Trusts within the Statute.

53. *Surety receiving deed as indemnity.* Where a surety, upon receiving an absolute deed to land for his indemnity, executes an ob-

ligation to convey to a third person, when requested after he shall be released, there is no such relation of trust and confidence between him and the obligee as will prevent the running of the statute in his favor against a bill to compel a specific performance; but the statute would not probably commence running until there had been a request and refusal to convey. If, however, the surety acquire an outstanding title apparently good, the statute would commence, at all events, to run from that date; *Mitchell v. Woodson*, 8 G. 567. See *post*, 190.

54. *Attorney collecting money.* The statute of limitations will run in favor of an attorney against the claim of his client for money collected by him, notwithstanding the failure of the attorney to notify him of the collection; *Cook v. Rives*, 13 S. & M. 328.

55. *Sheriff receiving voluntary payment.* The statute will run in favor of sheriff receiving payment of money from the defendant in execution, after the return day; and if the plaintiff ratify the payment, he succeeds only to the rights of the defendant, and the statute will run against his claim for the money; *Edwards v. Ingraham*, 2 G. 272.

56. *Adverse possession of executor.* One of two executors claimed property as his own, and his co-executor filed his petition in the Probate Court to compel the first to inventory the property as a part of the estate, and the court decided in favor of the claimant; *Held*, that the possession of the property, after the decision, by the claimant executor, was adverse, and the statute commenced to run from that time; *Kilcrease v. Shelby*, 1 C. 161.

XII. Effect of Bar to Trustee on cestui que Trust.

57. *Bar of trustee no bar to infant beneficiaries.* The exception in favor of infants and *femmes covert* in the statute of limitations, applies to all their rights, legal as well as equitable; and hence, the fact that their trustee holding the legal title is barred, does not bar the right of infant *cestui que trust*. This principle was applied in this case, where the trust estate was personal property; *Bacon v. Gray*, 1 C. 140; *S. P., Fearn v. Shirley*, 2 G. 301. And this principle is applicable as well to actions at law, as suits in equity, and to suits for the recovery of a mere money demand, as well as for the recovery of specific property; *Pearson v. McMillan*, 8 G. 588. See *post*, 122.

58. *Same: Instances.* If a note be given to "A. as guardian of B., the statute will not bar B.'s right to collect, until the expiration of six years after B.'s arrival at majority;" *Adams v. Torrey*, 4 C. 499. And so the statute will not commence running against an official bond, payable to a trustee for the benefit of another, as a guardian's or executor's bond, whilst the *cestui que trust* is under a disability to sue; *Pearson v. McMillan*, 8 G. 588. And the principle is also applicable,

where an administrator fails to sue for the recovery of property, which has been mortgaged by the intestate, and where the right to recover it from the mortgagee accrued after the death of the mortgagor; *Anding v. Davis*, 9 G. 574.

59. *Administrator's removal of property.* If an administrator wrongfully remove personal property of his intestate to another jurisdiction, he has no rights as administrator over it; there, he is a mere trustee for the heirs; and if in that jurisdiction, another wrongfully acquire possession of the property, the statute of limitations will not run in favor of such possessor, against the rights of the infant distributees; but the statute will be applied precisely as if there never had been an administrator; *Kilpatrick v. Bush*, 1 C. 199.

XIII. Limitations in Specific Cases.

1. Accounts.

See *post*, 175.

60. *Physicians' accounts.* Under the Act of 1822 (H. & H. p. 568), an action on an open account for services rendered by a physician was not barred in three years; *Hazlip v. Leggett*, 6 S. & M. 326.

61. *Open accounts generally.* The period in which actions to recover upon open accounts, under the statutes of this State, as they existed prior to 1844, was three years. The "actions of account and upon the case" referred to in the 4th section of the Act of 1822, relate exclusively to actions of that character, and not to actions in assumpsit, upon open accounts; *Philips v. Cage*, 12 S. & M. 141.

The statute commences to run against the various items, in an open account, from the time each becomes due; *Effinger v. Henderson*, 4 G. 449. An account kept by a physician for medical services, is barred at the end of three years from the time it is due, and the presumption will be that the items are due at their date; but evidence may be introduced of a local custom, that they are not due till the end of the year; *Hunter v. Wilkinson*, 44 M. 721.

And where the only evidence that a partial payment has been made, is a statement in the account made up by the creditor, showing its reception and appropriation by him to an item in the account barred by the statute of limitations, the debtor will not be entitled to reject the item thus barred, and have the payment appropriated to the balance of the account. If the item barred by the statute be rejected, so must the credit; *Crisler v. McCoy*, 4 G. 445.

62. *Accounts between merchant and merchant.* The 4th section of the act of limitations of 1822, exempted from its operation "such actions as concern the trade of merchandise, between merchant and merchant." This exception applies only where there are mutual dealings and credits, between merchant and merchant, and not to a single sale, however large, of merchandise, by one mer-

chant to another. Nor does it apply to an account stated between merchant and merchant; *Davis v. Tiernan*, 2 H. 786.

It does not apply to an account for work and labor done by one merchant for another; *Slocumb v. Holmes*, 1 H. 139.

To bring an account within the exception the parties must both be merchants when the debt was created—the account must relate to articles of merchandise—be unsettled, current and mutual, arising from a mutual and alternate course of dealings, consisting of debts and credits. If the account be stated, the exception does not apply; nor will a single new item added to an account stated, of long standing, bring it within the rule that the balance of an account stated, carried to a new account, will make it an item merely in an account current; *Fox v. Fisk*, 6 H. 328.

2. Amendment of Judgments.

63. *No limitation on.* There is no limitation prescribed by the statute to the proceedings allowed for the correction of mistakes in the entry of judgments, where the error and mistake appear of record; *Graves v. Fulton*, 7 H. 592.

3. Covenants.

64. *Not embraced in the Act of 1844.* An action of covenant for a breach of a general warranty of title, contained in a deed, is not embraced in the act of limitations of 1844. The 7th section of the act, which prescribes periods of limitations for "actions of covenants for rent or arrearages of rent, founded upon any lease under seal, actions of debt upon any single or penal bill for the payment of money, or any other thing, or upon any condition for the payment of money or any other thing, or upon any award for the payment of money or any other thing," does not include actions on a covenant of warranty, within its terms, and the courts will not extend the statute to cases clearly not within the enumerated classes; *Burrus v. Wilkinson*, 2 G. 537.

4. Ejectment.

65. *As to the adverse possession necessary,* see *ante* 41.

65a. *As to possession conferring title,* see *ante* 41.

66. *Time prescribed for ejectment.* Thirty-two years' adverse possession, under the limitation laws of this State, as they existed in 1844, was sufficient to bar any action for the recovery of land, unless plaintiff showed he was under some of the disabilities mentioned in the statute; *Montgomery v. Ives*, 13 S. & M. 161.

By the Act of 1854 (Session Laws, ch. 39, § 3), the period for bringing ejectment, prescribed by the Act of 1844, was extended from seven to ten years; *Harper v. Tapley*, 6 G. 506.

Under the pleading Act of 1850, the statute of limitations might be specially pleaded to an action of ejectment; *Tegarden v. Carpenter*, 7 G. 404. But under the Act of 1857,

all special pleas in ejectment are nullities; *Hutton v. Thornton*, 44 M. 166.

As to effect of a part of the plaintiffs in ejectment being under a disability, see *post*, 131.

See DOWER, 15.

5. Executions.

67. *Issuance of execution in seven years: Void and voidable.* By the Act of 1844, no execution can be issued after the expiration of seven years from the date of the last preceding execution. But a void execution will not be counted to save the bar; nor will an execution, issued and delivered to the sheriff, with instructions to return it immediately, if issued solely with the view of saving the bar, and with no intent that it should be levied, have that effect. Hence, where an execution was issued by the plaintiff, who was the deputy circuit clerk, and delivered to the sheriff, with the return written out, for the signature of the sheriff, "received too late to execute," and upon the sheriff signing the return, immediately carried back to the clerk's office; it was held that it had no effect to save the bar; *Harris v. West*, 3 C. 156. But the issuance of an execution, in good faith, which is merely irregular and voidable, and for that reason has been quashed, will have the same effect to save the bar as a regular and valid execution; *Nye v. Cleveland*, 2 G. 440.

68. *Executions from Probate Court.* The above statute applies to executions from the Probate Court, on a decree in favor of a distributee against an administrator, on final settlement; *Dilworth v. Carter*, 3 G. 206. See *post*, 74b.

69. *Statute has no retrospective operation.* The statute of 1844, prescribing seven years after the last execution as the period for the issuance of a new one, does not apply so as to commence to run from the date of an execution issued before its passage. In such a case the statute would commence to run from the date of the act; *Brown v. Wilcox*, 14 S. & M. 127. See *ante*, 8. See also as to effect of this statute on the revivor of judgments, *post*, 75.

6. Foreign Judgments.

70. *Act of 1844: Judgments rendered before its passage.* Under the fourteenth section of the Limitation Act of 1844 (H. C. 832), actions on all judgments rendered in another State prior to its passage, were barred at the expiration of two years from the date of the act; *McClintock v. Rogers*, 12 S. & M. 702. And this is so though the defendant was never a resident of the State; *Mailand v. Keith*, 1 G. 499. Yet if the defendant die, the nine months after his appointment, in which an administrator cannot be sued is to be excepted out of this statute, as in other cases; *Barringer v. Boyd*, 5 C. 473.

71. *Act of 1846: Limitation on foreign judgments, where defendant was a citizen of the State.* In the Act of 1846, amendatory of the limitation act of 1844, it is provided,

"that no record of any judgment recovered in any court of record, without the limits of the State, against any person who was, at the commencement of the suit in which the judgment was rendered, a citizen of this State, shall be received in evidence in any court in this State, as evidence to charge such citizen with liability, after the expiration of three years from the date of such judgment." An action was brought on such a judgment within three years from its date, but so late that the issue or trial term of the suit would not happen until after the expiration of the three years, and the defendant relied on the statute: *Held*, that the provision was a statute of limitations, and applied to the commencement of the suit, and was no bar to this action; *Moore v. Lobbin*, 4 C. 304. This statute does not apply to judgments rendered before its passage; *Boyd v. Barringer*, 1 C. 269; *Garrett v. Beaumont*, 2 ib. 377. Whether if three years elapsed after the date of the act, such a judgment would then be barred; *Quære? Garrett v. Beaumont. supra.* See *post*, 170, for plea setting up this statute.

72. *Other foreign judgments.* Generally, seven years from the date of a foreign judgment is the time limited by the Act of 1846, in which suit may be instituted on it in this State; and the limitation commences from the date of the judgment, and not from the time the defendant came within the jurisdiction of the State (citing *Mailand v. Keith, ante*, 70); *Clements v. Brown*, 2 G. 93.

7. Judgments and their Liens, and Revivor of them.

73. *Action against an administrator for not paying judgment.* An action of debt against an administrator and his sureties on his bond for not paying a judgment rendered against him, is founded on the judgment, and is not embraced in the fourth section of the Act of Limitations of 1844, which limits actions of debt "founded on any contract not under seal" to three years, but comes within the eighth section, which prohibits the bringing of actions on judgments, after seven years from the date of their rendition; *Lee v. Gardiner*, 4 C. 521.

74. *Statute does not apply to judgments of Board of Police.* The statute of limitations, in prescribing a period beyond which judgments shall not be revived by *scire facias*, nor execution be issued thereon, furnishes no bar to the enforcement of judgments which cannot be revived by *scire facias*, nor enforced by execution. Hence, it does not bar the remedy by mandamus to enforce the collection of a warrant issued on the county treasurer, in pursuance of an order of the Board of Police; *Carroll v. Board of Police of Tishamingo Co.*, 6 C. 38.

74a. *As to expiration of judgment liens, under thirteenth section of Act of 1844, see JUDGMENT, 88, 89.*

74b. *Revivor of judgments: Statute applies to probate and chancery courts.* The statute of limitations of 1844, which declares that

"judgments in any court of record in this State shall not be revived by *sci. fa.*, nor shall any action of debt be instituted thereon after seven years next after the date thereof," applies to judgments and decrees in the Probate Court; *Byrd v. Byrd*, 6 C. 144. And the statute of 1824 was held to apply to decrees in chancery; *McCoy v. Nichols*, 4 H. 31. And in this last case, it was held that after a judgment against an administrator was barred, a court of chancery would not permit the administrator to take any step in relation to it, which would prejudice the heir or those holding under him; See *ante*, 68.

75. *Revivor barred, though executions have regularly issued.* The right to issue a *scire facias*, to revive a judgment against the administrator, or heirs of the debtor, is barred after the lapse of seven years from the date of its rendition, even where executions have been regularly sued out within seven years prior to the issuance of the *scire facias*; *Vick v. Cheunings' Heirs*, 2 G. 201. Nor can a bill in equity be maintained in such a case, to subject property, fraudulently assigned by the debtor, to the payment of the judgment, which being barred at law, cannot be collaterally enforced in equity (citing *Vick v. Cheuning's Heirs, supra*); *Fox v. Wallace*, 2 G. 660. See *ante*, 67, 69.

8. Mortgages.

76. *Lien of mortgages.* There is no law in this State (in 1850) which prescribes the duration of the lien of a mortgage; and it seems the lien will continue as long, at least, as the mortgage continues valid and binding; *Morse v. Clayton*, 13 S. & M. 373. The rule seems to be the same, under the Act of 1857, Rev. Code, p. 399.

77. *On the bar of mortgages generally*, see *ante*, 33 to 39.

9. Right to Repurchase.

78. *When barred.* The right to repurchase, under a conditional sale, in a case where no time for its exercise is specified in the agreement, will be extinguished by the lapse of the period prescribed by the statute of limitations, for the institution of a suit for the recovery of the property, if it were held adversely; *Magee v. Catching*, 4 C. 672.

10. School Funds.

79. *Statute runs against.* The statute of limitations runs against a note given for the loan of the common school fund; *Money v. Miller*, 13 S. & M. 531.

11. Sinking Fund.

80. *Does not run against.* The sinking fund is the property of the State, and an action for its recovery, though in the name of the commissioner, is not barred by the statute of limitations; *Hill v. Josselyn*, 13 S. & M. 597. See *ante*, 22 to 24.

12. Slander and Libel.

81. *Same.* The sixth section of the Act of 1824, which provides that every action on the

case for words, shall be commenced and sued within one year after the words spoken, &c., applies to words written as well as words spoken; *Menter v. Stewart*, 2 H. 698.

13. Trial of the Right of Property under the Statute.

82. *Statute same as in detinue.* The statute of limitations, which would bar an action of detinue, will also bar a recovery by a plaintiff, in a proceeding for the trial of the right of property levied on under execution, in all cases where the claimant's title, or the title of him under whom he claims, commenced before the lien of the judgment, and also where the lien has expired; *Claughton v. Black*, 2 C. 185.

14. Trover.

83. *Commences to run from conversion.* The statute commences to run against an action of trover from the time of the conversion, whether plaintiff knew of the conversion or not, if no fraud was used to conceal it; and hence, where the conversion arises from buying from a person rightfully in possession, but with no authority to sell, the statute commences to run from the date of the sale; *Johnson v. White*, 13 S. & M. 584.

15. Writ of Error.

84. *The writ must issue within three years.* The statute declares that no writ of error shall issue unless within three years from the rendition of the judgment or decree sought "to be reversed." Held, that the writ cannot issue after that time, though the plaintiff in error filed his petition for the writ in time, and it was the negligence of the clerk that it was not issued till too late; *Butler v. Craig*, 5 C. 628.

See WRIT OF ERROR, 37.

16. Writ of Right.

85. *Plea of statute to, under Act of 1850.* Under the Pleading Act of 1850, which required the defendant to state specially in his answer every defence he relied on, it is unnecessary to plead the statute of limitations to an action in the nature of a writ of right; for in that action it is necessary to aver in the declaration, seisin within the time prescribed by the statute, and a denial of the averment in the answer, sufficiently puts it in issue; *Ellis v. Murray*, 6 C. 129.

86. *Construction of statute as to limiting writ of right.* Though it is generally true, that a statute which treats of persons or things of an inferior degree, cannot by any general words be extended to those of a superior degree; yet where all those of the inferior degree are enumerated, by the express words used, the addition of general words must be held to include those of a superior degree, or else they would be meaningless and nugatory. Hence, the first section of the Act of Limitations of 1844, (H. C. 829), which prescribes a limitation of seven years to every possessory, ancestral, mixed,

or other action, for land, &c., must, by the general words "or other action," include real actions, which are of a superior degree, since the express words used include all those of the inferior degree; *Id.*

See STATUTES, 31, *et seq.*

XIV. The Statutes as applied to Actions affecting Decedent's Estate.

See EXECUTOR AND ADMINISTRATOR, 177, to 183, 271 to 275.

1. Presentation of Claims to the Executor.

87. *Nature of the statute limiting a time for presentation.* Whether the statute limiting the time in which claims shall be presented against the estates of decedents, and declaring that on failure to present a claim it shall be barred, "and the estate discharged therefrom," is anything more than a statute of limitations; *Quære?* *Johnson v. Planters' Bk.* 4 S. & M. 165. In *Miller v. Jefferson College*, 5 S. & M. 631, the court in reference to this statute say, "that it is difficult to draw a distinction between this statute and the general statute of limitations, as the same result is brought about by both. In the one instance (the latter) the right is destroyed as a consequence, and in the other directly by the language used."

88. *When this statute begins to run.* This special statute of limitations does not begin to run until the expiration of the period required for the publication of the notice to creditors; *Henderson v. Hsley*, 11 S. & M. 9.

89. *How the publication is to be made.* But no bar arising from non-presentation within the time limited by the statute, will attach, unless the publication of notice to present was made in accordance with the statute. If the publication be not commenced in two months after the appointment of the administrator, or the qualification of the executor; *Branch Bank of Alabama v. Windham*, 2 G. 17; *Pearl v. Conley*, 7 S. & M. 356; *Dowvell v. Webber*, 2 id. 452.

90. *What is a good presentation.* As to this, see EXECUTOR AND ADMINISTRATOR, subdivision, Presentation of Claims, 276, *et seq.*

2. Suits must be brought against Administrator in four year. after his Appointment.

91. *Statute is prospective.* The 12th section of the Act of Limitations of 1844, which provides that no action or suit at law or in equity, shall be brought against any executor or administrator after the expiration of four years from the date of his appointment or qualification, is prospective, and applies only to administrators and executors who were appointed or qualified after the passage of the act; *West Feliciana R. R. Co. v. Stockett*, 13 S. & M. 395.

92. *The exception of nine months added to the four years.* But the statute does not commence to run from the date of the appointment or qualification, but only from the expiration of the nine months thereafter, in which administrators and executors are pro-

hibited from being sued. To constitute the bar, therefore, four years and nine months from the date of appointment or qualification, must elapse; *West Feliciana R. R. Co. v. Stockett*, 13 S. & M. 395; *Wilkinson v. Moore*, 5 C. 365; *Jennings v. Love*, 2 C. 249.

93. *It does not apply to sci. fa. against the heir.* This section (12) does not apply to a *sci. fa.* to revive a judgment against the heir, when no administration has ever been granted; *Ferguson v. Crowson*, 3 C. 430.

94. *It refers to causes of action against decedent alone.* The 12th section of the Act of 1844, is in the following words: "No action or suit at law or equity shall be brought against any executor, administrator, or other person having the charge or management of the estate of a decedent, upon any judgment or other cause of action against the decedent; nor shall any *sci. fa.* issue against any executor, &c., to revive any judgment, or other cause of action, after the expiration of four years from the qualification of such executor, &c., and all such judgments or causes of action, after the expiration of four years as aforesaid, upon which no proceeding shall have been had, shall be deemed to be paid and discharged." The first clause of the statute, expressly names judgments, &c., against the decedent, and the second clause in *italics*, though not so expressly stating, means all judgments and causes of action against the decedent. And hence, neither clause refers to the revivor of judgments which were rendered against the executor or administrator, and as to such judgments the four years limitation of this section does not apply. And the same construction is proper upon a similar provision in the Act of 1822; *Bingaman v. Robertson*, 5 C. 501; *S. P. French v. Davis*, 9 G. 48. Art. 11, p. 408, of the Rev. Code of 1857, is substantially the same as to the points ruled in this section, and in 92, 93, *ante*.

95. *Same: Another illustration.* Nor does this section apply where the last endorser being sued, and a judgment recovered against him after the death of the first endorser, and the last endorser having paid this judgment (after the death of the first), sues the administrator of the first endorser. The demand, in such a case, of the last endorser against the first, arises upon the payment of the judgment, and that taking place after the first endorser's death, it cannot be said that the demand is a "judgment or cause of action" against the decedent, on which, by the statute, suit could not be brought after four years from the appointment of the administrator; *Pope v. Bowman*, 5 C. 194.

96. *New promise to save this bar.* If an executor having power by the will to do so, make an acknowledgment of a debt, not then barred by the statute, the period prescribed in this 12th section will commence to run from the date of the new promise; *Waul v. Kirkman*, 3 C. 609.

See as to power of administrator to waive the bar, EXECUTOR AND ADMINISTRATOR, 177 to 183; and *post*, 157, 159.

3. The Nine Months' Exception, in which Executor cannot be sued; and the One Year allowed after Death to bring Suit.

97. *The nine months excepted.* As a general rule, when the statute of limitations once commences to run, its operation is not suspended by any subsequent disability. But if the disability grows out of any positive statutory provision, the time during which it continues should be excepted. Hence, the period of nine months after the appointment of an administrator, during which the statute prohibits the bringing of any action against him, is excluded from the computation of the time prescribed by the statute, and is added to the ordinary period, in which actions are limited where the debt is due at the time of the appointment; *Dowell v. Webber*, 2 S. & M. 452; *Abbott v. McElroy*, 10 S. & M. 100; *Henderson v. Hsley*, 11 S. & M. 9. This exception is general, and applies to actions on judgments rendered out of the State; *Barringer v. Boyd*, 5 C. 473.

98. *Same: The one year after death allowed: And the two added.* The 11th section of the Act of Limitations of 1844, limits actions upon open accounts to three years, and it also provides, "that in case of the death of the debtor or creditor, the further time of one year from the death of such creditor or debtor shall be allowed for the commencement of the suit." It is also a part of the statute, that an executor or administrator shall not be sued for nine months after his appointment or qualification. This period of nine months, it is now settled, is not counted as a part of the period limited by the statute for the bringing of actions: *Held*, that the provision allowing suit to be brought within one year after the death of the debtor or creditor was not intended in all cases, where such death occurs before the bar has attached and become complete, to make the limitation on open accounts four years instead of three years; but it was intended, in all such cases, to provide so that, at all events, one year from the time of the death of the debtor or creditor should be allowed, in which suit may be brought; and this provision will not have the effect of prolonging the period prescribed in the statute, unless the death should occur, when less than one year of the general statute should remain, in which suit might be brought.

And it was also held, that so much of the one year as might happen to be embraced in the nine months, in which an administrator or executor could not be sued (in case of the death of a debtor), should be added as an enlargement of the time, to the one year allowed in the statute. So that, if an administrator of a deceased debtor was appointed on the day of his death, the period of one year so allowed, would not commence to run, until after the expiration of the nine months, and would not expire for twenty-one months after such death; *Jennings v. Love*, 2 C. 249.

There is a material difference between this statute, and the Revised Code of 1857, p. 401, art. 18. The first applies only to actions on

open accounts, and the latter to all actions; the first allows one year only from the death of the debtor or creditor, whilst the latter seems to suspend the statute in all cases, for the time intervening between the death, and the appointment or qualification of an executor or administrator; and to allow in all cases, where the bar had not become complete at the time of such death, one year in which to bring an action, without reference to the time which might elapse between the death and the appointment. (G).

4. Insolvency of an Estate as an Exception to the Statute.

99. *Effect of.* After an estate has been declared insolvent by the Probate Court, no suit can be brought against the administrator or executor to enforce a debt against the estate; and hence, from the time of such declaration, the statute of limitation ceases to run in favor of the estate. The only bar that can attach afterwards, is the one arising from a failure to present and establish a claim within the time prescribed by the statute; *Waul v. Kirkman*, 3 C. 609.

Whether this is the rule under the Rev. Code of 1857; *Quere?* (G.)

5. Miscellaneous.

100. *When there is no administrator.* When there is no administrator, when the adverse possession commences as to property belonging to an estate, the statute will not commence running in favor of the adverse possession, until one is appointed; *Wood v. Ford*, 7 C. 57. But the distributees have a right to sue for personal property belonging to their ancestor, when there is no administrator and no debts are shown to be due; and in such a case the statute will run against them, and where their suit would be barred, a suit by an administrator afterwards appointed would also be barred, though there was no administrator when the cause of action accrued; *Manly v. Kidd*, 4 G. 141. See *ante*, 10.

100a. *Absence of administrator from the State.* The Act of 1852 (Session Laws, ch. 56), which provides, that where an administrator of an estate resides beyond the limits of the State, so that the ordinary process of law cannot be served on him, he may be sued by publication of notice against him in a newspaper, furnishes parties having claims against the intestate, a full and ample remedy for their collection, notwithstanding the absence of the administrator; and hence, the running of the statute will not be affected by the absence of the administrator; *French v. Davis*, 9 G. 167. See *post*, 119.

XV. Exceptions to the Statute.

1. Generally.

101. *Equitable exceptions not allowed.* The doctrine is fully established, that implied and equitable exceptions will not be engrafted by the courts upon the statute of limitations, and where the Legislature has

not made an exception in express words, the courts will not allow it; *Dozier v. Ellis*, 6 C. 730; *Smith v. Westmoreland*, 12 S. & M. 663; *Ingraham v. Regan*, 1 C. 213; *Kilpatrick v. Byrne*, 3 C. 571; *Robertson v. Alford*, 13 S. & M. 509; *Butler v. Craig*, 5 C. 628; *Young v. Cook*, 1 G. 320; *Crane v. French*, 9 G. 503. See *post*, 182, for rule as to equitable extension of the statute.

102. *Exception where positive disability created by statute.* But where a positive disability to sue is created by statute for a limited period, that term will be excepted from the statute without any express direction in the statute to that effect, and therefore the nine months in which an administrator is not allowed to be sued, are excepted from the statute; *Dowell v. Webber*, 2 S. & M. 452, and cases digested in 97, 98, *ante*.

2. Fraud as an Exception to the Statute.

A. WHERE THERE IS TRUST.

103. *As to this*, see *ante*, 44, 45, 46, 47.

B. DILIGENCE, MEANS OF DISCOVERY.

104. *Is no exception, where discovery could be made.* Fraud will not constitute an exception where the plaintiff could have discovered his rights by the use of ordinary diligence, and it ceases to be an exception from the time such discovery might have been made by ordinary diligence. Thus, it is no answer to the statute set up by an executor against the claim of a specific legatee, if the records of the court in which the will was probated would disclose the legatee's rights; *Young v. Cook*, 1 G. 320. And the fraud of an agent in denying the reception of money, from a source well known to the principal, is no exception to the statute, since application at the source would have furnished the information; *Cook v. Lindsey*, 5 G. 451.

105. *When diligence excused.* In order to excuse the exercise of proper diligence to discover fraud, there must exist some relation of trust and confidence, as principal and agent, client and attorney—*cestui que trust* and trustee—between the party committing the fraud and the party affected by it, which rendered it the duty of the former to disclose to the latter the true state of the transaction; and which shows that it was through confidence in the acts of the party who committed the fraud, that the other was prevented from detecting it. And where there is no such relation, then it must be shown that some positive act of fraudulent representation or concealment was done directly towards the party injured, which lulled him into security, and caused him to rely upon the good faith of the other party. In the absence of these, when the right of action results from fraud, it accrues from the time of its commission, and commences from that date. And the presumption is, that if a party affected by a fraudulent transaction might, with ordinary care and attention, have seasonably detected it, he had seasonably actual

knowledge that a fraud had been committed; *Buckner & Stanton v. Calrote*, 6 C. 432; S. P., *Wilson v. Ivy*, 3 G. 233.

106. *The general rule as to fraud in equity.* The general rule is, however, well established in equity, that in cases of fraud, the statute of limitations begins to run only from the time of the discovery of the fraud; and in many cases of this kind the court will interfere to prevent the bar; but this rule will not be applied where, in reference to other principles, it would defeat the policy and equitable operation of statutes of limitation, and therefore, there are many exceptions to it. Thus, courts of equity discountenance laches. The powers of the court can be called into operation only by conscience and good faith and reasonable diligence, and it has always refused its aid to stale demands, when the complainant has slept on his rights, and acquiesced for a great length of time; *Buckner v. Calrote*, 6 C. 432.

107. *The rule applied to bill to annul certificate of bankruptcy.* Under these principles there is nothing to prevent the running of the statute of limitations against a bill to set aside for fraud, a bankrupt's certificate of discharge; *Ib*.

108. *Same.* Yet, if the fraud by which the plaintiff is prevented from asserting his rights, during the time prescribed by the statute, be so concealed by the positive act of the defendant, that the plaintiff could not have discovered it by reasonable diligence, the statute will not commence running until the discovery of the fraud; *Edwards v. Gibbs*, 10 G. 166.

109. *Same: Case in judgment.* The bill charged, that W., at the time of his application, and at the date of his discharge as a bankrupt, in 1842, had an estate in remainder, to vest after the death of his mother, in a large amount of property. This estate was secured to him by the will of his stepfather, which was probated in 1835; W. being then largely indebted, fraudulently withheld the will from record, after it had been probated, and kept it concealed till 1856, when he supposed all his debts were barred, and then placed it on record. W., being well aware of his rights to the property, fraudulently omitted it from his schedule in bankruptcy, and thereby concealed his interest in it from his creditors. The complainant recovered a judgment against W. in 1839, but had no notice of these frauds, nor means of knowing them, nor was there anything to put him on inquiry as to the interest of W. in the property, till the year 1856, when the will was recorded. The bill was filed in March, 1857, to set aside the discharge and recover the debt out of the property: *Held*, that it was not barred by the statute of limitations; *Ib*.

C. LEGAL DEMAND.

110. *Enforcement of legal demand in equity.* Where the complainant comes into a court of equity to enforce a legal demand, the defence of the statute of limitations will

not be disallowed on account of the fraud of the defendant, unless it be of such a character as to keep the complainant in utter ignorance of his rights, by placing beyond his control the ordinary means of discovery; and hence, where the agent fraudulently and falsely denied the reception of money for the principal, from a source well known to the latter, the fraud is not sufficient to take the case out of the operation of the statute; *Cook v. Lindsey*, 5 G. 451.

D. NO EXCEPTION AT LAW.

111. *Exception of fraud does not apply to actions at law.* There was formerly a difference in the authorities as to whether a fraudulent concealment, on the part of the defendant, was a good replication to the plea of the statute of limitations in an action at law, but now it is settled that the courts will not engraft an exception where the Legislature has made none; and such a replication is not good; *Dozier v. Ellis*, 6 C. 730.

112. *Limitation in action for false representations.* A right of action accrues to the purchaser of a slave, against a third person, for false and fraudulent representations made by the latter in relation to the title of the slave, from the date of such representation; and the statute of limitations will commence running from that time, and not from the date of the judgment of eviction; *Wilson v. Ivy*, 3 G. 333.

E. PROOF OF THE FRAUD.

113. *Must be clear.* Fraud, when relied on as an answer to the plea of the statute of limitations, must be clearly proven; it cannot be presumed; *Iler v. Routh*, 3 H. 276.

F. PURCHASER NOT AFFECTED BY FRAUD OF SELLER.

114. *Same.* A bona fide purchaser of a slave, who has held possession of the slave for the period limited for the bringing of an action against him, will not be affected by the fraud of his vendor in procuring possession of the slave, and in concealing from the true owner the place where the slave has been kept; *Fears v. Sykes*, 6 G. 333.

G. STATUTE OF 1857 ON FRAUD AS AN EXCEPTION.

115. *Same.* Art. 14, of section 2 (which section relates to personal actions), of the Rev. Code of 1857, p. 401, is as follows: "If any person, liable to any of the actions mentioned in this section, shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the cause of such action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or, with reasonable diligence, might have been, first known or discovered."

3. Absence from the State.

116. *Extent of the exception.* The exception in the statute of limitations (Poindexter's Code., p. 186), which prevents the running of the statute of limitations during the

time the defendant might be out of the State, applies as well to a case where the defendant had never been in the State when the cause of action accrued, as to a case where the defendant, having once been in the State, has departed therefrom. The time of absence from this State is to be deducted, even where it occurs before the defendant has resided here; *Estis v. Rawlins*, 5 H. 258. And it applies also though the defendant had, during his absence, property in this State which the plaintiff could have seized under attachment; *Fisher v. Fisher*, 43 M. 212.

117. *Exception applies to suit for enforcing vendor's lien on land situated here.* The absence of the maker of a note from the State, prevents the running of the statute during that time, and also prevents the running of the statute against the right of the holder (where the note was given for the purchase money of land situated here) to enforce the vendor's lien for its collection; *Trotter v. Erwin*, 5 C. 772.

118. *Act of 1844 as to suits on foreign judgment.* But the Act of 1844 bars an action in this State on a foreign judgment rendered prior to the date of the act, if it be not commenced within two years from the passage of the act, whether the defendant was ever a resident in this State or not; *Maitland v. Keith*, 1 G. 499. See further on this subject, *ante*, 70, 71.

119. *The reason of the rule as to absence and application.* The reason of the exception of the time of the defendant's absence from the State from the time limited for the bringing of suits against him is, that on account thereof the plaintiff is prevented from pursuing his remedy to recover the debt; if, therefore, the plaintiff's right to sue be unimpaired, notwithstanding such absence, he will not be entitled to the benefit of the exception. Thus the Act of 1852 (Session Laws, ch. 56) authorizes non-residents, who are administrators by appointment of the Probate Court in this State to be sued by the publication of the notice of suits against them, and this furnishes parties having claims against such estates, ample remedy to recover them, notwithstanding the absence of the administrator; and hence, the running of the statute will not be affected by the absence of an administrator from the State; *French v. Davis*, 9 G. 218.

120. *Construction of the statute where there are several absences.* Section 11 of the Act of 1844 (H. C. p. 831), is as follows: "If any person or persons against whom there is, or shall be, any cause of action, as specified in the preceding sections of this act (except for the recovery of lands, &c.), is, are, or shall be, out of the State at the time of such cause of action accruing, or during any time in which suit might be sustained on such cause of action, then the person or persons who are or shall be entitled to such cause of action, shall be at liberty to commence the same against such person after his, her, or their return to this State; and the time of such person's absence shall not be computed

as a part of the time limited by the act." This act was construed to run, without further deduction or intermission, from the time a debtor returns notoriously and openly in the State, so that he may be sued, notwithstanding he may afterwards be absent at intervals from the State; and it was further held, that if the debtor be absent on more occasions than one, the several periods of absence cannot be added together, and the aggregate time deducted from the statute; *Ingraham v. Bowie*, 4 G. 17.

The Act of 1857, Rev. Code, p. 400, art. 13, is in substance the same, except that actions for land seem also to be embraced within the exception.

4. Infancy and Coverture.

121. *Subsequent coverture or infancy no bar.* When the statute once commences to run, it continues to do so, notwithstanding any subsequent coverture of the plaintiffs, or the infancy of any subsequent parties who may become interested in the cause of action; *Stevenson's Heirs v. McReiry*, 12 S. & M. 9. And so if a *femme covert* become interested in land held adversely, and the statute has already commenced to run in favor of the possessor, it will still continue to run, notwithstanding her coverture; *Merritt v. Doss*, 2 G. 275.

122. *Exception applies to their equitable as well as legal rights.* The exception in the statute in favor of infants (and *femmes covert*) applies to all their rights, legal as well as equitable; and hence if the trustees be barred, it is no reason for barring the rights of infant, and *femme covert cestuis que trust*; *Bacon v. Gray*, 1 C. 140. See *ante*, 57, 58, 59.

123. *Onus probandi as to the disability.* If the plaintiff relies on the exception in the statute in favor of infancy or coverture, he must show affirmatively that he is entitled to the benefit of the exception; *Stevenson's Heirs v. McReary*, 12 S. & M. 9. As to bar where wife was insane when she married, see *post*, 137.

124. *Act of 1844 construed on this point.* The benefit of the exception in favor of infancy and coverture exists under the Act of 1844, though not mentioned expressly in that statute, the former statutes on this subject being unrepealed; *White v. Johnson*, 1 C. 68; S. P., *Simmons v. Pickett*, 2 C. 467.

125. *Femme covert not barred by adverse possession of her slaves.* The right of a *femme covert* to recover her slaves is not barred by an adverse possession for three years in this State; *Fatheree v. Fletcher*, 2 G. 265.

126. *Bar of wife's chose in action.* A chose in action accruing to the wife during coverture, vests at common law, immediately in the husband, and is, therefore, subject to the running of the statute, notwithstanding her coverture; *Cook v. Lindsay*, 5 G. 451.

127. *Husband's right to profits of wife's realty.* The husband's right of possession, or to the rents and profits of the wife's realty,

is but an incident to the wife's title. His seisin is not sole and separate in himself, but joint with the wife and in her right; and if the statute of limitations be no bar to the right of the wife, on account of her coverture, it will be no bar to the right of the husband, which is merely incidental, and does not vest until after the recovery of the land; *Merritt v. Doss*, 2 G. 275.

See HUSBAND AND WIFE, 180 to 185.

5. Cumulative Disabilities.

128. *Same.* Cumulative disabilities are not allowed in construing the statute of limitations; *Dease v. Jones*, 1 C. 133.

6. Disabilities of Joint Plaintiffs.

129. *Same.* It is a well established rule, both in law and equity, that if one of several persons entitled to a joint action, be capable of suing at the time the cause of action accrued against the defendant, and the suit be not instituted in the time limited by the statute, all the persons so entitled to the joint action will be barred; for the disability of one, will not save the right of the others; *Jordan v. McKenzie*, 1 G. 32. And, on the other hand, if, at that time, all be under a disability to sue, the statute will not commence running against any, until the disability be removed from all; *Masters v. Dunn*, 1 G. 264; S. P., *Anding v. Davis*, 9 G. 574. See *post*, 134.

130. *Same: Application of the rule.* A cause of action accrues to the distributees of an estate, against a purchaser of personal property from the administrator, at an illegal and unauthorized sale thereof, at the time the purchaser takes possession under the sale; and if at that time one or more of the distributees be under no disability, and the others be under age, the statute will commence to run against all from that date; *Jordan v. McKenzie*, 1 G. 32.

131. *Rule when the interest is joint and several: Application.* But where the interest of the plaintiffs is not merely joint, but joint and several, the statute will run or not against each of the several plaintiffs respectively, as he may or may not be under one of the disabilities mentioned in the act, and the right of one may be barred, and that of another remain unaffected by the statute. The interest of the heirs in the realty of their ancestor is not merely joint, but joint and several; and hence, in a joint action of ejectment by all for its recovery, the statute of limitations will be applied to each of the plaintiffs, as if he had sued singly for his share; *Root v. McFerrin*, 8 G. 17.

132. *Same: Act of 1844.* Whether the fifth section of the Act of 1844, prescribing a time for the heirs to bring an action for the recovery of land sold illegally by an administrator, is to be so construed that the statute will commence to run, where there are minor heirs, until the disability be removed from all; *Quære? Learned v. Matthews*, 40 M. 210.

133. *Particular tenant and remainder-*

man. The tenant for life and the remainderman, in personality, who join in a bill for its recovery, have not such a joint interest in the property as will make the statute of limitations commence running against both, if at the time the cause of action accrues, one of them be under no disability to sue; *Gibson v. Jayne*, 8 G. 164.

134. *Heirs of mortgagor suing mortgagee.* Where a bill is filed by the heirs of a mortgagor against the mortgagee, to recover possession of land conveyed by the mortgage upon the ground that the debt is paid, and also seeking a recovery of the rent and profits, and an account thereof, the claim of the complainants is joint within the meaning of the rule respecting the application of the statute of limitations to joint complainants, as laid down in 129, *ante*. And if, by the terms of the mortgage, the mortgagee is bound to convey the mortgaged property, upon payment of the debt, to the children of the mortgagee, the right to sue, when the debt is paid, accrues to them and not to the mortgagor; and if, at that time they be all minors, the statute will not commence running against any until the disability be removed from all; *Anding v. Davis*, 9 G. 574.

7. Another Suit no Exception.

135a. *Another suit dismissed no exception.* The defence of the statute of limitations applies strictly to the action to which it is pleaded. If that suit be not brought within the statutory period, the bar is complete, notwithstanding the plaintiff may have brought another suit within the proper period, which suit, for some legal cause, was abated; *Crane v. French*, 9 G. 503.

135b. *Same: Construction of statute allowing revivor.* The statute, H. C. 672, § 119, which provides that all actions which have been commenced and prosecuted for or against any testator or intestate (except actions of slander and torts to the person), shall, and are hereby declared to survive for and against executors and administrators, with the same effect that they might or could have been had or maintained by or against the testator or intestate, &c., refers only to such actions as were depending at the time of the death of such testator or intestate. And it does not, therefore, have the effect to authorize the institution of a new suit, which is to have the effect of a continuation of the suit commenced against a defendant in his lifetime, but which was abated by his death before the process was served on him, so as to exempt the last suit from the bar of the statute of limitations, when the time limited by the statute had expired, after the commencement of the first suit, and before the institution of the second suit; *Ib.*

8. Injunctions against Suit.

135c. *Injunction will not suspend the statute.* The running of the statute of limitations will not be suspended, except by legislative provision to that effect. A direct legislative provision, suspending the right to sue for a

limited term, will have the effect to suspend the running of the statute for that term; but a legislative direction for an injunction to issue (such injunction to have the force and effect of an injunction in chancery), restraining a bank against whom proceedings under the *Quo Warranto* Act of 1843 had been instituted, from collecting its debts during the pendency of such proceedings, is not a legislative prohibition against the bank bringing suits. For such is not the force and effect of an injunction in chancery, which is always subject to modification, at the discretion of the chancellor, and upon the application of the party enjoined from suing. And if the debt were likely to be lost, the chancellor would qualify the injunction so as to enable the creditor to bring the suit; and, moreover, an injunction against the bringing of a suit, does not have the effect to make the institution of a suit in violation of its terms, illegal; but the injunction, operating as it does only on the person of the party restrained, and not on the subject matter of the suit, nor on the court in which it is brought, if suit were brought in violation of it, it would not be dismissed; and in inflicting punishment on the party violating the injunction for a contempt, the necessity for its violation would be considered. And hence, an injunction restraining the bringing of a suit, does not stop the running of the statute of limitations; *Robertson v. Alford*, 13 S. & M. 509; *S. P.*, *Ingraham v. Regan*, 1 C. 213. And so, when an injunction is issued against the collection of a judgment, the statute of limitations will continue to run; *Sugg v. Thrasher*, 1 G. 135. And it will also run against the lien of a judgment so restrained; *Work v. Harper*, 2 G. 107.

136. *The remedy in such cases.* But a court of equity, upon the principle that it will not allow a party to avail himself of an unconscientious advantage obtained by his own act, and without fault of his adversary, will not permit a debtor to avail himself of the bar of the statute of limitations, which has occurred during the term when the plaintiff was under an injunction which prevented him from pursuing his remedy, except by a violation of the injunction; and hence, where a judgment debtor obtained an injunction against the collection of the judgment, and kept it in force till the bar attached, a court of equity will restrain him from setting up the statute, and the fact that the plaintiff might have issued an execution in violation of the injunction, and thereby have prevented the bar, is no reason for refusing this relief; *Sugg v. Thrasher*, 1 G. 135; *Marshall v. Minter*, 43 M. 666; *Wilkinson v. Flowers*, 8 G. 579.

136a. *Same.* And so the mortgagee of property, conveyed by a judgment debtor, will not be entitled to hold it discharged of the lien of the judgment, which was prior and superior to the lien of the mortgage, in a case where the creditor was restrained, at the instance of the mortgagee, from enforcing his judgment within the period prescribed by the statute, (citing, *Sugg v. Thrasher*, *supra*); *Work v. Harper*, 2 G. 107. By art 26 p.

402 of Rev. Code of 1867; the time in which an injunction is in force, is excepted from the running of the statute.

9. Insanity.

137. *Case in judgment.* In this case the heirs of a deceased woman sued her surviving husband for the property which she owned at the time of the marriage, alleging that the marriage was void on the ground of her insanity. The husband denied this and also relied on the statute of limitations: *Held*, that if it be conceded, that the marriage was void on the ground of her insanity, yet as the proof showed, she was subsequently sane for a period of six years before her death, the statute would run against her claim, as under that view she was a *femme sole* and under no disability to sue; *Ward v. Dulaney*, 1 C. 410.

10. The Exception of Nine Months in which an Administrator cannot be Sued.

138. *As to this*, see *ante*, 97, 98.

11. Where Plaintiff is dead when cause of Action Accrued.

139 *As to this*, see *ante*, 101, 100.

12. Effect of Dismissal of Bill without Prejudice.

140. *It is no exception.* The effect of a decree dismissing a bill without prejudice, is, that such dismissal shall not operate as a bar to a new suit which the complainant might institute on the same cause of action; it does not deprive the defendant of any defence, which he might otherwise be entitled to make to such new suit; nor confer any new right or advantage on the complainant, and hence, will not have the effect of excepting from the period prescribed by the statute of limitations the time during which that suit was pending; *Nevitt v. Bacon*, 3 G. 212.

13. The one Year allowed after Arrest of Judgment, &c.

141. See *ante*, 28 to 32. RES. AJUDICATA, 37.

14. The One Year allowed after Death, to bring Suit.

142. See *ante*, 98.

XVI. The New Promise or Acknowledgment to save the Bar.

1. Promise or Acknowledgment at Common Law.

• 143. *What the promise or acknowledgment must be.* To take a case out of the bar of the statute of limitations, there must be an express acknowledgment of the debt as a debt then owing, or an express promise to pay it, and this must be within the time limited by the statute. An acknowledgment that the debt was originally just, accompanied by a statement that the debtor has off-sets, will not do; *Davidson v. Morris*, 5 S. & M. 564. A partial payment on a promissory note does not take it out of the operation of the statute

of limitations, unless accompanied by an express acknowledgment of a further indebtedness, or by an express promise to pay the balance; *Smith v. Westmoreland*, 12 S. & M. 663; *Anderson v. Robertson*, 2 C. 389; *McCullough v. Henderson*, Ib. 92. And a receipt for a partial payment endorsed on a note, though signed by the maker, is not a sufficient acknowledgment to take the case out of the statute; *Davidson v. Harrison*, 4 G. 41.

144. *Same: Some instances.* A debtor deposited collaterals in a bank, to secure a debt due by him to the bank. The debtor on the collateral paper paid a part, and refused to pay the balance, and upon the principal debtor being informed of this, he complained because his debtor had paid no more: *Held*, that this complaint was not an acknowledgment on his part that he was indebted any further to the bank, and did not save his debt from the bar of the statute; *Anderson v. Robertson*, 2 C. 389. A covenant not to plead the statute is not binding, but it is equivalent to a new promise then made to pay the debt, and the statute will only commence running against the debt from the date of such covenant; *Crane v. French*, 9 G. 503.

145. *Effect of promise when made before or after the bar has attached.* In this case the promise was made before the bar had become complete, and it was contended that it would not do, because not made afterwards; but the court held that the promise was sufficient, and intimated on the authority of *Davidson v. Moss* (*supra*, 143), that if made afterwards, it would not do; *Peyton v. Minor*, 11 S. & M. 148. See *post*, 156.

146. *Same: Effect as to new cause of action.* Where the promise or acknowledgment was made before the bar attached, it is but a continuation of the old promise, and does not create a new cause of action. Hence, if the promisee have only an equitable title to the old debt, such new promise will not have the effect to enable him to sue on it in his own name; *Foute v. Bacon*, 2 C. 156. The action must be brought on the old debt; *Briscoe v. Anketell*, 6 C. 361.

147. *Same: Effect as to time of limitation.* The effect of a new promise or acknowledgment, when properly made, is to make the time at which it was made the date from which the statute will commence to run anew; *Foute v. Bacon*, 2 C. 156.

2. The Promise under the Act of 1844.

148. *Act of 1844, H. C. 832, § 16.* This section is as follows: "No promise or acknowledgment either express or implied, shall operate to revive at law any action, or cause of action from the bar, and limitations contained in the provisions of this act, unless such promise or acknowledgment be in writing and signed by the party to be charged thereby: *Provided, however*, that the promise or acknowledgment to save the bar, may be made without writing, if it be proved that the very claim sued on was presented and acknowledged to be due and unpaid."

149. *The sufficiency of the acknowledgment.*

Under this act it was held that proof, that the account sued on was presented to the defendant who said, "there was one item in it he did not recollect, he would see his brother and see the plaintiff, and make some arrangement about it," was not sufficient to show an acknowledgment of the debt; *Westbrook v. Beverly*, 11 S. & M. 419. And so an acknowledgment by the debtor, that he owes an unascertained balance on a particular transaction, is not sufficient; *Lawrence v. Mangem*, 1 G. 171.

150. *Same*. But a promise to pay the debt at a future day, and an acknowledgment of its justice is sufficient; *Brody v. Doherty*, 1 G. 40. So where the defendant signed the following endorsed on the note, "I hereby acknowledge the within note for the sum specified to be a just claim against R. C. & T. L. Evans, and promise as soon as I may be able to do so, to settle the same, hereby waiving, as far as I can do so, the outlawing of the note, signed R. C. Evans;" it was held, that it took the case out of the statute, for there was a clear and distinct acknowledgment of the debt, and a waiver of the statute, and that the promise to pay was unnecessary, and it was not therefore necessary to show that the defendant was able to pay; *Beasley v. Evans*, 6 G. 192.

151. *No promise necessary*. A clear and distinct acknowledgment of the justice of the debt is sufficient to revive the debt, after the bar has attached; *Beasley v. Evans*, *supra*. And so if the acknowledgment be made before the bar has become complete; *Shackelford v. Douglass*, 2 G. 95. And section, 16, ante, 148, applies as well to promises made before, as well as those made after the bar is complete; *Briscoe v. Anketell*, 6 C. 361.

152. *Presentation necessary*. When the promise or acknowledgment is not in writing, it must be proven that the very claim sued on was presented to the debtor, and acknowledged by him to be due and unpaid, or that he expressly promised to pay it; *Lawrence v. Mangum*, 1 G. 171; *Briscoe v. Anketell*, 6 C. 361; *Shackelford v. Douglass*, 2 G. 95. But to make the presentation good, it is not necessary that the claim should be actually presented to the view of the debtor, it is sufficient if the claim were present with the parties, and so clearly presented to the mind of the debtor that he could not mistake as to its identity; *Brody v. Doherty*, 1 G. 40. The presentation must be made under such circumstances, that the claim acknowledged to be due, cannot be misunderstood, and its identity should not depend on the uncertain recollection of the witnesses testifying about the acknowledgment. Thus where the witness who held the claims sued on as guardian for a minor, testified that he "mentioned the claims to the debtor who acknowledged them to be just, and expressed a desire to pay them when he was able, but the witness could not recollect that he had the claims with him during the conversation, or that he exhibited or presented them to the debtor"; it was held that the presentation was insufficient; *Adams*

v. Torry, 4 C. 499; *Lambkin v. Nye*, 43 M. 241.

153. *Same: Another instance*. And so where the action was on an account for medical services, proof that the plaintiff had drawn an order in favor of the witness on the defendant, for about the amount of the account, and when the witness presented it the defendant, speaking of the medical services, and recognizing the order as drawn on that account, said he "thought the bill was too high, he had not the money to pay it then, and he would see plaintiff and settle it himself;" *Held*, to be insufficient to show that the very claim sued was presented, the order being an entirely different thing from the medical account; *Thornton v. Crisp*, 14 S. & M. 52.

154. *Promise by one of several debtors*. Under said section 16, where there are several joint debtors, the promise or acknowledgment of one will not bind the others, it will only bind the party making it; *Foute v. Bacon*, 2 C. 156; *Briscoe v. Anketell*, 6 C. 361. And a new promise or acknowledgment by the endorser has no effect on the maker's liability so far as it is affected by the statute of limitations; *Bibb v. Peyton*, 11 S. & M. 275.

3. Act of 1857.

155. *Requires promise to be in writing*. Art. 21, p. 401, of the Rev. Code of 1857, requires the promise or acknowledgment to be in writing, and "signed by the party chargeable thereby," and provides that no one joint contractor shall be bound by the promise or acknowledgment of the other; *Lambkin v. Nye*, 43 M. 241.

4. Pleading the New Promise.

156. *How pleaded*. When the new promise is made before the bar has attached, the declaration is upon the original contract, and it seems that it is unnecessary to aver the new promise in the replication; *Shackelford v. Douglass*, 2 G. 95; *S. P. Foute v. Bacon*, 2 C. 156; *Briscoe v. Anketell*, 6 C. 361. But it seems the rule is different where the promise is made after the bar was complete; *Shackelford v. Douglas*, *supra*.

5. New Promise by Executor and Administrator.

157. *Power to make*. An administrator (and also an executor, who has no such power conferred by the will) has no power to make a promise or acknowledgment which will revive a claim against the estate already barred by the statute; *Henderson v. Ilsey*, 11 S. & M. 9; *S. P. Trotter v. Trotter*, 40 M. 704; *Byrd v. Wells*, 1b. 711. And he has no power to make a promise which will prevent the running of the statute where the bar has not attached; *Waul v. Kirkman*, 3 C. 606. But this last proposition seems to be overruled to this extent, that as to debts not barred when the administrator was appointed, he can make such promise, for it is held that as to such he is not bound to plead the statute, and if he pay them, though barred when

payment is made, he is entitled to a credit therefor; *Byrd v. Wells*, *supra*.

158. *Power of executor to make new promise.* A wife held a separate estate under a marriage settlement, which authorized her to make a will. By her will she appointed her husband executor, and directed that her portion of the estate should be administered with her husband's, without division, and that he should manage it to the best advantage, until the profits arising from the estate should pay off the debts against it, whether they were in her own name or in the name of her husband: *Held*, that this conferred on the executor the power to make acknowledgments and promises to pay the testatrix's debts not then barred by the statute, which would have the effect to prevent the running of the statute, as it was the evident intent of the testatrix that the executor should be allowed to keep alive debts so as to give the estate the benefit of the indulgence necessary to pay them by the profits; *Waul v. Kirkman*, 3 C. 609.

See EXECUTOR AND ADMINISTRATOR, 177 to 183.

159. *Effect of such promise on the four years' statute.* And when the executor having power, makes a new promise, it will have the effect to postpone the running of the statute requiring suits to be brought against him in four years after his appointment. That statute will commence to run only from the date of the promise; *Id*

XVII. The Statute of Limitations in Equity.

1. Equity adopts the Spirit of the Statute, and applies it to Analogous Cases.

160. *Same: The rule.* It is well settled, that a court of equity will adopt the spirit and substance of the statute of limitations, applicable to cases at law of an analogous character; and will apply the principle of the statute, and the periods of limitations thereby created, to such cases; *Goff v. Robins*, 4 G. 153. In courts of law, the statute of limitations is applied only to the particular remedies and forms of action enumerated in it. In equity, its spirit and meaning have been adopted and acted on as rules of decision, though the words of the statute may not embrace the court; equity, therefore, applies the statute to the right asserted or the substantial relief; *Mandeville v. Lane*, 6 C. 312; *S. P., Her v. Routh's Heirs*, 3 H. 276, 296; *Ingraham v. Regan*, 1 C. 213; *Mitchell v. Woodson*, 8 G. 567; and where there would be no bar at law, there will be none in equity; *Wood v. Ford*, 7 C. 57. And the suspension of the statute at law by legislative action, will also be allowed in equity, though the court be not mentioned in the act making the suspension; *Hill v. Boyland*, 40 M. 618.

161. *Same: Instances.* Hence, though it may be questioned whether the act of limitations of 1844, which bars an action of debt on, and a *scire facias* to revive, a judgment after the expiration of seven years from its date, would apply to an action on the judg-

ment under the pleading act of 1850, which abolishes the action of debt, and all forms of pleading. Yet, as the Limitation Act of 1844 contained a limitation against all the remedies which then existed to enforce a judgment, a court of equity will, notwithstanding the Pleading Act of 1850, apply the bar of the Act of 1844, to a bill to enforce a judgment; *Mandeville v. Lane*, 6 C. 312.

And hence, also, a motion in a court of equity to appoint a commissioner to execute a decree to foreclose a mortgage, will not be entertained after the lapse of seven years from the date of the decree, for a revivor of a judgment would be barred in that time; *Goff v. Robins*, 4 G. 153.

162. *Same: Other instances.* And so a judgment barred at law, is also barred in equity, and cannot be made the foundation of a creditor's bill to set aside a fraudulent conveyance; *Edwards v. M'Gee*, 2 G. 143; *Fox v. Wallace*, 2 G. 660; and a bill to foreclose a mortgage on land, will be barred by the lapse of the same period, which bars an action of ejectment; *Benson v. Stewart*, 1 G. 49; and when the mortgaged property is personal, the bill is barred by the lapse of time prescribed for the recovery of personalty; *Nevitt v. Bacon*, 3 G. 212; *Wilkinson v. Flowers*, 8 G. 579.

163. *Instance of following the exceptions at law.* Hence, also, where the adverse possession of a decedent's slaves, commenced when there was no administrator in whom the legal title, and the right to bring an action at law, could be vested, and for that reason the statute did not run against the legal title, it will not be applied to a suit in equity by the distributee, who only has an equitable title, to recover his interest in the slaves; *Wood v. Ford*, 7 C. 57.

And so the statute of 29th January, 1862, which suspended the statutes of limitation of the State for a limited time, as to all actions for the recovery of money, &c., will be held to suspend the statute also, as to all suits in equity for the foreclosure of mortgages; *Hill v. Boyland*, 40 M. 618.

2. Rule of Equity in Cases of Fraud.

164. *As to this*, see *ante*, 44 to 47, 104 to 110.

3. The Statute must be Relied on as a Bar.

165. *If not relied on, will not be noticed.* The statute of limitations as a bar to a bill in equity, must be insisted on by the defendant, either by plea, answer or demurrer. If he suffer the bill to be taken for confessed, he cannot, in the High Court, insist on the bar of the statute as a defence; *Patterson v. Ingraham*, 1 C. 87.

166. *Need not be technically pleaded.* It is not necessary that the statute of limitations should be technically pleaded in chancery; it will be sufficient, if the substantial matter which constitutes the bar be set out; *Mitchell v. Woodson*, 8 G. 567. But the defendant must distinctly show by demurrer,

plea, or answer, that he intends to rely on that defence, and this is so, though the bill show on its face that the time prescribed as a bar, has elapsed; *Wilkinson v. Flowers*, 8 G. 579.

4. The Defence set up by Demurrer.

167. *When thus set up.* The statute cannot be set up by demurrer to a bill in equity, unless it appear on the face of the bill that the claim is barred; *Dickson v. Miller*, 11 S. & M. 594; *Mathews v. Sontheimer*, 10 G. 174. But it may be so set up, if the time has elapsed, notwithstanding the bill charges that the debt is due and unpaid; *Nevitt v. Bacon*, 3 G. 212.

168. *How set up by demurrer.* If the statute of limitations be relied on in a demurrer to a bill in equity, that ground should be distinctly assigned in the demurrer; *Wood v. Ford*, 7 C. 57; *Archer v. Jones*, 4 C. 583. But a general demurrer setting up the statute of limitations to a bill in equity, where it appears that the time prescribed by the statute had elapsed before the institution of the suit, ought not to be sustained, merely because it does not appear from the bill that one of several joint complainants was under no disability to sue at the time the cause of action accrued—the disability of the others being distinctly averred. The defendant, in such a case, ought to give notice by his demurrer of the insufficiency of the allegation of the bill on that point, so as to allow the complainants to amend; *Fearn v. Shirley*, 2 G. 301.

5. The Defence set up by Plea.

169. *Fraud must be denied.* Where it appears from the bill that the defendant has been guilty of a concealed fraud, which was not discovered until within six years (the period of limitation) next before the bringing of the suit, the defendant's plea of the statute of limitations must be accompanied by an answer denying specifically the fraud charged, or it must be averred that the fraud charged was discovered more than six years before the filing of the bill; *Livermore v. Johnson*, 5 C. 284.

XVIII. Plea of the Statute.

170. *Plea must set up the particular bar relied on.* A plea setting up the statute of limitations should be certain, so as to show the particular statute relied on. Hence, a plea to an action on a foreign judgment, rendered previous to 1846, which sets up a limitation of three years, because the action was not brought within that period from the date of the judgment, will not be sufficient to let in the defence, that the action was barred because it was not brought within two years from the passage of the Act of 1846; *Boyd v. Barringer*, 1 C. 269.

171. *How pleaded to writ of right:* See *ante*, 85.

172. *Non-assumpsit infra sex annos.* This is not a good plea to an action on a promise not

due at the time it was made. It should be *action non accrevit infra sex annos*, where the debt is due after the date of the promise; *Slocumb v. Holmes*, 1 H. 139.

173. *Plea is meritorious.* The plea of the statute of limitations is a meritorious one. Hence, where judgment by default is entered, and an affidavit of merits made to set it aside at the same term, it is proper to set aside the judgment, to enable the defendant to plead the statute of limitations; *Sanders v. Robertson*, 1 C. 389. And so under the Act of 1840, in relation to practice, it is proper to allow the defendant to amend his pleadings at the issue term, by interposing for the first time, the plea of the statute of limitations; *Peyton v. Minor*, 11 S. & M. 148. See *NEW TRIAL*, 40.

174. *Administrator need not plead.* An administrator may rely upon the statute of limitations under the general issue; *Parmille v. McNutt*, 1 S. & M. 179. Where the statute is not pleaded by an administrator, he must raise the question by asking a charge from the court to the jury; *Roberts v. Singleton*, 2 C. 438.

XIX. Miscellaneous.

1. Accounts.

See *ante*. 60, 61.

176. *Where one item is barred.* Where the only evidence that a partial payment has been made, is a statement in the account of the creditor showing its reception and appropriation by him, to an item in the account barred by the statute of limitations, the debtor will not be entitled to reject the item thus barred, and have the payment appropriated to the balance of the account; but if the item barred by the statute be rejected, so must the credit; *Crisler v. McCoy*, 4 G. 445.

2. Administrator cannot Sell Land to Pay a Debt Barred.

176a. *Same.* An administrator cannot sell the land of his intestate to pay a debt barred by the statute of limitations. And if such sale be ordered by the Probate Court, the party in possession of the land being a purchaser at sheriff's sale, under execution against the decedent, may enjoin it in equity; *Moody v. Harper*, 9 G. 599.

3. Chickasaw Indians.

176b. *Chickasaw Indians barred by the statute.* The interest of a Chickasaw Indian in land situated in this State, is subject to the bar created by an adverse possession, for the time prescribed by the statute of limitations; *N. O. J. & G. N. R. R. Co., v. Moye*, 10 G. 374.

4. Color of Title.

177. *Void deed.* A void deed, made by an administrator, is competent evidence to show color of title in a suit by the heirs against the grantee, where the defence relied on is the statute of limitations; *Root v. McFerrin*, 8 G. 17; *S. P., Welborn v. Anderson*, 8 G.

155; *Hanna v. Renfro*, 3 G. 125. And a deed from a party who appears never to have had title, is color of title; *Welborn v. Anderson*, 8 G. 155.

See ADVERSE POSSESSION, 16, 17, 18.

5. Counties not Entitled to Benefit of.

178. *Same*. The statute of limitations constitute a bar only to suits to enforce rights. Where no suits can be maintained, the statute does not apply. No suit can be maintained against a county for a debt due by it. The only remedy is by application to the Board of Police for its allowance and payment. Hence, the statute of limitations constitutes no bar to a debt due by a county; *Carroll v. Board of Police of Tishamingo Co.*, 6 C. 38. But by Act of 1857, p. 419, art. 34, counties may be sued.

6. Covenant not to Plead the Statute.

179. *Effect of*. The statute of limitations is founded on reasons of public policy to discourage stale demands, and to give repose to society; and hence, a covenant by a debtor that he will never plead the statute to a particular demand, is void, and will not bind him not to rely on the plea. But such a covenant in respect to a particular debt, on which the statute has already commenced to run, will have the effect of a new promise, and the statute will only commence to run from its date; *Crane v. French*, 9 G. 508.

7. Creditor's Bill.

180. *When it will not run against*. The statute of limitations will not run in favor of the debtor's wife and child, against a creditor's bill to set aside a fraudulent assignment in their favor by the debtor, if the latter has remained with them jointly in possession of the property; *Abbey v. Com'l Bank of N. O.*, 2 G. 434.

8. Dower.

181. *When barred*. A widow's right to dower is barred by the lapse of that time after her disability is removed, prescribed by the statute of limitations for an action of ejectment. And where her right to dower is barred, a court of equity will, at the instance of a purchaser from the husband, enjoin her from proceeding in the Probate Court to procure an allotment of dower; *Moody v. Harper*, 9 G. 599.

9. Extension of the Statute to Cases not Embraced in it.

182. *No extension by judicial construction*. The courts will not, by judicial construction, extend the provisions of the statute of limitations so as to include within the statutory bar actions not enumerated in it; *Burrus v. Wilkinson*, 2 G. 537. See *ante*, 101, for the rule as to equitable exceptions to the statute.

10. Ignorance.

183. *No excuse for laches*. Ignorance and want of mental culture form no excuse for a failure to assert one's rights within the time

prescribed by the statute; *Young v. Cook*, 1 G. 320.

11. Laches as a bar.

184. *As to this*, see DEBTOR AND CREDITOR, 9.

485. *Laches no bar to parol proof*. Where complainant's right to sue is competent in its inception to be established by parol proof, it will not be lost by any lapse not sufficient to bar it by the statute of limitations; *Anding v. Davis*, 9 G. 574.

12. Mandamus.

186. *Not embraced in the statute*. The statute of limitations, in prescribing a period beyond which judgments shall not be revived by *scire facias*, nor executions issued thereon, furnishes no bar to the enforcement of judgments which cannot be enforced by execution, nor revived by *sci. fa.* Hence, it does not bar the remedy by mandamus to enforce the collection of a warrant on the county treasury, issued in pursuance of a judgment of the Board of Police; *Carroll v. Board of Police of Tishamingo Co.*, 6 C. 38.

13. Outstanding Title Barred.

187. *Cannot be set up*. The defendant in an action of ejectment cannot defeat the plaintiff's recovery by showing that he has purchased in an outstanding title which was barred by the statute of limitations at the time of the purchase; *Griffin v. Sheffield*, 9 G. 359.

14. Partners, statute Between.

188. *When it runs*. The statute will commence to run from the date of the dissolution of the partnership, against a bill by one partner against the other for an account; *Prewett v. Buckingham*, 6 C. 92.

189. *Partner cannot have a decree to sell property to pay a debt barred*. A surviving partner is not entitled to have a decree to sell partnership property for the purpose of paying a debt of the firm barred by the statute of limitations. In such a bill he stands in no better position than the creditor whose debt is barred; *Id.*

15. Principal and Surety.

190. *When it commences against surety*. As between principal and surety, the statute of limitations commences to run from the time of payment by the surety, and not from the time the original debt fell due; provided, as it seems, that at the time of payment by the surety, the debt was not barred; *Scott v. Nichols*, 5 C. 94.

See *ante*, 53.

16. Probate of a Will.

191. *Not within the statute*. There is no limitation as to the period in which a will may be probated; and hence, a long continued possession of the estate, adverse to the will, is no presumption against its validity, unless it be shown that the devisee propounding the will for probate was under no disability, and

that there was no impediment to the assertion of his rights, and that his acquiescence was tantamount to a disclaimer under the will, with a full knowledge of its legal character; *Falther v. Lawrence*, 4 G. 585.

17. Sheriff's Agreement.

192. *Case in judgment.* The statute of limitations of six years, bars an action on the following agreement endorsed and signed by a sheriff, on an execution: "In this case, I promise on honor punctually to pay the amount received on the execution by"—a day named; whether the agreement be regarded as a promissory note, or as a mere written promise; *Matthews v. Redwine*, 1 C. 233.

18. Suspension of the Statute during the late War.

193. *Same.* The time during which the statute of limitations was suspended in this State, under the Acts of 1861 and 1862, is that period which intervened between the date of the acts suspending the statute, and the 2d day of April, 1867, which last date is twelve months after the close of the war, as announced by the President's proclamation; *Griffin v. Mills*, 40 M. 611; *Mister v. McLean*, 43 M. 268; *McCutchen v. Dougherty*, 44 M. 419. And the suspension is applied also to suits in equity; *Hill v. Boyland*, 40 M. 618.

Statute of limitations as to writs of error, were suspended by the above act; *McCutchen v. Dougherty*, 44 M. 419.

194. *Local act of 1860 for the benefit of Atlantic Company construed.* See *Nash v. Fletcher*, 44 M. 609.

Limitation of Estates.

The entailment of lands in England was in partial use prior to the introduction of the feudal system. By the establishment of that system, lands, both on the Continent and in England, were rendered inalienable and imprescriptible. The spirit of feudal tenure created so intimate a connection between the two parties, that it could be dissolved by neither, without the consent of the other. Wherever the feudal polity prevailed efforts were made to fetter or prohibit the alienation of fiefs, in order to preserve intact the tie which bound the vassal to his lord, by virtue of the tenure of his land. A clause in Magna Charta was intended to check the practice of sub-infeudation. By degrees these restraints were removed; earlier in the case of alienation in the lifetime of the owner, than by devise, though gavelkind lands were devisable by custom from a very remote period. The statute of wills, 32 Henry VIII., gave the right of devise of nearly all the lands in the realm. Up to this time, it is probable that the struggle between the right to alienate, and the power to fetter the right, was confined mainly to the practice of sub-infeudation, and was meant for the benefit of the lords of domains.

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But afterwards there arose the further struggle, under the English law, to tie up property, in order to preserve it in the same families, for the purpose of accumulation, in opposition to a free and unfettered transfer, for the benefit of the community at large.

By various acts of Parliament, and numerous judicial decisions, it was finally established in the English law, that both real and personal estate may be so far fixed in settlement as to be confined in a particular course of devolution, and rendered absolutely inalienable, during one life, or any number of lives in being at the same time, and a further period of twenty-one years and ten months.

At the end of this period the property again became open to alienation, with this difference, that at the end of the period, real estate must either vest in some person as an absolute estate in fee simple, or as an estate tail, liable to be converted into a fee simple by fine or common recovery; but at the end of the same period personal property became vested absolutely.

The practice of limitation of estates, according to the English law, was brought into America by our forefathers; and Redfield on Wills says, no restriction on the right of devise ever existed in this country, either as to real or personal estate, except in regard to dower.

But, at the time of our Revolution, such limitations, at least when they assumed the form of estates tail, were thought to be not congenial with the spirit of republican institutions. Hence, the several States, led by Virginia, at an early day, passed laws abolishing estates tail. But as technical estates tail were the only kind of limitation which might extend into perpetuity, the courts held that these statutory prohibitions did not extend beyond them, and that other limitations, making provision for families, might still be created within the limits adopted by the English courts to guard against perpetuities.

By this means the subtle and intricate learning which envelopes this whole subject, became a part of American law, and has led to as much confusion in the cases as had grown up in England.

The Legislature of this State, as early as 1822, attempted enactments intended to make the subject plain and intelligible; but by some means, under the adjudication of the courts, they have not proven successful, as will be seen by the cases here reduced to digest.

These statutes are so closely interwoven with the whole framework of our State decisions on the subject, that it is deemed necessary to insert them here.

Act concerning Conveyances, sect. 24. Every estate in lands or slaves, which now is, or shall hereafter be created an estate in fee tail, shall be an estate in fee simple; and the same shall be discharged of the conditions annexed thereto by the common law, restraining alienations, before the donee shall have issue, so that the donee, or person in whom

the conditional fee is vested, or shall vest shall have the same power over the said estate, as if they were pure and absolute fees: *Provided*, That any person may make a conveyance or devise of lands, to a succession of donees then living, and the heir or heirs of the body of the remainderman, and in default thereof, to the right heirs of the donor, in fee simple; Poin. Code, 453, H. C. 609.

Sec. 25. Alienations of land shall only pass or assure such title as the alienor might lawfully pass or assure, and shall not bar the residue of said estate; nor shall the alienation of any particular estate impair or affect the remainder.

Sec. 26. Every contingent limitation in any deed or will, made to depend upon the dying of any person without heirs, or heirs of the body, or without issue, or issue of the body, or without children, or offspring or descendant, or other relative, shall be held and interpreted a limitation, to take effect when such person shall die, not having such heir or issue, or child or offspring, or descendant or other relative (as the case may be), living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it.

Sec. 27. Where an estate is limited in remainder to a child of any person to be begotten, such child born after the decease of the father, shall take, as if born in his lifetime, although no estate may have been conveyed to support the contingent remainder after the death of the father; and, hereafter, an estate of freehold or inheritance may be made to commence in futuro, by deed, in like manner as by will; *Id*.

These provisions remained unchanged until 1857. The code of that date enacts as follows:

Art. 3. Estates in fee tail are prohibited; and every estate which shall be created an estate in fee tail, shall be an estate in fee simple: *Provided*, That any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two; and to the heirs of the body of the remainderman; and in default thereof, to the right heirs of the donor, in fee simple; Rev. Code of 1857, p. 307.

The Code of 1871, re-enacts this section without change, p. 499, sec. 2286.

By a contract made in the State of Tennessee, in contemplation of marriage there, certain slaves owned by the woman were conveyed to a trustee "for the use of the wife during her natural life, and from the termination of that estate to the heirs of her body and their heirs forever: and in case she should die without such heirs, or, having such heirs, they should die before they arrive at mature age, then to her brothers by the mother's side, and their heirs forever." *Held*, that the instrument was to be governed by the law of Tennessee, and that the case of *Polk v. Faris* 9 Yerger's Rep. 207, in the Supreme Court of

Tennessee, was decisive of this case, and shows that the limitation was too remote and void, and that the whole interest vested in the first taker.

The court intimated strongly, that by the laws of this State, the limitation would be good; *Carroll v. Renich*, 7 S. & M. 798.

Deed of gift by father to daughter of certain slaves, "to have and to hold the same to my said daughter, and the heirs of her body. *Provided, nevertheless*, that should my said daughter depart this life without heirs of her body, then the said slaves, with their increase, shall be the property of my children and grandchildren who shall be alive at my said daughter's decease."

Held, by the court, that this was a valid limitation by the operation of the 26th sec of the act concerning conveyancers; Poindexter's Revisal, 453, H. & H. 343; without regard to the common law. That this provision extends equally to deeds and to wills, to personal and to real estate, except where the use of the personalty involved its consumption, and that it will be difficult to conceive a case of limitation after the failure of issue, which could be construed to be an estate tail.

Held, also, that the statute furnishes a rule of construction, simple, obvious and intelligible; one which sweeps away the whole mass of former adjudications on the subject, and so peremptory that the courts may not feel at liberty to disregard it; *Kirby v. Calhoun*, 8 S. & M. 462.

The will of Mrs. O. Sullivant, of South Carolina, contained this clause: "I give and bequeath to my daughter Mary certain slaves, to her and the heirs of her body; should she die without an heir, her part to go to or be divided between all her brothers."

Held, by the court, that the case was to be decided by the laws of South Carolina, and that its decisions are not free from conflict and confusion. The later cases in that State favor a construction which would uphold the present limitation as valid, and in accordance therewith, the court held it to be good, and in harmony with the certain and definite rule which the statute of this State prescribes; *Newell v. Newell*, 9 S. & M. 56.

A testator in his will says: "I wish the property I bequeath and bestow on Sarah A. Truly, to be given and secured to herself and her bodily heirs, and at her death, should she have no issue, it is to go to her brothers and sisters." The court held that "this is not an estate tail, but an executory devise, coming within the provisions of our statute in regard to that species of limitation, and protected by it." It adds, the question is fully covered by the decisions in *Kirby v. Calhoun*, and *Carroll v. Renich*; *Rucker v. Lambdin*, 12 S. & M. 230.

Bequest in South Carolina, of certain slaves, "to Sally Swanzy, the wife of James Swanzy, to be for her sole and separate use, for and during the term of her natural life, and after her decease to the lawful heirs of her body."

Held, in accordance with *Newell v. Newell*,

9 S. & M. 56, that this limitation was not too remote, and was valid. *Stuart v. Swanzy*, 12 S. & M. C. 684.

By his last will, John Rail devised certain real and personal estate to a trustee, for his daughter Mary, and directed "that the said Mary should have the entire control and disposal of the proceeds and profits of said land and slaves for life, and at her death the said land and slaves shall be divided among her children; but in case she should die without issue, then said land and negroes shall be equally divided among my surviving children." There was a codicil to this will, which gave rise to other questions in the case; but the court held that it did not affect the limitation, and that according to its former decisions the limitation was valid. *Held* also, that estates created by the exercise of powers, deriving their effect from the statute of uses, and not transgressing the rules adopted to guard against perpetuities, have the same claims to support, as executory devises, and should be held equally protected by the 26th section of our statute; *Rail v. Dotson*, 14 S. & M. 176.

In *Powell v. Brandon*, 2 C. 343, the operative words of the will were to create a trust for certain specified purposes, then in trust, "after the decease of Matthew Brandon, to put and continue in possession of said land and slaves, the lineal descendants of the said Matthew to the remotest posterity, and on failure of lineal descendants of said Matthew, then to the heirs generally of the testator."

The court held, that the rule in *Shelly's Case*, at least as to personal property, had not been abolished by the twenty-fourth and twenty-sixth sections of the acts above set out, but that the same still exists, and will be applied whenever it expressly or as plainly appears from the instrument creating the estate, that it was the intention of the grantor, by the use of the words "heirs," "heirs of the body," "issue," &c., to specify a class or denomination of persons, to take the inheritance in succession from generation to generation, in their character as heirs of the ancestor.

It is expressly declared, continued the court, that the limitation in this case shall take effect whenever "there shall be a failure of lineal descendants of Matthew Brandon, in the latest posterity," a period of time so indefinite and remote that it might not take effect for a hundred or a thousand years. Such a limitation is not valid, because against the principles of the common law, at war with the settled policy of the State, and in violation of the spirit, if not the letter, of the twenty-sixth section of the Act of 1822.

Held, further, "that such a devise of slaves is within the rule in *Shelly's Case*, and would vest an estate tail in the first taker, which, by the twenty-fourth section of the Act of 1822, is converted into a fee simple. That the proviso to that section relates exclusively to real estate, and cannot affect the application of the rule to personalty, and that the will

vested a fee simple title in the first taker;" *Powell v. Brandon*, 2 C. 343.

NOTE BY THE AUTHOR. The decision in this case, is in entire accordance with the previous decisions of the court; it could not have been held otherwise, than that the limitation was void. But the grounds of the decision, and the reasoning in support of it, differ widely from the earlier cases. They hold, that the statute in itself furnished a rule sufficiently comprehensive for the determination of all questions arising upon those vexed points; this case holds that it does not, and that it is a necessity, at least in cases of personalty, to invoke the aid of the rule in *Shelly's Case*; but it is not necessary, in the view of the earlier cases, to make such resort.

By the rule in *Shelly's Case*, "where there is a gift or conveyance to the ancestor, and in the same gift or conveyance an estate is limited to his heirs or the heirs of his body, the heirs are words of limitation on the estate, and not words of purchase." This rule, it is admitted, in most cases, interferes with the presumed, and often with the declared intention of the parties to the instrument. The 26th section reverses this rule. It makes the intention paramount. It gives to certain well known words a determinate meaning; that meaning is made to prevail, in order to carry out the intention, and to give validity to the disposition. But if the instrument creating the limitation clearly and expressly declares on its face a contrary intention, so as to exclude the statutory construction, then the limitation is void, not because of the rule in *Shelly's Case*, but because it violates a more general principle—the law which prohibits perpetuities. This seems to me to be the true meaning of the statute, and that the rule which it furnishes is amply sufficient to work out its own results.

This departure opened the door to still wider divergence in subsequent cases.

The forfeiture of the life estate by act of the tenant for life, does not affect the interest of the remainder man; *Archer v. Jones*, 4 C. 583.

Where a grant of land is made upon a certain condition, which is not complied with by the grantee, the land would revert to the grantor; but this does not hold as to portions of the land sold by the grantor, in the attempt to comply with the condition; *Gadberry v. Sheppard*, 5 C. 203.

Deed of gift by a father to his daughter "of a slave, and her future increase to her, and the heirs of her body forever:" *Held*, by the court, that the proviso to the 24th section refers exclusively to conveyances and devisees of lands.

Held, also, that the rule in *Shelly's Case*, so far, at least, as personal property is concerned, had not been abolished. That the statute itself is a legislative recognition of the existence of the rule, and is equivalent to a declaration that it should be applied in all cases in which, under the operation of the statute, it could, according to settled doc-

trine, be applied: *Held*, also, that the 24th section was designed to abolish entailments in respect to lands and slaves, or to raise them to the dignity of estates in fee simple. That the language of the *proviso* is definite and intelligible; and that the boundaries of the limitations therein sanctioned, are marked with unmistakable certainty; and that it was not the intention of the 26th section to introduce new, or render valid, limitations upon a contingency not theretofore recognized by the courts, as it must be construed in reference to the 24th section of the same act, whose object was to free property from the fetters of entailment. Moreover, that it was the object of the 26th section simply to lay down a certain, intelligible and uniform rule of construction, by affixing to certain words used in deeds and wills, a definite and fixed signification, different from that which had been theretofore attached to the same words by the courts: *Held*, also, that the terms of the instrument, in this case, would have conveyed an estate in fee tail, in real estate, and consequently the whole interest in personal property; *Hampton v. Ra/her*, 1 G. 193.

John Thurman by his deed, conveyed certain property "in trust for his daughter during her life, and after her death to her child or children; but should she die without living issue, then and in that case to his lawful heirs." The rights of the parties to this controversy accrued in Alabama, and must be governed by the laws of that State; but the court seems to regard the laws of that State and of this, as the same in this particular: *Held*, that partial interests in personal chattels may now be created, both at law and in equity, though it was formerly otherwise; and that where the right to create a life estate in chattels is admitted, the right to limit a remainder necessarily follows. Farther, that reversionary interests, or *quasi* reversions of personal chattels, exist both in law and at equity, where partial interests alone are created in them; and in all cases in which partial interests are created, with limitations over which fail to take effect, or which are void *ab initio*, or which become void; except in those cases in which an intention to dispose of the whole interest is apparent, and where also conditional limitations are engrafted upon interests in the first takers, which in the absence of the conditional limitations, would be held to be absolute interests.

A man cannot make a conveyance of real estate to his heirs; they would take by descent as the superior title. Hence, an ultimate remainder, limited to the right heirs of the grantor, is void. The same principle is applicable to gifts of personal property, and the reversionary interest passes by representation and not by purchase. In this case, the limitation to the heirs of the donor was void, and the property vested absolutely in the donee.

The limitation of the life estate to the donee, with direction of a return of the property to the heirs of the donor, upon failure of issue of the donee, does not prevent her

from taking by distribution, as next of kin of the donor; if the property did not vest, by force of the deed, absolutely in the donee. If the absolute estate did not vest, the limitation over to his heirs remained in the donor as his reversion, and at his death went to those who were his next of kin at that time, and not to those who became next of kin by events after that time; *Harris v. McLaran*, 1 G. 533.

Benjamin Roach, by his last will and testament, gave certain real and personal estate to his daughter Mary, who afterwards married the appellant, Jordan. The will contains the following clause, which gave rise to the controversy in this case: "To make my intention plain, the property in this my last will and testament, devised and bequeathed to my daughter, is for her sole and separate use and behoof, and her heirs forever; but should she die without issue, or if her child or children surviving her, should die before arriving at the age of twenty-one, then the estate herein devised shall revert to my other children and their heirs, share and share alike, according to the laws of this State." Mary died, after having given birth to twins, who survived her but a few weeks: *Held*, by the court, that under this instrument, Mrs. Jordan did not take an estate in fee simple, but an estate tail, unless the subsequent limitation had the effect to convert it into a qualified fee, determinable on the conditions specified. The effect of our statute, is to make the limitation over to "the other children, a limitation dependent upon a definite failure of issue, unless the contrary intention is expressly and plainly declared on the face of the will."

The devise in this case is one to which this legislative construction attaches, and the same construction must be given, as if the will contained the additional words, "living at the time of her death." The word "heirs" in this case was used by the testator in the restricted sense "of heirs of the body," and the superadded words "living at the time of her death," do not convert the fee tail limited to her, into a qualified or determinable fee, and thus render the limitation over good as an executory devise. They are nothing more than what is involved in the very nature of the estate itself, and are in strictness, perhaps, a mere nullity (citing *Driver v. Edgors*, Cowp. 379.)

There is a settled distinction between cases of this character, and those in which the first limitation is to the devisee, and his heirs generally, which would carry the fee simple; and the words "dying without leaving issue at the time of his death," subsequently used, are held to cut down the fee simple. They cite *Pells v. Brown*, Cro. Ins. 590, which decided that as a fee could not by way of remainder be limited after another, the limitation being on a definite failure of issue, was good as an executory devise; and the court adds, that words which import a definite failure of issue following a devise of the fee, will never confer an estate tail. On this view,

therefore, Mrs. Jordan took an estate in fee, subject to be determined by the event of her death without issue then living, and not an estate tail.

The limitation in this case is made to depend upon a double contingency, first, the death of Mrs. Roach without issue, and next the death of her child or children, under the age of twenty-one years. Mrs. Roach having had issue, the first contingency failed, and the court, confining its attention to the second, first considered the questions arising upon it, without regard to the statute, and with exclusive reference to the English law.

By that law, executory devises are not subject to be barred or destroyed, and the courts have, therefore, prescribed certain limits of time, within which they must be confined, and if they transcend these limits, they are void. The utmost limits allowed to them are a life or lives in being, and twenty-one years and the fraction of a year, sufficient to cover the ordinary period of gestation.

The question is, does this will violate this rule? The intention of the testator to be deduced by applying the principles of law from the terms of the will must determine it. Then was it the testator's intention that the contingency, upon which within the limitation over was to take effect, must happen twenty-one years after the death of Mrs. Jordan.

The words "child or children," as they are employed in the will, are synonymous with "issue." The term "issue" is of very extensive import, and when used as a word of purchase, or when unexplained or uncontrolled by any clear indication of intention, will comprise all persons who can claim as descendants, whether as children, grandchildren, &c., from or through the person to whose issue the limitation is made; and to restrict the legal meaning of the term, a clear intention must appear upon the will.

Unless, therefore, there is some clear indication in the will before us that the testator intended to restrain the legal import of the term, and to confine it to some limited portion of the issue of her daughter, as the immediate issue, to the exclusion of her grandchildren, or great-grandchildren, he must be understood to include as the objects of his bounty, any or all of her remotest descendants who might live to attain the age of twenty-one years.

The court held that there was no indication of an intention to restrain the legal import of the term, and that the clear and manifest intention of the testator was that the limitation over was not to take effect upon any contingency short of an entire failure of the lineal descendants of Mrs. Jordan.

The principle upon which it is held, that where lands are devised to one and his heirs generally, with a limitation over if he shall die under the age of twenty-one, and without issue, a definite failure of issue is intended, and hence is construed as a "devise in fee simple, subject to an executory limitation over, in the event of the prior devisee's death

under the given age, and leaving no issue surviving him," is not applicable to this case.

That class of cases is not like the case at bar. In all the cases in which the event of the dying of the first taker is confined to a definite age, the person upon whose death without issue is made dependent, is referred to as a specific person or individual who can only take in the character and capacity of a purchaser, and not as a class or denomination of individuals, who would take by inheritance.

In the will before the court, the issue of Mrs. Jordan would not take by immediate devise, as purchasers, but by descent as her heirs, and are not referred to as specified individuals, but as a class or denomination of persons to take in succession, any individual of whom, attaining the age of twenty-one, would be entitled.

Where lands are devised to one and his heirs, with a devise over, in case he should die without issue, or such issue should die under the age of twenty-one, he would be tenant in tail, which clearly would not be the case if the words referring to the dying of the issue under twenty-one, imported a definite failure, or an extinction of the issue within twenty-one years from the death of the first taker.

This principle was recognized in the leading cases of *Johnson v. Wright*, 2 J. 291, and afterwards in the case of *Grimshaw v. Pickup*, 9 S. & M. 596. In these cases, it was held, that the contingency of the issue dying under twenty-one, did not necessarily imply a failure of issue at a specified time, and therefore could not control the legal import of the words, "die without issue," previously used.

According to the true legal construction of this will, the issue of the issue, or the grandchildren of Mrs. Jordan, were included within the objects of the testator's generosity, and the limitation over could not vest, so long as a grandchild or great-grandchild of the first devisee survived. The contingency, therefore, was too remote, and the limitation over void as an executory devise. The whole property, real and personal, vested absolutely in Mrs. Jordan.

This disposes of the controversy, unless the statute sustains the devise over to the other children of the testator. We propose to make a very brief examination of this subject.

The 27th section of the Act of 1822, by its last clause, enacts, "that hereafter an estate of freehold or of inheritance, may be made to commence in future, by deed, in like manner as by will. This clause, the only one material to be noticed, was not designed to relax the rule against perpetuities, and to sanction limitations by way of executory devise, which, under the rule against perpetuities, would be void. One of the main effects of this provision is to destroy the characteristic differences then recognized between remainders and conditional limitations, or executory devises.

When this statute was passed, neither the

statute *de donis condicionalibus*, nor the statute of wills, was in force in this State, the Legislature having declared as early as 1807, that all the statutes of Great Britain not re-enacted, were excluded from operation within the territory. It follows that the whole doctrine, in regard to estates tail and executory devises, which was engrafted upon the statutes above named, never had existence in this State by legislative enactment, and consequently the whole system of rules in regard to estates tail, which was constructed upon it by the English courts, never was a part of our jurisprudence.

The 26th section of the statute, as construed by this court, was not intended to authorize new limitations, upon contingencies not warranted by the common law, but to apply a definite and fixed construction to certain words of frequent use in deeds and wills, in cases in which the grantor or testator, had not upon the face of the instrument, plainly and expressly declared the meaning to be otherwise.

By declaring in the 24th section, "that every estate in lands or slaves, which now is, or shall hereafter be created an estate in fee tail, shall be an estate in fee simple absolute," the Legislature must have intended to abolish estates tail, supposing them to exist under our law, as it then stood, or it must have intended to limit the power which a man may have over his own estate, and to confine its exercise within the period of his own life.

We must look at the statute as one, the express object of which was to abolish estates tail, which the Legislature supposed was sanctioned by the law, and construe it accordingly.

Its manifest object was, by converting fees tail into fees simple, to withdraw the restraints upon the alienation of property imposed by the system of entailments. But the legislature thought that the right of alienation might be suspended for a limited period of time after a person, either by conveyance or devise, has divested himself of the ownership of his estate. By the proviso to the 24th section, it has fixed that limit to a life or lives in being, giving to the donor or devisor the right to limit the ultimate fee to the heirs of the body of the remainderman, and in default of such heirs, to his own right heirs. Within this limit, partial interests or particular estates, given to the successive donees, may be created by deed, or by executory devise.

There is nothing in the proviso, or upon the face of the statute, or within its equity, or in the policy of the law, from which the authority can be inferred, to limit an estate upon a contingency which is not to happen, within the compass of time prescribed by the proviso.

This court has heretofore recognized the validity, in regard to both real estate and personal property, of limitations by way of executory devise, but it has never held that broader limits were allowed, than the boundaries prescribed by the proviso, to the 24th section (*Kirby v. Calhoun*, 8 S. & M.

462; *Lambden v. Rucker*, 12 ib. 230); *Jordan v. Roach*, 3 G. 481.

NOTE BY THE AUTHOR. As this decision goes far beyond *Powell v. Brandon*, and is an entire overthrow of the doctrine, "that the statute of itself furnishes a rule amply sufficient for the determination of all questions arising upon the limitation of estates," which had been established by at least four unanimous decisions of the court, it may be pardoned the writer of those opinions, to submit some remarks on the present case.

Those earlier cases in the court, rested upon the position that the statute contained within itself, the means of redeeming this branch of the law, from the obscurity and perplexity which rested upon it, by reason of conflicting decisions which had been accumulating for centuries. In taking this position, the court followed the lead of the case of *Smith and Wife v. Chapman*, 1 H. & M., a case which Hoffman, in his course of legal studies, pronounced to be the ablest in the American books.

The object of the Legislature, it was believed, was to place the law upon the subject, in a simple and intelligible form. The 26th section of the statute declares, that certain words, which, for a long course of time, had been the fruitful source of controversy, should be held to mean, not an indefinite, but a definite failure of issue, "unless a contrary intention is expressly and plainly declared on the face of the instrument." That such contrary intention does not expressly and plainly appear on the face of the will of Mr. Roach, is demonstrated by the elaborate course of reasoning and argument pursued by the court, to deduce such intention, by the application of principles of law, and rules of construction, drawn from cases of remote antiquity, to the terms of his will. As a specimen of this line of argument, we select the assertion of the court, that the testator used the word "heirs," in the restricted sense of "heirs of the body;" and so interpreting that word, they say that Mrs. Jordan took an estate tail, unless the subsequent limitation had the effect to convert it into a qualified, determinable fee. Here, such intention was not, in the language of the statute, expressly and plainly declared, or it could not have been necessary to interpolate "the words heirs of the body," from a conjectural interpretation to reach that result.

In the same vein, the court say, the word "child or children" is synonymous with "issue" and that when "issue" is unexplained and uncontrolled by any clear indication of intention, it means descendants to an indefinite extent of duration, and to restrict the legal meaning of the term, a clear intention must appear upon the face of the will.

With all due deference, it is submitted that the authorities do not sustain this view. Roper says the word "children" does not, ordinarily and properly speaking, comprehend "grandchildren and issue generally;" *Legat.* 68. Kent says the word "issue" in devises of

real estate often means children, and is then a word of purchase, though it may be used either as a word of limitation or of purchase; Com. 4, p. 230. Keyes "on Chattels," p. 68, section 97, says the word children is construed in its natural sense, and is not so extended as to include grandchildren, unless the intent is apparent, or the instrument would otherwise be inoperative. *The onus rests upon those who desire to extend the construction.* See *Tucker v. Stites*, 10 G. 196.

In *Hubbard v. Selser*, 44 M. 705, the court says that the word "children" is, in a technical as well as in a general sense, used as a word of purchase, as a description of persons, and not as a word of limitation. If another meaning is sought to be enforced upon it in a particular will, deflecting it from its general and appropriate sense, that must be made out by clear and unequivocal evidence. And what is most remarkable is, that the same judge who delivered the opinion in *Jordan v. Roach*, says twice, in his dissenting opinion in *Gray v. Bridgforth*, 4 G. 312, that the legal and appropriate sense of the word "children" is the "immediate offspring" of the party. Authorities to the same effect might be greatly extended, but these are deemed sufficient and conclusive. They show that in its usual, and even in its appropriate, legal meaning, it does not ordinarily embrace any but the immediate offspring. That if any one avers the contrary, the onus is upon him, and he must sustain it by clear and unequivocal evidence. But in this case the court explicitly lays down the reverse of this rule, and says that if unexplained and uncontrolled, it means descendants to an indefinite extent, and to restrict that meaning, a clear intention must appear on the face of the instrument; and it equally reverses the statutory rule. This decision ascribes to them a technical meaning, carrying with it an indefinite failure of issue, unless the instrument itself gives a clear indication of a different intention.

It is said the intention of a will must govern in its construction, unless plainly against the rules of law. Here the will expressly excludes the marital rights of the husband, and yet by a construction of it, not from express and plain words upon its face, but deduced from adjudged cases, decided long before the statute, the whole estate is made to go to the husband, a result which the testator sedulously sought to avert.

The meaning of this term "children," is made by the court, the very hinge upon which the decision turns, and resting upon a misapprehension, according to the authorities, of the meaning of that term, necessarily involves error in the conclusion.

It may not be unworthy of remark, that the case of *Driver v. Edgar*, Cowp. 379, cited and relied on by the court, could not have been decided in this State as it was in England, because the 25th section of our statute of conveyances, provides that an alienation of a greater estate than he is entitled to, by any person, shall only pass his own right, and

shall not affect the interest of those in remainder; See *Archer v. Jones*, 4 C. 583. A decision based on unsound authority, partakes of the unsoundness.

The criticism of the court, upon the language of the 24th section, may be just, yet they felt themselves bound to construe it as if the Legislature understood what it said. The same regard to the intention of the 26th section, might have saved an infinitude of difficulty and uncertainty.

It is not easy to perceive the significance and the bearing of the position of the court, that neither the statute *de donis*, 13 Edw. I., nor the statute of wills of 32 Hen. VIII., ever had existence here after their repeal in 1807. In the ordinance for the organization of the Mississippi Territory in 1798, provision was made for the transmission of estates by descent, by devise or bequest, and by conveyances, and provisions for these purposes were contained in Toulmin's & Turner's Digest, and have always formed: in some shape, a substantial part of our laws. They gave the unlimited right to the owner to devise all his estate, right, title and interest in possession, remainder or reversion, or goods and chattels, and personal estate of every description. There was nothing to prevent the cutting up of the estate into different parcels, and disposing of a partial interest to one, and of the residuum to another. There was no legislative prohibition in this respect, until the Act of 1822. Apart from that prohibition, without any dependence upon the English statutes, the owner might limit his estate at pleasure, unless he violated the rule against creating perpetuities, and to put bounds to this unlimited right, was the object of the act abolishing entails in 1822.

But it is time to close this comment, perhaps already too far extended. The just conclusion would seem to be, that the devise of the real estate in this will was void, because it transcended the limits of the proviso to the 24th section of the statute; but that the bequest of the personal estate was valid, because, according to two decisions of the court, the proviso does not extend to personality; and that to make it invalid, as a limitation upon an indefinite failure of issue, in the language of the court in *Gray v. Bridgforth*, 4 G. 312, "is in opposition to the entire weight of modern authorities."

The cases following *Jordan v. Roach*, and dependent upon it, will receive no separate comment. But *Sims v. Conger*, 10 G. 231, decided the limitation in that case to be valid, upon words not materially different from those contained in the will of Mr. Roach, and thereby gave full effect to the statute. And this would seem to be the effect, in *Hubbard v. Selser*, 44 M. 705.

The will of David Bridgforth, who died in Tennessee, contained this clause: "If any of my children shall die without heirs, then the property hereby devised to them is to be equally divided among the balance of my children, or the heirs of their bodies."

This provision is to be decided by the laws of Tennessee. The Supreme Court of that State has frequently held, that although the words "dying without issue," if they stand alone in a will, must be taken in their technical sense to mean an indefinite failure of issue; yet, that any accompanying words, or clause, or circumstance in the will, indicating that the general words were used in the sense of dying without issue living at the time of the death, will control that intention.

The word surviving, or its equivalent, and the direction for an equal division among the other children, have the effect in this case, to exclude the idea of an indefinite failure of issue.

The proposition that the words must be taken in their technical import, and are not to be controlled by accompanying words, showing a different intention, is in opposition to the decisions in Tennessee, and the entire weight of modern authorities; *Gray v. Bridgforth*, 4 G. 312; and the bequest held valid.

A deed of gift, executed by Thomas Rowan to John King, conveyed a number of slaves to him, as trustee for Louisa Smith, "to be held by him in such manner as he shall deem most conducive to her interest, until she arrives at the age of twenty-one years, or shall marry, and then deliver said slaves to her. And upon the further trust, that said trustee shall see that said property shall not be sold or disposed of, but shall be preserved for the benefit of the heirs of the body of said Louisa, and shall vest in the heirs of her body upon her death, in case she shall die leaving heirs of her body; but if she should die without leaving heirs of her body, then to vest in the legal heirs of said Louisa on her mother's but not on her father's side."

The court held it to be well settled, that if the import of the previous limitations be such as to vest the absolute estate in the first taker, subsequent restrictions, inconsistent with such an estate, would be void. A limitation to the first taker for his life and no longer; or only for life; or for his life and no longer, and that it shall not be in his power to sell or d spouse of the same, will not prevent the operation of the rule.

After the marriage of Louisa, her right of possession vested in her by operation of the deed, and the legal title was held in trust for her, or for her use. This use was executed in possession, by operation of the statute of uses, and upon delivery of possession, the legal estate became vested in her or her husband, and the trustee had no power over the property. The trust lost its executory character, and became executed, and there was no longer two estates of different qualities, one equitable, the other legal. The whole became subject to the rule in *Shelly's Case*, and the entire interest vested in the first taker.

The case of *Hampton v. Ra'her*, 1 G. 193, which held that the rule in *Shelly's Case*, as far as personalty property is concerned, is not abolished, cited and approved; *Carradine v. Carradine*, 4 G. 698.

A power of sale, attached to an express

estate for life, will not have the effect to enlarge it into a fee; *Dean v. Nunnally*, 7 G. 358.

In the absence of any intention to the contrary on the face of the will, "where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take *per capita*, and not *per stirpes*. If there is no indication of an intention that they should take as a class, they will take as individuals *per capita*; *Nichols v. Denny*, 8 G. 59.

A testator bequeathed and devised all his property, personal and real, "to his wife, to use and dispose of in any way she may think proper during her natural life, and at her death to his step-son, to him and his legal heirs forever."

Held, by the court, that this disposition of the property, if it had stood alone, would have passed an absolute estate to the widow, but taken in connection with the limitation which immediately follows to the step-son, it is so qualified as to give her the usufruct of the property during her life, and a vested remainder to the step-son; *Edwards v. Gibbs' Administrator*, 10 G. 166.

Bequest of a slave to Susan Hodge during her life, and after her death to Mary and Elizabeth, her infant daughters; or if either of said infant daughters be then dead, to the survivor, or if both be then dead, to the surviving children of said Susan equally." Both Mary and Elizabeth died leaving children, who claim the property, as against other surviving children of Susan.

Held, by the court, that words of disposition in a will must be construed according to their plain, natural sense, presuming that the intention of the testator is thereby fully expressed, unless an intention, different from that imported by the words, be manifested by the context.

Under this will, the slaves, upon the death of Susan, went to her surviving children, and not to the issue of her children who died in her lifetime; *Tucker v. Stites*, 10 G. 196.

By deed, certain real and personal estate was conveyed to a trustee, in trust for the wife of the grantor, "and the heirs of her body by the grantor begotten;" *Held*, that these words create an estate tail, and are words of limitation and not of purchase; *McKenzie v. Jones*, 10 G. 230.

The will of Phebe A. Kenly contained, among others, the following clauses:

Item 3. I direct that my executor shall carry on my plantation until my son, Allison Wade Sims shall arrive at the age of twenty-one years.

Item 4. When my son shall arrive at the age of twenty-one years, I give to him all my estate, both real and personal.

Item 6. It is my will and desire, that in case I survive my said son, that one-half my estate should go to Isaac B. Conger, my cousin, and the remaining half, to the children (naming them) of my brother, Jonathan Conger.

Item 7. It is my will, should my said

son die without lawful issue, that all the property and estate hereby given him, shall descend in like manner as set forth in item sixth.

There were but two witnesses to the will, and it was therefore admitted to probate, only as a will of personality.

Held, that upon the face of the 4th and 7th items of this will, a plain case is presented of an estate in fee in A. W. Sims, on his reaching majority, determinable on his dying without issue, and upon that contingency, of an executory devise over to the parties named in the sixth item. The will contains no clause, showing that the words of limitation were not used by the testatrix in their established legal sense, and therefore they must be understood in that sense.

By force of our statute, the words "dying without issue" mean, "a limitation to take effect when such person shall die, not having such heir, issue, &c., living at the time of his death, or born to him within ten months thereafter."

In the absence of all expressions, showing a different intention, the words of limitation must be taken to refer to the time of the death of the first taker. This is inconsistent with the construction here contended for, on behalf of the appellants, that the dying without issue must be referred to the death of the legatee before his majority, and is conclusive against the construction insisted upon by him. The appellees claim title under the seventh item of the will, and that claim is valid; *Sims v. Conger*, 10 G. 231.

Devise to John and William of one-quarter section of land, my late residence and farm, provided, however, that the children who are now living with me, hold a home thereon, until otherwise provided for.

Held, that the children thus referred to, had a life estate, determinable upon their being otherwise provided for.

Held, that it is the duty of courts to uphold every instrument of a testamentary character, where it can be fairly done; *Williams v. Radcliffe*, 42 M. 145.

"I give and devise to my sons, James and Eugene Selser, and to their lawful children, after their decease, jointly, the plantation whereon I now reside."

Held, that in the construction of wills, the intention of the testator is the pole star, and must prevail when ascertained, unless contrary to law.

Held, that the word children is, in a technical as well as a general sense, used as a word of purchase, as a description of persons, and not as a word of limitation. If another meaning is sought to be enforced upon it, in a particular will, deflecting it from its general and appropriate sense, that must be made out by clear and unequivocal evidence.

Held, that in this case, the estate is limited to the children after the death of the father, and they take the fee under our statute. This fee is limited by way of contingent remainder, and vests in the children, as they come in

esse, the estate to open and let in children as they are born; *Hubbard v. Selser*, 44 M. 705.

Lis Pendens.

1. *Binds intruder.* After the institution of an action of unlawful detainer, if a third person intrude into the premises, he will be affected with notice of the suit and be bound by the judgment, and the sheriff, under the writ of *habere facias possessionem*, will turn the intruder out of possession; *Newman v. Mackin*, 13 S. & M. 383.

2. *When it commences.* There is no *lis pendens* till there is service of process on the defendant; *Allen v. Mandaville*, 4 C. 397. This is the rule as to a purchaser, *pendente lite*, but as to the defendant so far as relates to the statute of limitations, the suit is commenced in chancery (at least) from the filing of the bill; *Bacon v. Gardner*, 1 C. 60. But this rule requiring service as to strangers, does not apply so as to protect a purchaser under a decree in chancery (where the sale was on a credit) who was a solicitor in the cause, in making payment of this bond for the purchase money to the party to whom it was made payable, when at the time of payment a writ of error had been actually sued out, but no citation had been served, though he had no actual notice. He was bound to take notice of all the steps taken in the suit; *Cueller v. Herrod*, 5 C. 685.

3. *Purchaser pendente lite.* A decree in chancery binds a purchaser of the property *pendente lite*, without his being made a party by amended bill. And a deed made by a commissioner under a chancery decree relates back to the commencement of the suit, so far as the rights of the defendant and those claiming under him are concerned; *Shotwell v. Lawson*, 1 G. 27. But a purchaser is bound by the decree only when title is adjudged in complainant, or where by the decree, the complainant enforces a subsisting lien on the property. Where no right of property is asserted by, or adjudged to complainant, and where there is no lien existing at the purchase or enforced by the decree, a purchaser for value, and without actual notice of the pendency of the suit, is not affected by the decree; *McCutchen v. Miller*, 2 G. 65.

4. *Purchase pending a creditor's bill.* A creditor's bill to set aside a fraudulent conveyance, asserts no title to the property in the complainant, and if the creditor's judgment be no lien on the property, a purchaser *pendente lite*, for value and without notice takes it discharged of the decree which may be rendered on the bill. And in such a case the rule will be the same if the lien was lost by the lapse of time, *pendente lite*; *McCutchen v. Miller*, 2 G. 65.

Lost Instruments.

See ACTION, 38, et seq. EVIDENCE, 173 to 195, CHANCERY, sub-division Jurisdiction.

Lunatic.

See CRIMINAL LAW, sub-division Insanity.

Magnetic Variation.

See SURVEYING.

Maintenance.

See CHAMPERTY.

Malice.

See TRESPASS. DAMAGES. EVIDENCE. CRIMINAL LAW.

Malicious Prosecution.

1. *Want of probable cause: Effect of.* Want of probable cause is not alone sufficient to maintain an action for a malicious prosecution. The plaintiff must also show that the defendant acted from malice; although the prosecutor had no probable cause for instituting the prosecution, yet, if he thought he had, he is not liable for an honest mistake of judgment. Want of probable cause, whilst it is not the same thing as malice, nor is a circumstance from which malice is presumed in law, yet it is a circumstance from which the jury, in their discretion, may draw an inference of malice. The malice being the gist of the action, must be found to exist, and it will be error for the court to charge the jury that, if they find a want of probable cause, they must find for the plaintiff; *Greenwade v. Mills*, 2 G. 464; S. P., *Whitfield v. Westbrook*, 40 M. 311.

2. *Proof of want of probable cause.* The discharge and acquittal of a party by the committing court, before whom his case was examined, is *prima facie* evidence of want of probable cause; *Whitfield v. Westbrook*, 40 M. 311.

3. *Belief of defendant as to guilt of plaintiff.* In an action for malicious prosecution, the following instruction was given: "That if defendant believed he had probable cause, however strongly and confidently, yet, if it were induced by his own error or mistake, or negligence, it will not amount to such probable cause as will give him any defence to this action." *Held*, to be error, because the instruction did not contain also, after "negligence," the following: "And that he acted without any occasion for suspicion by the party prosecuted;" *Id.*

4. *Probable cause is a mixed question of law and fact.* The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to constitute probable cause exist or not, is a question of fact for the jury; but whether, supposing them to be established, they amount to probable cause, is a question of law for the determination of the court; *Greenwade v. Mills*, 2 G. 464; *Whitfield v. Westbrook*, 45 M. 311.

5. *Advice of counsel as proof of probable cause.* The defendant, in order to show pro-

bable cause, has a right to prove that he acted on the advice of a lawyer; but to make the proof competent, he must show that he communicated to the counsel the facts of the case, and when he is examined as a witness to prove the advice, he will not be permitted to state generally, that he communicated all the facts within his knowledge, but he must state in detail what facts he communicated to counsel; *Whitfield v. Westbrook*, *supra*.

6. *Duty of court in charging in respect to probable cause.* It will be error for the court, in a trial for malicious prosecution, by its instructions, to refer the question of probable cause to the determination of the jury, without declaring to them the principles of law, by which they ought to be governed in settling that question. If the evidence be doubtful or conflicting, the court should instruct the jury hypothetically, with reference to the different views which they may take of the evidence, but if there be no disputed question of fact, nor any conflict in the testimony, nor any question of the credit of the witnesses, it is the duty of the court to instruct the jury whether the circumstances proved are or are not sufficient to show probable cause; *Greenwade v. Mills*, *supra*; S. P., *Whitfield v. Westbrook*, 40 M. 311.

But it was held in *Furness v. Porter*, W. 442, that it would be error for the court to charge the jury directly "that, admitting all the testimony of the plaintiff to be true, want of probable cause has not been shown."

7. *Instance of probable cause.* B. whilst a minor, made a verbal gift of a slave to C., and delivered possession. C. afterwards sold the slave to G., who retained possession for five years. After B. arrived at majority, he affirmed the gift, but some doubt afterwards arising as to the validity of the title, G. offered to give B. horses for the slave. After this, and while the slave was still in G.'s possession, B. sold him to M., who thereupon came late at night to G.'s negro cabins, and clandestinely removed the slave during G.'s absence; *Held*, that G. had probable cause to institute a prosecution against M. for larceny; *Greenwade v. Mills*, *supra*.

8. *Instruction as to malice.* The following instruction was given for the plaintiff, in an action of malicious prosecution: "It is not necessary to render an act malicious, that a party (doing it) be actuated by a feeling of hatred or ill will towards the individual, or that he entertain any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere purpose to bring about a reformation of manners, but in pursuing that design, if he wilfully inflicts a wrong on others, which is not warranted in law, such act is malicious: *Held*, to be error, because the instruction was contradictory, the two motives, viz.: acting for a good purpose and for a reformation of manners, and inflicting a wilful wrong, being inconsistent; *Whitfield v. Westbrook*, *supra*.

9. *Same: Abstract instruction.* The following was also given: "In a legal sense,

any unlawful act done wilfully and purposely, to the injury of another, is malicious." *Held*, to be correct as a legal proposition, but if not purely abstract, it was yet so remotely applicable as to render the propriety of giving it a matter extremely questionable; *Ib.*

10. *Pecuniary ability of defendant provable.* In this action the pecuniary ability of the defendant may be shown, with a view of increasing the damages; *Ib.*

Mandamus.

- I. Nature of the writ, and by what court issued.
- II. In what cases it lies.
- III. Practice in mandamus case.

I. Nature of the Writ, and by what Court Issued.

1. *Not a writ of right.* The writ of mandamus is not a writ of right, and does not pertain to the ordinary courts of common law; *Swann v. Buck*, 40 M. 268. In England it is a prerogative writ, issued by the Court of King's Bench, and by it that court exercises a large portion of its exclusive powers in superintending inferior tribunals, and commanding magistrates and others to do their duty; *Swann v. Buck*, 40 M. 268. An application for the writ is addressed to the sound legal discretion of the court; *Ross v. Lane*, 3 S. & M. 695.

2. *What court issues the writ in this State.* In this State the jurisdiction to issue writs of mandamus is vested in the Circuit Court, by that provision of the constitution which vests in it original jurisdiction in all matters, civil and criminal, and by that part of the Rev. Code of 1857, p. 482, art. 29, which provides that that court shall have jurisdiction in all civil suits and actions, and of all matters and things arising under the constitution and laws of the State, which are not expressly cognizable in some other court established by law; *Swann v. Buck*, *supra*.

The old Supreme Court of the State had power to award a mandamus; *Robson, ex parte*, W. 412.

II. In what Cases Mandamus Lies.

3. *When mandamus an appropriate remedy.* Mandamus is the appropriate remedy to compel public functionaries and tribunals to perform some duty required by law, where the party applying for it has no other remedy. The right sought to be enforced, however, must be certain; *Board of Police of Attala Co. v. Grant*, 9 S. & M. 77. When there is a clear legal right, and there is no specific remedy, and where in justice and good government there ought to be one, mandamus is the proper remedy; *Carroll v. Board of Police of Tishamingo Co.*, 6 C. 38; *Beaman v. Leake Co.*, 42 M. 238.

4. *Court may be compelled by mandamus to proceed to judgment.* A court may be compelled by mandamus to proceed to judgment, but it cannot be compelled to render any prescribed judgment. The court so ordered to proceed to judgment, must render such

judgment as its conscience dictates. Hence, if the Board of Police give a judgment, which is unsatisfactory to one having a claim against the county, he may, if a party to the judgment, appeal to the Circuit Court, but he cannot have the judgment corrected by mandamus; *Board of Police of Attala Co. v. Grant*, 9 S. & M. 77; *Swan v. Gray*, 44 M. 383. A mandamus will be allowed to compel the Board of Police to audit a claim against the county; *Madison Co. Court v. Alexander*, W. 523.

4a. *Mandamus against chancery clerk for refusal to approve a bond.* The duty of the chancery clerk to approve official bonds is in the nature of a judicial act, requiring the exercise of judgment or discretion in its performance, and the court cannot act directly on him and control his judgment and discretion in a matter entrusted to him, in the discharge of his official duties. A mandamus cannot control the discretion of the officer; he may be compelled to act according to his discretion, if he refuse to act at all, but the mode in which he shall exercise it cannot be prescribed; *Swann v. Gray*, 44 M. 393.

5. *The remedy to compel levy of tax to pay a debt due by a county.* Where a board of police have audited and allowed a claim against their county, and directed a warrant to issue therefor, on the county treasurer, they thereby impliedly contract to place funds in the county treasury to meet the warrant, and if they fail to do so, mandamus to compel them to levy a tax to pay the debt, is the appropriate remedy; *Carroll v. Board of Police of Tishamingo Co.*, 6 C. 38; *S. P.*, *Board of Police of Attala Co. v. Grant*, 9 S. & M. 77.

6. *Mandamus compels performance of only ministerial act.* As a general rule, wherever the statute gives power to, or imposes an obligation on a particular person, to do some particular act, or duty, and provides no specific remedy for non-performance, a mandamus will be granted; but where the writ is directed to a public officer, it must be to enforce the performance of a mere ministerial act, not involving on his part the exercise of any judgment or discretion; *Swann v. Buck*, 40 M. 268.

7. *Mandamus to compel the issuance of warrant for salary.* The right of a public officer to receive a warrant on the State treasurer, for the salary attached to his office, may be enforced by mandamus; and generally, when a person is entitled to receive from the State treasury a sum fixed and ascertained by law, and there is an existing appropriation to pay it, he is entitled to this writ to compel the auditor to issue his warrant for it; but the State is sovereign, and cannot be sued without her consent; and the only remedy, in ordinary cases, to obtain payment, is to apply to the Legislature; and mandamus is not to be applied so as to become in effect a suit against the State to establish demands which are either uncertain or unliquidated, or which the Legislature does not recognize, or refuses to pay; *Ib.*

8. *Mandamus to compel sheriff to make a deed.* Whether mandamus is a proper remedy to compel a sheriff to make a deed to land sold by him under execution; *Quære? Davis v. Pryor*, 6 S. & M. 114.

9. *Not allowable to compel an action contrary to law: Instances.* Mandamus will not be awarded to enforce the performance of an act contrary to law, though it be a means to a lawful end; and it was, therefore, refused to compel the tax collector to pay over to the contractor a special tax levied to pay for a court house, though the payment was so ordered by the Board of Police—the law compelling the collector to pay all the county levies to the county treasurer; *Ross v. Lane*, 3 S. & M. 695. And hence, also, it will not be allowed to compel the Board of Police to sign a bill of exceptions where the appeal was not applied for within the time prescribed by law; *Board of Police of Yalabusha Co. v. Ray*, 12 S. & M. 342.

III. Practice in Mandamus Cases.

10. *Practice as regulated by the statute.* By the statute, Rev. Code, p. 479, art. 9, power is given to circuit judges to allow writs of mandamus, in term time or vacation; and under this provision, the practice has been adopted of applying by petition to the judge in vacation for the issuance of an alternative writ returnable to the Circuit Court having local jurisdiction; and the petition thus becomes, in the place of the rule to show cause in England, and the fiat of the judge is equivalent to the rule absolute in the English practice for an alternative writ. Beyond these necessary modifications, the proceedings are according to the common law; *Swann v. Buck*, 40 M. 268.

11. *Practice at common law.* In applying for a mandamus, the usual course is to obtain a rule on the defendant, to show cause why a mandamus should not issue, and if the cause shown be insufficient, then a mandamus in the alternative issues, to which a return is made, and if good cause is not shown by the return for not doing the thing asked for, then a peremptory mandamus issues; but a peremptory mandamus will not issue in the first instance, except in remarkably clear cases; *Board of Police of Attala Co. v. Grant*, 9 S. & M. 77. The petition is *ex parte*; and if it make a *prima facie* case, an alternative mandamus is awarded, to which the defendant must answer, by showing that he has done the thing required, demur to the writ, or make return denying the allegations of the writ, or setting up new matter constituting a defence; *Swann v. Gray*, 44 M. 393.

12. *The answer to the petition: And the return taken as true.* On the coming in of the answer to a petition for a mandamus, if the petitioner move for a peremptory mandamus it will be an admission of the truth of the answer; *Board of Police of Yalabusha Co. v. Ray*, 12 S. & M. 342; *S. P., Ross v. Lane*, 3 S. & M. 695; *Board of Police of Attala Co. v. Grant*, 9 S. & M. 77; *Swann*

v. Work, 2 C. 439; *Swann v. Gray*, 44 M. 393; *Beaman v. Leake Co.*, 42 M. 238. And so where a peremptory mandamus is moved for on the return of the defendant to a mandamus in the alternative, the facts stated in the return are admitted to be true. But this rule only applies to such facts as are relevant, for as to irrelevant facts, it is immaterial whether they be true or not; *Carroll v. Board of Police of Tishamingo Co.*, 6 C. 38.

13. *Where the facts are alleged to be untrue.* If the facts stated in the return be alleged to be false, the court cannot go into an investigation as to the issue thus made. The remedy is by an action against the defendant for a false return, in which there will be a judicial ascertainment of the facts, and upon that the court will grant a mandamus or not, as the facts warrant the one course or the other; *Board of Police of Attala Co. v. Grant*, 9 S. & M. 77; *S. P., Swann v. Work*, 2 C. 439.

14. *What the return must state.* The return must state all the necessary facts, so that the court can give judgment; the court cannot go into an investigation of the facts. The return must, therefore, state all the facts necessary to entitle the relator to relief, or else judgment will not be given for him; *Swann v. Work*, 2 C. 439.

15. *Same: Case in judgment.* The relator had a claim against the State for \$4,000 for work and labor done; he had no special contract, but claimed under a *quantum meruit*. His claim had been presented to the Legislature, which passed an act allowing him \$750 in full of the claim. He accepted the \$750, but endorsed on the receipt he gave to the auditor, that he did not thereby waive his rights to the balance. The relator then applied for a mandamus to compel the auditor to issue his warrant for the balance of the \$4,000. The return of the auditor showed the above facts, and in addition stated, that when he, the auditor, was a member of the Legislature, the claim appeared to him to be just, and he voted as such to pay it; but that he refused to issue his warrant, because he doubted his authority to do so: *Held*, that this was no admission by the auditor of the justice of the relator's claim, and that a peremptory mandamus could not be awarded, there being neither an admission of a debt due, nor a judicial ascertainment of the fact; *Id.*

16. *Mandamus against tax collector whose term has expired.* A mandamus was issued by the Circuit Court to the tax collector to collect and pay over a special tax, and the collector appealed. Pending the appeal, the collector's term of office expired: *Held*, that this was a sufficient reason for not affirming the judgment of the court below, as it would be illegal for the collector to pay the judgment when he was out of office; and his successor, if it were revived against him, could not collect the tax without a new assessment, as he had no power to collect taxes not on the assessment roll for the year in which he was collector; *Ross v. Lane*, 3 S. & M. 695.

17. *As to statute of limitations in respect*

to *mandamus*, see LIMITATION OF ACTIONS, 166.

Manufacturer.

1. *Warranty of skill.* Every mechanic who undertakes to make any machinery, engages to bring sufficient skill and dexterity to the performance of the contract, so as to complete it in a workmanlike manner; and if on account of his fault it be worthless, he cannot recover for the price; *Lefflore v. Justice*, 1 S. & M. 381. When he undertakes to manufacture an article or to furnish it for a particular use or purpose, he is under an implied warranty, that it is reasonably fit for such purpose, as far as an article of such kind can be; *Ottis v. Alderson*, 10 S. & M. 476; S. P., *Brown v. Murphee*, 2 G. 91.

2. *Same: When materials furnished are worthless.* When the employer has notice of the inferior quality of the materials used, and consents, nevertheless, that they be used, he cannot complain of any inferiority of the work occasioned thereby. And so, if the work be exposed by the employer improperly, after it is completed he cannot complain; *Collins v. Mcney*, 4 H. 11.

3. *When title vests in the person ordering a machine.* If a manufacturer completes an article ordered by a purchaser according to the terms of the contract, and by the time specified, and have it ready for delivery, and set it apart for the purchaser, he can recover the price therefor, without an offer to deliver; if the purchaser have notice of its readiness and completion, and make no objection; *McIntyre v. Kline*, 1 G. 361.

Marriage and Divorce.

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I. The Nature of the Contract of Marriage.

1. *Is a civil contract and a civil status.* Marriage is a civil contract, and something more, it is a civil status or relation, created by public law, and is dissolvable, not by the will of the parties, but only on the terms prescribed by law; and it is not within that provision of the Constitution of the United States prohibiting the States from passing laws impairing the obligation of contracts; *Carson v. Carson*, 40 M. 349.

2. *Same: Power of Legislature over.* Hence, the Legislature, may by law, make that a ground of divorce, which at the time it was done, though inconsistent with the marital obligations, was not a ground for dissolving the contract; and, therefore, the Act

of February 9th, 1860, which provided that, where husband and wife, prior to its passage, had lived separate four years, but not with collusion and intent to obtain a divorce, either party might procure it, is valid and constitutional, and a divorce will be granted on that ground; *Id.*

II. How Marriage can be Contracted, and its Validity.

3. *Observance of legal forms not necessary.* The statute of this State (H. C. 492, also Rev. Code of 1857, p. 331-2), which prescribes the forms and ceremonies in which marriages shall be solemnized, does not declare that marriages contracted not in conformity to its provisions, shall be void. Hence, if a marriage be solemnized in this State, between parties capable of contracting it by the common law, but without an observance of the forms prescribed by the statute, it will be good and valid; *Hargroves v. Thompson*, 2 G. 211. Thus, the marriage of an infant of the age to contract marriage by law, is, without the consent of his guardian, valid; and a license to marry is also unnecessary; *Hargroves v. Thompson*, *supra*.

4. *Issuing marriage license improperly.* By art. 6, p. 332, of the Rev. Code of 1857, the probate clerk is prohibited from issuing a license for the marriage of males under twenty-one years of age, and of females under eighteen years of age, without the consent of the parent or guardian. In case he issues such license without such consent first given, he acts at his peril, and becomes liable for the statutory penalty, notwithstanding he may have been honestly mistaken as to the age of the party; *Detterly v. Yeamans*, 10 G. 475; S. P., *Bates v. Stokes*, 40 M. 56.

5. *License for non residents.* The statute contemplates the marriage license shall be issued in the county in which the female usually resides; it does not apply to license issued for the marriage of persons who are non-residents of the State. And though licenses for the marriage of such may be properly issued, yet the highly penal parts of the statute, which subjects the clerk to a *qui tam* action for an improper issuance of license to infants, was not intended for the protection of non-residents; and such action will not lie where the licensees are non-residents; *Bates v. Stokes*, *supra*.

III. Proof of Marriage.

1. Cohabitation and Declarations.

6. *Acts and declarations of the parties, and of deceased persons.* In all cases, except in actions for crim. con., and in prosecutions for bigamy, the fact of marriage may be established by evidence of the acts and declarations of the parties, by proof of general repute in the family, and by proof of the declarations of deceased persons, who are related to them by blood or marriage, when made *ante litem motam*. A bill for divorce, and the answer, in which the marriage is charged and

admitted, are evidence of the marriage in a controversy relating to the legitimacy of the offspring of the complainant and defendant; *Henderson v. Cargill*, 2 G. 367. See *post*, 10.

7. *Onus as to showing declarations to be post litem motam.* And it is incumbent on the party objecting to such declarations, on the ground that they were made *post litem motam*, to show that they were made after a controversy had, in fact, arisen on the subject; *Ib.*

8. *Cohabitation, &c.* Proof that a man and woman cohabited together as husband and wife, and that they acknowledged and treated each other as such, and that they were so regarded and treated by their relatives, and that they had children which they owned and to which they gave the family name, raises the legal presumption that they were married; and such presumption will not be overturned by proof that the parties made declarations denying the existence of the marriage, unless they were made under circumstances of peculiar seriousness and solemnity; nor will it be overturned by conduct on their part which only amounts to a suspicion that no marriage had in fact taken place; *Ib.*

9. *Cohabitation, &c.: Effect of as proof.* The cohabitation of a man and woman, as husband and wife, and their acknowledgment of each other as such, and the raising and providing for their children and acknowledging them as such, are circumstances from which a marriage between them may be inferred, but they are not conclusive, nor are they the same thing as marriage; *Stevenson's Heirs v. McReary*, 12 S. & M. 9.

2. Reputation.

10. *Reputation: When admissible.* The principle on which the law resorts to hearsay evidence in cases of pedigree, is the interest of the declarants in the person from whom the descent is made, and their consequent interest in knowing the connections of the family; and hence, the rule of admission is restricted to the declarations of deceased persons, who are related, by blood or marriage, to that person, and, therefore, interested in the succession in question; it is not, therefore, competent to introduce, as evidence to establish or disprove a marriage, the general reputation in the neighborhood, on that subject, outside of the members of the family; *Henderson v. Cargill*, 2 G. 367; S. P., *Spears v. Burton*, 1b. 547.

See *ante*, 6.

3. Presumption in Favor of Marriage.

11. *Presumption of life.* Where a person has departed from this State, and has not since been heard from, the presumption of law is that he is alive until the lapse of five years, and after that time, that he is dead. But the presumption of life within the five years is not sufficient to establish the illegality of a second marriage of such person's wife, within that time; for that would be to establish a crime by mere presumption of law; and especially ought the second marriage to be deemed

legal, when it is attacked after the lapse of twenty years, and during all that time the absent party has not been heard from; *Spears v. Burton*, 2 G. 547.

12. *Presumption in favor of validity.* The law favors marriage, and when once solemnized according to the forms of law, will not declare its nullity, except upon clear and certain evidence, especially after the death of one of the parties; and this presumption exists also in favor of the capacity of the parties contracting the marriage; *Powell v. Powell*, 5 C. 783.

IV. Capacity of the Parties.

1. Infants and Insane Persons.

13. *Infant may marry without consent of guardian, &c.* As to this, see *ante*, 3.

14. *Parties must have mental capacity.* The contract of marriage, like all other contracts, in order to be valid, requires the assent of both parties. If either party, from imbecility of mind or deranged intellect, be incapable of volition, or unable to comprehend the nature of the engagement, the marriage will, for that cause, be declared void. But the contract is so important in its nature and consequences, and involves so much the happiness, peace and honor of families, that the policy of the law requires courts to uphold it, unless the proof be entirely clear and satisfactory, leaving no doubt of the incapacity of one of the parties, and the consequent invalidity of the marriage. Mere weakness of intellect, or even great eccentricity of conduct, unless it reaches a point that evinces an inability to comprehend the subject matter of the contract, will not suffice to avoid it; *Ward v. Dulaney*, 1 C. 410.

15. *Same: Case in judgment.* In this case, the marriage was contracted between a widow and widower of mature age, who were well known to each other, and who were of the highest respectability and standing. They lived together about a year and then separated—the husband providing liberally for the wife during the remainder of her life, which continued about ten years. After her death, the validity of the marriage was assailed by those who would have been her heirs, in case she were an unmarried woman, on the ground of her insanity; and the court reviewed the evidence on that point, which was quite voluminous and consisting of many interesting details, showing many eccentricities of conduct on her part, and her subjection to hysterics, and reached the conclusion that she was sane at the time of and before and even after the marriage. And among the evidences of insanity relied on was, that the wife conceived a violent love for, coupled with a desire of marriage with, a near relative, a marriage with whom would have been immoral and incestuous in law; and the court held that this was no evidence of insanity; *Ib.*

15a *Ratification of marriage.* Whether, if at the time of the marriage, one of the parties be incapable of entering into the contract,

but afterwards becomes sane, and then lives and cohabits with the other as a married person, the marriage is to be considered as absolutely void, and incapable of ratification, by such cohabitation, or the contrary; *Quære? Ib.*

16. *Capacity presumed.* A person contracting marriage is presumed to have sufficient capacity to consent to it, till the contrary is proven, by clear and certain evidence; *Powell v. Powell*, 5 C. 783.

2. Effect of Divorce on Capacity to Marry.

17. *Either party may marry after divorce.* An act of the Legislature, passed in 1842, and never published, gives either party, after a divorce *a vinculo*, for any cause, the right to contract marriage; *Powell v. Powell*, *supra*.

V. Divorce.

1. Causes for.

18. *A mensa et thoro.* Mere intemperance in the husband's habits, connected with harshness of manner, threats of violence, and indecency of conduct, is no cause for a divorce *a mensa et thoro*; *Waskam v. Waskam*, 2 G. 154. But if it be shown that the husband beat and chastised the wife, so as to endanger her life or health, a divorce *a mensa* will be granted; *Holmes v. Holmes*, W. 474. But to justify the wife in leaving the husband's bed and board, on account of cruel treatment, there must be a reasonable apprehension of bodily harm. Mere austerity of temper, petulance of manner, rudeness of intercourse, want of civil attention, and even occasional sallies of passion, if they do not threaten bodily harm, do not amount to that cruelty against which the law relieves; *Kenley v. Kenley*, 2 H. 751.

19. *A vinculo: Adultery.* Adultery in either party is good ground for divorce; *Tewksbury v. Tewksbury*, 4 H. 109; *Armstrong v. Armstrong*, 3 G. 279.

20. *Same: Proof of adultery.* The admissions of the husband are not sufficient alone to establish the charge of his adultery, but if supported by other proof, or corroborated by other circumstances clearly proven, they are competent and sufficient to justify a decree for a divorce *a vinculo*; *Armstrong v. Armstrong*, 3 G. 279.

21. *Same: Condonation.* Condonation is but a forgiveness on condition of future fidelity, which if not kept, the rights of the injured party are restored, as if there had been no condonation. The doctrine is not applied with the same strictness against the wife, as against the husband. Her want of control over him, the difficulty she may find in quitting his house or withdrawing from his bed, and the fact that his guilt is not of the same consequence as hers, renders it not improper that she should for a time show a patient forbearance, and, therefore, condonation will not be implied against her, from the mere fact of cohabitation, after a knowledge of his guilt; *Ib.*

22. *Desertion: Voluntary separation no desertion.* A voluntary separation of husband

and wife by mutual consent, and agreement of both parties, is no ground for granting a divorce to either. A divorce will not be granted on the statutory ground "of wilful, continued and obstinate desertion of the defendant for three years," unless it appear that such desertion was without the consent of the complainant; *Fulton v. Fulton*, 7 G. 517.

23. *Mere absence no desertion.* The mere absence of the husband or wife from the matrimonial domicile, without an intention to discontinue the matrimonial relation, is not, in a legal sense, desertion; but such absence becomes desertion as soon as the absentee abandons the intention of returning; *Ib.*

24. *Desertion for three years must be continuous: Offer to return.* To authorize a divorce for the cause of desertion for three years, the desertion must be continuous for three consecutive years. If there has been a return, the broken intervals of absence caused by it, cannot be added together, but the desertion must be for three years at one time; it seems this must elapse since the last cohabitation; *Gaillard v. Gaillard*, 1 C. 152. And hence, also if there be a valid offer by the absentee to return within the three years, before the filing of the bill, a divorce will not be granted. But the offer to return must be *bona fide*, and unaccompanied by any improper qualifications or conditions, and really intended to be carried out, if accepted; *Fulton v. Fulton*, 7 G. 517.

25. *Same: An improper condition: Case in judgment.* The husband has a perfect legal right to determine who shall be received at the matrimonial domicile as guests and visitors, and who shall be excluded therefrom; and hence, if in the exercise of that right, he prohibits the wife from receiving at that place the visits of her child by a former husband, this constitutes no excuse for an abandonment of the matrimonial domicile by her, and if she afterwards offer to return, upon condition that such visits be allowed by the husband, such offer does not put an end to her desertion; *Fulton v. Fulton*, 7 G. 517.

2. Alimony and Allowance to the Wife.

See ALIMONY. HUSBAND AND WIFE, 135.

26. *Alimony pendente lite.* On an application for alimony, pending a suit for a divorce by the wife, if the bill contain sufficient matter, if true, to entitle her to a divorce, no investigation will be made into the merits of the cause, but the allowance will be made almost as a matter of course, and in a sum sufficient to enable her to prosecute her suit, if she have no separate estate. But the court will make the allowance in view of the circumstances and condition of the husband; and his pecuniary ability, therefore, is a matter to be inquired into on such applications; *Porter v. Porter*, 41 M. 116.

27. *The restoring to the wife her property in granting a divorce.* Independent of the statute (H. C. 496. § 7), which provides that a chancery court granting a divorce, "shall make such order touching the maintenance and alimony of the wife, or any allowance to

be made to her, &c., as from the circumstances of the parties and nature of the case, shall seem equitable and just;" the wife, upon being divorced from the husband, has no equity to reclaim personal property which she owned, and which, by the marriage, was vested in the husband. Whether, under that statute, the court granting the divorce, could restore to her the property, was not decided, but the intimation was in favor of the exercise of such power; and it was further held, that if not restored in that suit, the property could not be recovered in any subsequent suit; *Lawson v. Shotwell*, 5 C. 630.

See CHANCERY, sub-divisions Res Adjudicata and Decree.

28. *Same*. If the wife get a divorce for the adultery of the husband, the property of the wife acquired by him by the marriage, will be restored to her; *Tewksbury v. Tewksbury*, 4 H. 109. But her earnings during the marriage belong to the husband, and will not be restored to her as property belonging to her; *Armstrong v. Armstrong*, 3 G. 279.

29. *Same: Her separate estate*. The right to the exclusive use and possession of slaves held by the wife under the Act of 1839, is restored to her by a decree of divorce *a vinculo*, without any special provision in the decree to that effect; *Clarke v. Slaughter*, 9 G. 64.

30. *Effect of giving her back her property*. But a decree of divorce which restores to the wife the property she owned at the marriage, will not affect the title of a valid purchase from the husband who became such before the divorce was granted; *Warner v. Warner*, 4 G. 547.

31. *Allowance to wife on divorce a mensa et thoro*. A separate maintenance will not be allowed the wife unless there be a reasonable apprehension of bodily harm from the husband. And if it be decreed it will be discontinued if the husband *bona fide* offer to cohabit with her and to treat her kindly in the future; *Kenley v. Kenley*, 2 H. 751.

32. *Allowance when husband is insolvent*. Upon a decree for a divorce, if the husband be insolvent, and the wife under the decree get the greater part of his property, the court should not make a further allowance of alimony against him for the support of the wife; *Bankston v. Bankston*, 5 C. 692.

33. *Extent and right to the allowance*. Upon a decree of divorce for the adultery of the wife, reasonable alimony should be allowed to her; and in that case, her conduct being unobjectionable, she was allowed one-third of her husband's estate; *Armstrong v. Armstrong*, 3 G. 279.

3. Proceedings for Divorce.

A. THE BILL.

34. *Wife's bill*. A bill filed by a wife for a divorce may also embrace her claim for an account for her separate estate received by her husband; *Armstrong v. Armstrong*, 3 G.

279. And it must embrace her claim for the restoration of any property which she owned at the marriage, and which by that event became the husband's; *Lawson v. Shotwell*, 5 C. 630.

35. *Frame of bill charging adultery*. In a bill seeking a divorce upon the ground of adultery committed by the defendant, the offence must be charged, with reasonable certainty, in reference to the particular time and place of its commission; a charge "that the defendant, at various times and on various occasions since the marriage, committed adultery with a servant girl of complainant and other females," is demurrable for vagueness and uncertainty. But when reasonable certainty can be otherwise obtained, it is unnecessary to charge in the bill the name of the person with whom the offence of adultery was committed, and this rule; as it preserves the record from unnecessary scandal, and suppresses the names of persons not parties to the controversy, and who are without opportunity of defending themselves, is favored by the courts; *Farr v. Farr*, 5 G. 597.

B. OTHER MATTERS.

36. *Equity has jurisdiction*. Proceedings for a divorce are a branch of equity jurisdiction, and regulated by the general chancery practice, except when otherwise expressly provided; *Fulton v. Fulton*, 7 G. 517.

37. *An appeal lies*. The statute (Rev. Code of 1857, pp. 555, 556, §§103, 108), provides expressly that an appeal on certain conditions may be prosecuted from any final decree rendered in the Chancery Court, at any time within three years from the date of its rendition, and there is no exception in this respect in relation to decrees pronounced in suits for divorce, and an appeal is allowable in such cases; *Fulton v. Fulton*, 7 G. 517.

38. *Notice to non-residents*. The Act of 1827, requiring that notice in suits for divorce shall be published for three months, where the defendant is a non-resident, is repealed by the Act of 1848 (Session Acts, page 148), which provides for a publication of notices for one month only in chancery cases; *Plummer v. Plummer*, 8 G. 185.

39. *Adultery is a bar to alimony*. Proof of adultery on the part of the wife is a bar to her claim for alimony, where she seek a divorce on other grounds than the adultery of the husband; *Holmes v. Holmes*, W. 474.

40. *Declarations of the parties as evidence*. In a suit for divorce on the ground of desertion, where there is no ground to suspect collusion between the parties, the declarations of the complainant made to the defendant about the time the separation took place, explanatory of the relations subsisting between them, and of the motives on which complainant acted, are in the nature of verbal acts, constituting a part of the *res gestæ*, and are admissible in evidence in favor of the declarant; *Fulton v. Fulton*, 7 G. 517.

Marriage Settlement.

See HUSBAND AND WIFE, 90a, for descent of wife's property held under a settlement, and 95 to 132, for this title generally.

Master and Slave.

See SLAVERY.

1. Liability of master for tort of slave.

The master is not liable for a tort committed by his slave, if not done in pursuance of his orders, or occasioned by his improper conduct, or his failure to exercise his authority over him. And he may order his slave to arrest another slave illegally on his premises, without being responsible for a tort committed by the use of unnecessary violence, in making the arrest; *Newell v. Cowan*, 1 G. 492.

2. Liability for failure of slave to work public road. The owner of a slave is not liable for the statutory penalty imposed for a failure of the slave to work on a public road, where notice to work was given to the overseer in the master's absence, and did not come to the owner's knowledge until after the default had occurred; *Cocke v. Board of Police of Coptah Co.*, 9 G. 346.

Mechanic's Lien.

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I. Statutes.

1. Acts of 1821 and 1830. These acts will be found in H. C., p. 626, arts. 4, 25.

2. Act of 1838, H. C., p. 627, art. 6. This act provides that, "Every dwelling house * * * or other building, which may hereafter be erected within the State, shall be subject to the payment and satisfaction of the price contracted therefor, or in case there be no special contract, of so much as reasonably ought to be paid for the work and labor done and performed, or the materials and implements supplied and furnished, or employed in the erection of said building, by any brick-maker, mason * * * lime merchant, or other merchant or mechanic, in preference to any other lien originating subsequently to the commencement of said building, or date of the contract therefor: *Provided*, that such contract shall be reduced to writing, and signed by the parties thereto, and recorded, &c., or in case there be no such written contract, or it be not recorded, that each and every person possessing a lien on such buildings, &c., shall have instituted suit for the amount thereof, * * * within six months after the date of said written contract, or the commencement of said building: *Provided*, that the contractor or mechanic shall perform the work according to his contract. All former acts were repealed by this act.

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2. Act of 1840, H. C., 627, art. 7, § 1. This act provided that, "In all cases hereafter, when any contract shall be made between any proprietor or lessor, of any tract of land or town lot on the one part, and any other person on the other part, for the erection or *repairing* of any house or other building, mill or machinery, bridge, or any description of mechanical work whatever, or their appurtenances; or for furnishing labor or materials for the purpose aforesaid, and every other person who may have furnished materials which may have been used in the construction of such house, building, mill, machinery, bridge or other mechanical work, whether by special agreement, or otherwise; the person or persons who shall in pursuance of such contract have furnished labor or materials for such purpose, or who shall have furnished such materials as aforesaid, shall respectively have a lien to secure the payment of the same upon the buildings and materials aforesaid; and said buildings and materials shall not be subject to any other lien whatsoever, until the aforesaid lien shall be cancelled according to the provisions of the act."

3. Same: § 2. "In the event of there being no other lien in existence on such lot or parcel of ground, or upon the term of any lessee, at the time of making such contract, &c., then, and in that case, the said lot or parcel of ground, or term, &c., to be equally subject to the payment of said contract, as in the case of the house, &c., erected or constructed thereon."

4. Same: § 3. It was further provided that if any person shall seek to avail himself of "the provisions of such lien," he shall commence suit, "or have the contract upon which the lien is founded, recorded, &c., within twelve months from the time payment should have been made by virtue of such contract, by which the lien is claimed."

5. Same: § 4. This section provided for the issuance of a special execution on the judgment, describing the property on which the lien exists, and for the sale of such property, or so much thereof as was necessary; and that when there were more executions than one, the proceeds of the sale, if insufficient to pay all, should be ratably divided.

6. Act of 1857, Rev. Code, p. 327, art. 1. This provides that, "Every house or other building, bridge, mill or any addition erected thereto, and any fixed machinery or gearing, or other fixtures for manufacturing purposes, and every boat or other water craft, or pal-ing or other enclosure, hereafter erected or built in this State, shall be liable for any debt contracted and owing, or labor performed, or materials furnished, about their erection and construction, and such debts shall be a lien on such building or improvement, and on the land whereon it stands, including the lot or curtilage whereon the same is erected; but such lien shall take effect as to purchasers, and encumbrancers in good faith and for a valuable consideration, without notice of the

lien, from the time of filing the contract under which the debt was contracted, in the probate clerk's office, &c., to be recorded, or of the commencement of the suit * * for the enforcement of the lien."

7. *Same: Art. 2.* Provides that when the improvement is done by contract the lien shall exist only in favor of the contractor for work and materials done and furnished in pursuance of the contract, and not in favor of any person not employed by the owner.

8. *Same: Art. 3.* "If any such building or other improvement shall be erected by any tenant, or other person, not the owner of the land, then only the building and estate of the tenant, or other person, so erecting such building or improvement, shall be subject to the lien created by the act, unless, such building be erected by the written consent of the owner of the land."

9. *Same: Art. 4.* This article contains provisions for the enforcement by the laborers and material men employed by the contractor, of a lien for their debts, on the amount due by the owner to the contractor.

10. *Same: Art. 5.* Provides that when the contract for the improvement shall be recorded, "the lien shall commence from the time when such contract is filed for record."

11. *Same: Remainder of the act: The suit to enforce the lien.* The act further provides, that any person desiring the benefit of the lien "shall commence his suit," in the proper court in the county where the property is situated, within six months next after the time when the money due and claimed by such suit became due and payable, and not after." And here it will be noted, that it differs from the Act of 1840, which saves the lien, when either suit is commenced, or the contract is recorded, within the time limited. See *ante*, 4.

It is also provided, that all persons "interested in the controversy," and "all persons claiming liens under the act, shall be made parties to the suit; and that "the claims of several parties having liens on the same property may be joined in the same action. (See art. 7.)

That publication for one month shall be made against a non-resident defendant. (See art. 8.

That when defendant is served personally with process, the judgment shall be general against his property, as well as special against that on which the lien exists, and execution shall issue accordingly.

That the "sheriff's deed," if for the building alone, shall convey the same to the purchaser, free from any former encumbrance on the land, and shall authorize him to enter and remove the same from the land with reasonable dispatch; and if such deed shall be for the land also, it shall convey to the purchaser such estate therein as the owner or builder, as the case may be, had at the time when the lien under which the sale is made attached thereon, or at any time afterward, subject to all prior encumbrances, and, moreover, shall convey to the purchaser the building in the

same manner as if the sale was of the building alone.

It is also provided, that all liens for the erection of the same building shall be concurrent and be paid *pro rata*.

12. *Suit in Circuit Court.* The acts of 1838, 1840, and 1857, all provide for the enforcement of the lien in the Circuit Court, where the amount is over \$50, and before justices of the peace, when under that sum.

II. Lien under Acts of 1821 and 1830.

12a. *Lien given when contract recorded.* The Acts of 1821 and 1830 (H. C. 626, arts. 4, 5), give to carpenters and joiners a lien, for the price of their labor on the buildings on which it has been bestowed, and for materials furnished, when the contract between such mechanic and his employer has been reduced to writing and filed in the clerk's office for record, within three months from its execution; and the filing of the contract is notice of the lien to subsequent purchasers; *Buck v. Brian*, 2 H. 874.

III. Lien under Act of 1838.

13. *No lien for repairs.* The Act of 1838 (see *ante*, 2), gives no lien for repairs, but only for materials furnished and work done in the erection of buildings; *Kirk v. Talaferro*, 8 S. & M. 754.

14. *Lien as to building prior to encumbrances.* Under the Act of 1838, which provides that every building shall be subject to the lien of a mechanic or material man in preference to any subsequent lien, the mechanic's lien does not attach to the building even in preference to the rights of a person holding a prior encumbrance on the lands, as a mortgagee, or vendor who has only given a bond for title on payment of the purchase money. In such a case the building, on its erection, is attached to the soil, and is subject to the rights of the parties then holding a right to the soil; *English v. Foote*, 8 S. & M. 444. The act does not profess to give the power (and if it did, it would be unconstitutional), to a tenant to bind the freehold by a mechanic's lien. The party making the contract for the improvement can only bind his interest in the land; *Kirk v. Talaferro*, 8 S. & M. 754.

15. *General and special execution.* Under the Act of 1838, the mechanic having obtained a judgment, may proceed with a general execution against all the property of the defendant, or with a special execution against the building erected and the lot on which it is situated; but if he adopt the former, and sell the building and land under it, it is a waiver of the special execution, and hence, he cannot, after such sale under a general execution, go into chancery and enforce a specific lien against the building; *Id.* See *post*, 27, as to waiver of special execution under Act of 1840.

16. *Resort to equity.* Under the Act of 1838, after a suit has been brought at law within six months from the completion of the

work, and judgment recovered and no satisfaction had, the mechanic could still go into equity to enforce his lien; *Andrews v. Washburn*, 3 S. & M. 109.

IV. Lien under Act of 1840.

1. Extent of the Lien.

17. *It affects only the interest of the employer.* Under this act the lien of the mechanic extends only to the interest in the land of the party who employs him; and hence, if he be a mortgagor, the lien cannot be set up against the rights of the mortgagee. But if the mortgagee file a bill to foreclose, and a receiver be appointed, the mechanic will be entitled to have so much of the rents accruing from the building before the receiver took possession, as the said receiver may have collected from the prior occupant, but his claim for the enhanced rent occasioned by the improvement was not sustained. And in such a case, it makes no difference that the mortgagee knew that the improvement was being made, and did not object; his mortgage was on record, and this was full notice of his rights, and he was not bound to give any other; *Hoover v. Wheeler*, 1 C. 314; S. P., *Laud v. Muirhead*, 2 G. 89; *Falconer v. Frazier*, 7 S. & M. 235; *English v. Foote*, 8 S. & M. 444. The case of *Hoover v. Wheeler* was explained in *Olley v. Haviland*, 7 G. 19, and held not to decide that the mechanic was not entitled to a lien on a building erected by him in preference to the lien of a mortgagee.

18. *Lien as to the building allowed, against prior encumbrance.* Under the Act of 1840, a mechanic erecting a building under a contract with the proprietor or lessor of land, is entitled to a lien on the building so erected, in preference to any prior lien then existing on the land; and a mortgagor in possession before foreclosure, is "a proprietor" in the meaning of the statute, and a building erected under contract with him is subject to the mechanic's lien in preference to the rights of the mortgagee; and the mechanic, after selling the building under his judgment, may go into equity and get permission to remove it; *Olley v. Haviland*, 7 G. 19. But this lien is so protected only where a building is erected, for the lien for repairs does not extend beyond the interest of the employer in the land; it has no separate force or vigor as to the building repaired; *Hawley v. Henderson*, 5 G. 261.

19. *Exist only in favor of the contractor.* The mechanics' lien is a security only for a debt due by the owner or employer, erecting or repairing a building or other improvement, and where there is no relation of debtor or creditor between him and the person claiming the lien, there can be no lien. The lien arises only when the contract to build or repair is made with, and the materials furnished, or the work done, on the credit of, the owner. Hence, there is no lien in favor of the lumberman who furnishes materials to the contracting mechanic; *Shotwell v. Kilgore*, 4 C. 125; nor in favor of a sub-contractor, who

has done work, or furnished materials under a contract with such mechanic undertaking the work; *Holmes v. Shands*, 4 C. 639. Under the Act of 1857, such parties may acquire a lien on the debt due by the owner by giving him notice, in writing, of their claim; See Rev. Code of 1857, p. 327, art. 4.

20. *Extent of lien when building erected by guardian.* A mechanic, who under a contract with the guardian, erected a building on the ward's land, is not entitled to a lien on the land for payment. The guardian has no power to bind the ward's land for a debt, and a mechanic dealing with a guardian who has by law only a limited authority, can have no right beyond that which the authority, rightfully exercised, would confer. But it was said that the decision left unsettled the right of the mechanic to hold the rents liable so far as they had been increased by his improvements; *Payne v. Stone*, 7 S. & M. 367. However, in *Weathersby v. Sinclair*, 43 M. 189, it was held that a mechanic erecting a house by contract with an administrator, though he got no lien on the land, had a lien on the house and might sell it. This was under the Act of 1857, and under that act a similar right would exist where the guardian erected a house.

2. The Date and Commencement of the Lien.

21. *When it commences.* The lien of a mechanic commences from the date of his contract, and not from the time when he commences to perform it, and it will be prior to all encumbrancers, subsequent to the date of the contract, who have notice; and if at the time the contract is made the owner has no title to the land upon which the lien can operate, it will commence as soon as a title is acquired; *Bell v. Cooper*, 4 C. 650.

22. *Effect of proceedings to enforce lien as proof of date of lien.* When a mechanic's lien has been enforced by a sale of the land and building, in a controversy afterwards between the purchaser and an encumbrancer, as to which has priority, the commencement of the mechanics' lien will be held to be the date of the note or contract on which the proceedings to enforce it were founded, and not any prior act of furnishing materials or doing the work; *Smith v. Olley*, 4 C. 291.

3. Proceedings to Enforce the Lien.

23. *Effect of, as to encumbrancers.* The pendency of a suit to enforce the lien, is notice to an encumbrancer; *Bell v. Cooper*, 4 C. 650. And where a judgment has been rendered in favor of the mechanic, an encumbrancer will not be permitted in a bill to enjoin it, to assail it by showing that it was merely erroneous, and ought not, on the facts, to have been rendered, there being no fraud or collusion between the owner and the mechanic; *Bell v. Cooper*, *supra*. This is probably different under the Act of 1857, which requires all the parties "interested in the controversy," to be made parties to the proceeding to enforce the lien.

24. *Title to land not in issue.* In such a

proceeding, the title to the land on which the improvement is made, cannot be brought in question. An issue, therefore, tendered by the plea of the defendant, that he is not "lessor or proprietor" of the land, is immaterial, and the judgment affects nobody but the defendant in the record. If he have no interest the judgment will confer no lien; *Falconer v. Frazier*, 7 S. & M. 235.

25. *The venue.* A suit to enforce a mechanic's lien, is a proceeding *in rem.* and may be prosecuted in the Circuit Court of the county where the land on which the improvement is made is situated, without reference to the residence of the defendant. (This is true under Acts of 1840 and 1857); *Guerrant v. Dawson*, 5 G. 149.

26. *Parties to the suit.* The lien of a mechanic, for the erection of a building, &c., so far as the land is concerned on which the erection is made, only extends to the actual interest therein of the person with whom the mechanic contracted for the building, and such person is the only proper party defendant under the Act of 1840; *Laud v. Muirhead*, 2 G. 89. But if the owner be dead, his heirs and administrators both should be parties defendant to the proceeding; *Guerrant v. Dawson*, 5 G. 149.

27. *Plea, trial, verdict and judgment.* In this proceeding, if the plea of *non assumpsit* be filed, the jury may return a general verdict for so much money, without noticing the lien. And if in the account sued on there be items not properly entitled to the lien, the verdict including them will not be set aside if no objections were made to them on the trial; and the plaintiff may waive the benefit of the lien, by taking a general judgment, if he see proper. The lien being for his benefit, may be waived at any time; *Richardson v. Warwick*, 7 H. 131.

28. *Judgment when there are two defendants.* When the petition was filed against two, and judgment by default was rendered against one at one term and a verdict and judgment was rendered against the other at a subsequent term, for a different sum, it was held erroneous, for the plaintiff cannot have two distinct judgments against different persons, for different amounts, in the same suit; *Falconer v. Frazier*, 7 S. & M. 235.

29. *Publication against non-resident defendant.* To authorize a proceeding against a non-resident, there must be a statute allowing it. The statute authorizing this proceeding does not provide for publication against a non-resident, hence a judgment against a defendant on such publication would be void for want of jurisdiction in the court; *Ib.*

Under the Act of 1857 the publication is provided for.

For bill of particulars in suit for mechanics' lien, see BILL OF PARTICULARS, 7.

V. Lien Under Act of 1857.

30. *Lien on building good against purchaser without notice.* A mechanic will lose his lien on the land by a bona fide sale of it to

an innocent purchaser, for value, without notice; but such a sale will not defeat his lien on the building erected; *Buchanan v. Smith*, 43 M. 90; *S. F., Cochran v. Wimberly*, 44 M. 503.

31. *Reversal of erroneous judgment in.* A judgment in this proceeding, which often, under the statute, involves many interested and opposing parties, claims and counter claims, may be partly good and partly erroneous. The judgment may be good as a personal judgment, and yet erroneous in ordering a sale; and in such cases the Supreme Court will not reverse the decision *in toto*, but only cancel that part which is erroneous; *Weathersby v. Sinclair*, 43 M. 189.

32. *The suit: Change of its form.* A mechanic who has commenced a personal action to recover for building a house and furnishing materials, may, after plea filed, change his form of action to a proceeding *in rem.* to enforce his mechanic's lien; *Ib.*

33. *Power of administrator to create the lien.* An administrator cannot, by his contract with a builder, bind the realty of his intestate to pay for the same; but the mechanic can enforce his lien on the building; *Ib.*

33a. *Lien subordinate to vendor's lien.* A mechanic's lien for improvements erected by contract with the vendee, is subordinate to the vendor's lien, of which he had notice, but it is good on the interest of vendee, after the vendor has been paid; and if, after the vendor has notice of the mechanic's lien, he repurchase from vendee for a price greater than the purchase money due, the lien will attach on the excess, and he will be adjudged to apply it to the satisfaction of the mechanic's lien; *Cochran v. Wimberly*, 44 M. 503.

VI. Miscellaneous.

34. *The lien favored.* The claims of mechanics are favored in law, and the court will construe the statute, giving them a lien for their work and materials, liberally in their favor; *Buck v. Brian*, 2 H. 274; *Buchanan v. Smith*, 43 M. 90; *Weathersby v. Sinclair*, 43 M. 189.

35. *Act conferring jurisdiction on Circuit Court, constitutional.* The act conferring jurisdiction on the Circuit Court to entertain petitions to enforce the liens of mechanics, is constitutional; *Richardson v. Warwick*, 7 H. 131.

36. *Writing unnecessary to create the lien.* To create the lien, it is not necessary that the contract should be in writing. This is only necessary when it is desired to record the contract; *Harrison v. Breeden*, 7 H. 670.

37. *By what statute lien regulated.* The lien of a mechanic is regulated by the statute in force at the time the contract was made, and the work done, though there has been a subsequent change in the law; *Andrews v. Washburn*, 3 S. & M. 109.

38. *Lien must be enforced according to law.* A party seeking the benefit of the law giving mechanics and material men a lien, must

bring himself within its terms, for the lien only exists, and can be enforced only in accordance with the terms of the statute. The statute (of 1840) requires suit to be brought to enforce the lien within twelve months from the time when the debt was to be paid. This provision refers to the time when the debt was due, according to the terms of the original agreement, under which the building was erected; and if, after the work is done, the time be afterwards extended by the taking of a note, the suit must be brought so far as the time limited in the statute is concerned, as if no extension in the credit had been given; and if it be brought within twelve months from the maturity of the note, it will not do unless also brought within twelve months from the time the original debt fell due; *Jones v. Alexander*, 10 S. & M. 627.

39. *Adjustment of conflicting liens: Case in judgment.* The owner of a town lot contracted with D. to furnish a portion of the materials, and prepare them for use in the erection of a house on the lot; and, before the house was erected, gave D. a lien, by written contract, on the materials thus furnished and prepared, for the price thereof. The owner employed other mechanics, who furnished other materials, and with them and the materials furnished by D. nearly completed the house, and he then sold the house and lot to another. The purchaser had full notice of the liens due to the several mechanics, and of D.'s lien, and the amount due to D. was reserved in the price, and agreed to be paid to D. by the purchaser. After his purchase, he employed other mechanics and finished the house; and he also erected other buildings on the lot; and then paid off all the liens to the mechanics, but did not pay D., who filed this bill to subject the lot and all the buildings thereon to his lien: *Held.* that D.'s lien extended only to the materials furnished by him, and used in the buildings, and that he was not entitled to have the lot and all the buildings sold to pay his liens; but that the proper adjustment of the equities was to ascertain the value of the lot without the improvements, and the amount of the liens paid off by the purchaser, and the money expended by him in finishing the house; and that these sums should constitute his claim; and that D.'s claim was the amount of his lien on the materials; and that the whole lot and all the buildings should be sold, and if not sufficient to pay both claims, as thus stated, the proceeds should be divided *pro rata*; but the purchaser was not entitled to anything for the other buildings erected, and that they should be included in the sale; *Planters' Bank v. Dodson*, 9 S. & M. 527.

40. *Notice of the lien to encumbrancers.* The pendency of a suit to enforce the lien is notice of it to a purchaser or encumbrancer; *Bell v. Cooper*, 4 C. 650; and so is the filing of the contract, creating the lien, in the clerk's office for record; *Buck v. Brian*, 2 H. 874.

41. *Lien as to equity of redemption.* The interest in land of a mortgagor, if the mortgage debt be unpaid, is not subject to seizure

and sale, under an execution to enforce a mechanic's lien, accruing subsequently to the registration of the mortgage; *Olley v. Haviland*, 7 G. 19.

42. *Lien for building a levee.* The statute (H. & H. 465), allows the inspector of levees to cause the levee to be built or repaired by another, by letting out the contract to the lowest bidder, in default of the owner of the land on which it is situated doing the work; and it provides that the person doing the work shall receive a certificate from the inspector of the amount due, which shall operate as a lien on the land: *Held.* that no lien was created, except where the work was let out to the lowest bidder, and also where the contractor has the required certificate from the inspector; *Skipwith v. Dodd*, 2 C. 487.

43. *Lien as against married women.* A *femme covert* has no power to bind her land, or create a lien on it, except by the joint deed of herself and husband, properly acknowledged; hence, a contract made by her or her husband, without such deed and acknowledgment, with a mechanic to erect a building thereon, creates no lien in favor of the mechanic; *Selph v. Howland*, 1 C. 264.

44. *Proceedings and judgment in.* A judgment in a proceeding to enforce a mechanic's lien, may be partly good and partly bad. For example, the judgment may be good as a personal judgment, but erroneous as to the land; and in such case, the Supreme Court will not reverse *in toto*, but only so far as erroneous. And after assumpsit commenced for work and materials, the mechanic may change the form of action to a proceeding to enforce the lien; *Weathersby v. Sinclair*, 43 M. 189.

45. *Lien created by administrator.* See EXECUTOR AND ADMINISTRATOR, 203a.

Mesne Profits.

See EJECTMENT, 41 to 45.

1. *Possession not necessary.* The owner of land is entitled to recover from an adverse possessor the mesne profits, though he never had possession himself; *Brewer v. Beckwith*, 6 G. 467.

2. *Rent as increased by improvements.* Where the improvements made by a defendant in ejectment, have been destroyed by fire so that he cannot get compensation therefor, the plaintiff cannot recover the increased value of the rent occasioned by the improvements whilst they existed. The rent will be estimated, as if no improvements had ever been made; *Nixon v. Porter*, 9 G. 401.

Misnomer.

1. *Misnomer of witness.* A mistake in the name of a witness in the commission to take his deposition, is fatal. If the commission direct the deposition of Nancy *Griffin* to be taken, it will not authorize the taking of the

deposition of *Nancy Griffith*; *Henderson v. Cargill*, 2 G. 367.

2. *Mistake in Christian name in publication of notice.* Citation against non-residents should be directed to them by their proper names, and a mistake in this respect, by the substitution of one Christian name for another, will be bad; *John A. Cason v. John T. Cason*, 2 G. 597.

3. *Instance of idem sonans.* *Wanzer* and *Wanser*, are *idem sonans*; *Wanzer v. Baker*, 4 H. 363.

Mistake.

See CHANCERY.

1. *May be corrected.* A mere clerical mistake, by which one word (as "attachment" for "injunction") is used in an injunction bond, may be shown and corrected at law; *Leggett v. Burkhalter*, 1 G. 421.

Mitigation.

See SLANDER. LIBEL.

Money.

1. *Embraced in term of "property."* Money is embraced in the legal term property, and hence is within the provisions of the 1st section of the married woman's law of 1839, which enacts that "any married woman may become seized and possessed of any property, real or personal, by bequest," &c.; *Mitchell v. Mitchell*, 6 G. 108.

2. *As to power of attorney to collect anything but gold and silver,* see ATTORNEY AT LAW, 26. 27.

3. *Gold and silver only is money.* Nothing but gold and silver is, in law, money, though bank notes are sometimes treated as money. A sheriff having an execution in his hands for money, cannot take bank notes in discharge of it; *Gasquet v. Warren*, 2 S. & M. 514.

4. *Note payable in currency.* A note payable "in the currency of the State of Mississippi," is payable only in lawful money or legal tender—currency means lawful money; *Mitchell v. Hewitt*, 5 S. & M. 361.

5. *Definition of money: Bank notes, &c., treated as money.* Money is defined to be cash, that is gold and silver, or the lawful circulating medium of the country, including bank notes, when they are known and approved of, and used in the market as cash; and that is money which passes in a country as the medium of exchange and the representative of value, whether for the time being it be the precious metals or any chattel of intrinsic value, as cotton or tobacco, or that which is issued under the authority of the government, and by common consent is agreed on to represent value, and to pass from hand to hand as such. And the fact that bank notes or government notes are at a discount as compared to gold and silver, does not prevent them from being money, if they constitute the general circulating medium of the country. And hence, where a bank account

is kept in the depreciated currency, an action for money had and received or lent, may be maintained to recover the balance due either party; but the amount that would be recoverable would be the value of the balance computed in gold and silver. And this rule applies to Confederate States notes, "cotton notes" and State treasury notes, issued during the late war, notwithstanding their great depreciation; *Green v. Sizer*, 40 M. 530.

6. *Taking depreciated notes: Credit for them.* Where a creditor receives depreciated notes, under an agreement to credit them on his demand, provided the whole debt be paid, and the debtor being unable to get the balance, demands either that the credit shall be given for what was so paid, or that the notes be returned to him, and the creditor refuses to do either, but holds the notes as collateral security for the debt, he will be liable for the value at the time of the refusal, and the subsequent depreciation will fall on him; *Ib.*

7. *United States treasury notes the standard of value.* Damages for the non-delivery of property sold, are to be estimated according to its value in United States treasury notes; *Carter v. Cox*, 44 M. 148.

8. *United States treasury notes legal tender.* Under the act of Congress, United States treasury notes are a legal tender, and a verdict cannot, therefore, be rendered payable in gold; *Jamison v. Moen*, 43 M. 598.

Money had and Received.

See PLEADING, 30. ACTION, 20, 21.

1. *Illegal payment.* A person paying money to a corporation, under an illegal ordinance, may recover it back, as for money had and received for his use; *Leonard v. City of Canton*, 6 G. 189.

2. *Payment by mistake.* Money paid to the wrong person, under a mistake of fact, may be recovered back, by an action for money had and received for plaintiff's use; *Bank of Louisiana v. Ballard*, 7 H. 371.

3. *Will lie against an intruder.* So it will lie against an intruder or trespasser who has received money from the use of plaintiff's realty, as a party who has taken possession of the plaintiff's wharf wrongfully, and collected tolls; *O'Conley v. City of Natchez*, 1 S. & M. 31.

4. *Must be on contract.* The action can be maintained only on a contract expressed or implied; *White v. White*, 2 H. 731.

5. *What must be proven.* In order to sustain the action, the plaintiff must prove the reception by defendant of money, or of something readily convertible into money. A promissory note, given by defendant to plaintiff, will support the action, but a promissory note due to plaintiff by other parties, received by defendant, will not, unless it be shown that the defendant has collected it. Proof that he might have collected it by using diligence, will not do. Hence, where notes and accounts were delivered by a debtor to his creditors, with instructions to pay his debt from collections made on them, and to return the over-

plus, the creditor will not be liable in the action for an alleged surplus, unless it be shown that he actually collected it; *Fox v. Fisk*, 6 H. 328.

Mortgage.

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I. The Nature, Form and Requisites of a Mortgage.

1. The Form, and some Instances: Acceptance.

1. *No form necessary: The intent will control.* No form of words is necessary to create a mortgage, the clear intent of the parties will be carried out; *Baldwin v. Jenkins*, 1 C. 206; *Mason v. Moody*, 4 C. 184.

2. *Conveyances as security for money are mortgages.* Generally, all conveyances of real or personal property for the security of money, will in equity be holden as mortgages; *Mason v. Moody*, 4 C. 184.

3. *Instances where conveyances were held mortgages.* A deed conveying land to the grantee, and reciting in it that the sale was for certain promissory notes of the grantee, and containing a stipulation, that on payment of these notes the deed was to constitute a full title in law and equity to the grantee, is a mortgage, and the land conveyed, therefore, not subject to sale under execution against the grantee, until full payment of the notes; *Pugh v. Holt*, 5 C. 461. And so if a party by agreement with the debtor purchase at execution sale the land of the latter on joint account reserving, however, to the debtor the right to redeem within a year, the transaction is a mortgage, with the equitable right to redeem as in other cases of mortgage, but the debtor's statutory right to redeem land sold under execution within two years, is not thereby lost, but remains in full force; *Wallis' Heirs*

v. Wilson's Heirs, 5 G. 357. And so where an absolute bill of sale was made in pursuance of an agreement that the vendee should endorse the note of the seller for \$2,800, and should also endorse a renewal of it, and with the further agreement, that if the note was not paid by the seller, the slaves conveyed were to be the absolute property of the vendee "to all intents and purposes," and there being no proof that there had been any treaty between the parties about a purchase of the slaves by the endorser, it was held that the agreement was a mortgage; *Weathersby v. Weathersby*, 40 M. 462.

4. *Valid agreement to execute a mortgage, good in equity as a mortgage.* A valid agreement to execute a mortgage *in futuro* is of itself an equitable mortgage, which, however, will be merged in the express mortgage when it is executed; *Petrie v. Wright*, 6 S. & M. 647. But such an agreement will not be valid, if no property be specified in it on which the mortgage is to be executed; a mere agreement to give a mortgage on sufficient personal and real property, is not sufficient; *Adams v. Johnson*, 41 M. 252.

5. *When insufficient mortgage held security for an advance.* When an advance has been made on the faith of a promise by the borrower to execute a mortgage in a certain way, to secure that advance, and also a further sum which the lender agreed to advance on the execution of the mortgage according to the agreement, if the borrower execute the mortgage, but not according to the agreement, the lender may hold it as security for the advance already made, and refuse to advance the remainder; but if an independent security was taken for the advance, when it was made, to stand for it until the mortgage was executed, then, if the lender refuse to accept the mortgage, as a compliance with the agreement to execute it, and refuse to make the other advance, the mortgage will be no security for the first advance; *Ib.*

6. *Same: Necessity for acceptance: Case in judgment.* A. made an agreement with a bank in a sister State, by which the bank was to advance him \$50,000 of their notes to be put in circulation by him, in the purchase of commercial paper, and he was, as indemnity for the loan, to give a mortgage on real and personal property, to the value of \$100,000, and this valuation was to be certified as correct by M., in whom the bank confided. A., wishing an immediate advance of \$15,000, arranged to get it by giving the bank an acceptance of W. for that amount, which acceptance was to be a security for the advance, until the mortgage could be executed according to the agreement. A. made a mortgage on real property alone, and sent it to the bank without the certificate of M., and the bank refused to accept it as a compliance with the agreement, and directed its agent to see A., and procure a mortgage as agreed on. This was not done, and no further advance was made by the bank to A. Afterwards, the bank undertook to foreclose the mortgage for the \$15,000: *Held*, 1st, that the acceptance was

taken and relied on as a security for the \$15,000 until the mortgage should be executed, and that the bank having once rejected the mortgage as tendered by A., because it was not made in accordance with the agreement, could not afterward accept it without A.'s consent, and hold it as a security for the \$15,000, and the bill to foreclose was dismissed; *Ib.*

2. Absolute Conveyance, with Independent Defeasances.

A. THE DEFEASANCE, WHEN WRITTEN ON THE SAME PAPER.

7. *Same*: The defeasance may be written at the foot, or endorsed on the back of the absolute conveyance; it is not necessary that it should be contained in the body of it; *Kent v. Allbritain*, 3 H. 317. And so it may be on the back—for an agreement, written on the back of a deed at the time of its execution, and signed and sealed by the grantor and grantee, and in relation to the subject matter of the deed, is as much a part of the deed as if incorporated in it; *Baldwin v. Jenkins*, 1 C. 206.

B. DEFEASANCE IN SEPARATE WRITING AND IN PAROL.

8. *How absolute sale shown to be a mortgage*. A bill of sale of a chattel, absolute on its face, will be held a mortgage, if it be clearly shown that it was designed by the parties thereto to operate as a security for the payment of money, and such intention may be shown by a separate instrument contemporaneously or subsequently executed, or by an agreement resting in parol; *Prewett v. Dobbs*, 13 S. & M. 431; *Mason v. Moody*, 4 C. 184; *S. P.*, as to proof by parol; *Carter v. Burris*, 10 S. & M. 527; *Vasser v. Vasser*, 1 C. 378; *Anding v. Davis*, 9 G. 574. And it makes no difference in this respect, whether the debt intended to be secured, was then contracted, or a pre-existing liability; *Anding v. Davis*, *supra*.

9. *The time of the execution of the within defeasance*. The defeasance, when in writing, may be executed contemporaneously with the absolute conveyance, or subsequently; *Mason v. Moody*, 4 C. 184; *Prewett v. Dobbs*, 13 S. & M. 431. But if the defeasance be not executed contemporaneously with the absolute sale or conveyance, it must appear either that it professes on its face to be an explanation of the intention of the parties at the time the sale or conveyance was made; or if relied on as a subsequent independent agreement, it must be based on a sufficient consideration; a subsequent voluntary agreement, made by the vendee, to allow the vendor to redeem, cannot be enforced; *Vasser v. Vasser*, 1 C. 378.

10. *Instance of subsequent agreement, construed, as to the consideration*. A month after an absolute bill of sale of slaves was made, the purchaser executed a writing, which recited, that upon settlement of accounts with the seller that day, he was indebted to the seller

in the sum of \$371, which the purchaser was to pay back to the seller, or give to the seller the privilege of taking back any of the slaves purchased of him, at the price paid, specifying the names of the slaves and the price of each. "And further, that the vendor is to have the privilege of redeeming any of them at cost and interest:" *Held*, that as to the privilege of redemption of one slave, there was a valuable consideration viz.: the debt of \$371, due by the vendee to the seller, but as to the others there was no consideration, and the agreement as to them was void: *Ib.*

11. *Instances of mortgages shown by parol*. An absolute bill of sale was made of a slave worth \$550. The consideration was \$150 cash, \$200 in the note of the purchaser, payable in two years. The seller remained in possession at an annual hire of \$37.50, the value of the hire being \$85, and it was agreed that if the seller paid the purchaser, \$350, before the expiration of two years, the latter would make him a title to the slave: *Held*, in view of these facts the transaction was a mortgage, and not a conditional sale; *Prewett v. Dobbs*, 13 S. & M. 431. See *post*, 13, 14, as to difference between Mortgage and Conditional Sale.

12. *Same*. D. mortgaged land and slaves and other personalty to A., absolutely and in fee simple, and delivered possession. A., when he accepted the deed, made a parol agreement that he would hold the property and use it so as to make it profitable, and that he would apply the profits to the payment of the debt due by D. to him; and after the debt was paid, he would convey the property to the children of D. and in furtherance of this agreement, he promised that he would immediately execute a will, and keep it unrevoked, thus disposing of the property. A. executed the will, as he had agreed to do, but afterward destroyed it. After the death of A. and after the payment of the debt due him, the children of D. filed a bill to recover the property: *Held*, that the deed was intended only as a mortgage, and the trust in favor of the children of D. was valid; *Anding v. Davis*, 9 G. 574.

12a. *Same*. A sale absolute on its face was made of a slave, the seller being indebted to the purchaser in about one-third of its value; the purchaser gave his note to the seller for the remaining two-thirds of the value, but still retained his note against the seller for the old debt, and required a payment thereon after the sale, and the slave remained with the seller for two years after the sale; and it was proven that the buyer admitted to other persons that the sale was not absolute: *Held*, that these facts showed that the sale was intended as a mortgage; *Carter v. Burris*, 10 S. & M. 527.

As to registration of absolute bills of sale, see *post*, 47.

3. The Difference between a Mortgage and Conditional Sale.

See *CONDITIONAL SALE, ubique*.

14. *Same*. Whether a transaction is a con-

ditional sale or a mortgage, depends on the intention of the parties as to whether they designed a purchase and sale on the one hand, or a borrowing and lending on the other. If the transaction show that the intention was to borrow and lend money on a security therefore, it is a mortgage, and nothing can divest it of the equity of redemption. An agreement to bar the equity of redemption, is void. If the relation of debtor and creditor still subsists, it is a mortgage; if no debt be created by the transaction, or if a pre-existing debt was extinguished by it, then a mere privilege of repurchase to be exercised at the option of the seller, will not constitute it a mortgage, but it is a conditional sale; *Weathersby v. Weathersby*, 40 M. 462; *S. P. Hoopes v. Barley*, 6 C. 328; *Magee v. Catching*, 4 G. 672; *Mason v. Moody*, 4 C. 184, for which see **CONDITIONAL SALE**, 7, 8. See *ante*, 11.

4. Deposit of Title Deed.

15. *Rule on the subject.* Whether the deposit of title deeds to land, as a security for a debt will, under our statute of frauds, create an equitable mortgage; *Quære?* But if it would, there must, according to the English rule, be a deposit of all the title deeds, and the mortgage thus created would remain only during the deposit, and would, hence, cease upon the surrender of a title bond so deposited, to the vendor, and his making a deed which was not deposited, but kept by the vendee; *Williams v. Stratton*, 10 S. & M. 418. But a mortgage is a conveyance of an estate by way of pledge or security for a debt, and to become void on payment of it. By our statute a greater interest in land than a term for one year, cannot be created, except in writing. Hence, a mortgage of realty by a deposit of the title deed, and a parol agreement that it shall operate as such cannot be created. Such an agreement is within the statute of frauds and void; *Gothard v. Flynn*, 3 C. 58.

5. Miscellaneous.

16. *Absolute sale by an agent, when construed as a mortgage.* An absolute sale made by an agent, who was only authorized to execute a mortgage, is not binding on the principal, but if disaffirmed by him, it will be construed in favor of the purchaser as a mere security for the return of the purchase money applied by the agent to the use of the principal; *Coppage v. Barnett*, 5 G. 621.

16a. *Mortgage to secure future advances.* A mortgage to secure future advances is a valid security for such advances against subsequent liens and purchasers. And the fact, that it was given to secure future advances, need not appear distinctly on its face; it is sufficient, if in this respect its true character can be ascertained by the exercise of common prudence and diligence. Thus, where the mortgage is given for a sum named, and that much be not due by mortgagor, it may be shown by a contemporaneous writing, that future advances were to be embraced in said sum, and such advances will be a good lien

against an attaching creditor; *Summers v. Roos*, 42 M. 749.

II. Construction of Mortgages.

17. *Construction: Case in judgment.* A mortgage given by a contractor to do certain work, in consideration of advances made to him, which is intended to secure the faithful performance of his contract to do the work, is not a security for the advances; it binds the mortgage property only for the damages, which the mortgagee may sustain by reason of the non-performance of the contract. And in such a case, though as a general rule, when a mortgage of personal property is forfeited, the property belongs to the mortgagee, it seems that that result would not follow the forfeiture; *Petrie v. Wright*, 6 S. & M. 647.

18. *Same: Another instance.* A member of an unincorporated banking company, executed a mortgage to the president and directors, who by the articles of association had charge of the management of its affairs, and in the mortgage it was recited that the mortgagor had executed his bond payable at distinct periods by instalments for stock subscribed for by him, and in order to secure the payment of the bond at the time stipulated, and to bind the mortgagor in conjunction with each stockholder, to all, and singular the holders of the notes, bills, checks, and other liabilities of the company, then existing, or which might, thereafter exist, at any time within fifteen years, the mortgagor thereby conveyed the land to the president and directors, with the condition, that if the mortgagor paid the bond for the stock subscribed, at the several periods when the instalments became due, and if he should pay off and discharge, all the bills, notes, checks, and other liabilities of the said company, then the conveyance was to be void: *Held*, that the mortgage was not only a security for the payment of the bond of the mortgagor for stock, but it was also a security for the payment of all the debts of the company; and a creditor of the company, whose debt was due, might proceed at once to foreclose it, without waiting for the periods when the instalments of the bond for stock became due; *Wall v. Boisgerard*, 11 S. & M. 574.

18a. *Same: Issue of slave not included in mortgage.* The issue of a mortgaged slave born subsequent to the execution of the mortgage, is not bound by or conveyed in it; *Turnbull v. Middleton*, W. 413.

19. *Mortgages to indemnify surety.* See **PRINCIPAL AND SURETY**, 48 to 51.

III. Rights of Mortgagor and of Mortgagee.

20. *Possession of personalty after forfeiture of condition.* A mortgagee of personal property, after condition broken, is the owner, and if in possession, need not file a bill to foreclose, but may, himself, sell the property to realize the debt; *O'Reilly v. Hendricks*, 2 S. & M. 388. See **EXECUTOR AND ADMINISTRATOR**, 223, 224.

The legal effect of the forfeiture of the con-

dition of a chattel mortgage, is to vest in the mortgagee the right to possession and the absolute interest in the property; *Thornhill v. Gilmer*, 4 S. & M. 153. See *ante*, 17.

21. *Possession of realty: After forfeiture.* Upon the forfeiture of a mortgage (conveying realty and personalty) the legal title becomes absolute in the mortgagee, and with it, as an incident, the right of possession, which a court of law would also secure him. A court of equity may, therefore, on the application of the mortgagee, appoint a receiver in virtue of this right of the complainant, for this is but conferring upon an officer of court a right which the complainant has absolutely and without reference to the adequacy of the security to pay the debt; *Hill v. Robertson*, 2 C. 368. See *post*, 37.

22. *Liability of mortgagor for hire.* A mortgagor, after condition broken, retaining possession of the property, is liable for rents and hire; *Turnbull v. Middleton*, W. 413. See *post*, 26.

22a. *The remedy to enforce right of possession.* A mortgagee who, by the terms of the mortgage, is entitled to the possession of the mortgaged property, may recover possession by action at law against the mortgagor or those claiming under him. In an action at law, that party will prevail who has the legal title and the right to the possession; *Harmon v. Short*, 8 S. & M. 433.

23. *Mortgage as indemnity to surety.* A mortgagee who has received a mortgage to indemnify him from loss, as surety for the mortgagor, unless there be some provision in the mortgage giving him a right of possession before, will not be entitled to possession until after he has been subjected to loss on that account; *Ib.*

23a. *Nature of respective interests of mortgagor and mortgagee.* The equitable doctrine that a mortgagor in possession is regarded as the true owner of the property, and that the mortgagee has only a chattel interest, except that his interest is considered as real property, to enable him to recover possession; and that the mortgage is only a security; is now recognized by courts of law. And the same doctrine applies to deeds of trust, which are but a species of mortgage, with power of sale in the trustee; *Carpenter v. Bowen*, 42 M. 28.

23b. *Fixtures.* As between vendor and vendee, mortgagor and mortgagee, all things which are necessary to the full and free enjoyment of the freehold, and which are in any way attached to it, are held to be fixtures; *Richardson v. Borden*, 42 M. 71.

See *FIXTURES*.

IV. Rights of Purchasers of the Mortgage Security.

24. *His right of substitution.* Where the purchaser of mortgaged property, which is encumbered by several debts of equal lien, pays off one of the debts, he will, as against the other encumbrancers, be entitled to be subrogated to all the rights of the encum-

brancer whose debt he has paid off; *Ross v. Wilson*, 7 S. & M. 753.

25. *Same: Where foreclosure is had without all interested being parties.* So, where a mortgage is foreclosed on a bill filed by an assignee of one of several notes secured by the mortgage, the mortgagee holding the others not being made a party, the mortgagee, as against a purchaser under the decree of foreclosure, who had notice of the outstanding notes not embraced in the decree may have a new decree to foreclose and re-sell the property; but the purchaser under the first decree will be entitled to share in the proceeds of the last sale, *pro rata*, according as his bid shall compare in amount with the amount due on the notes not embraced in the decree of foreclosure; and if there be a surplus after paying both these amounts, he will be entitled to it; *Pugh v. Holl*, 5 C. 461. See *post*, 52, 55, 56.

26. *Right of bona fide purchaser without notice.* A bona fide purchaser, for value, of a chattel, from a mortgagee in possession, under an absolute bill of sale from the mortgagor, is entitled to the property against the claims of the mortgagor to redeem. But in a bill by the mortgagor against the mortgagee and the purchaser, to redeem, if complainant's right to a specific delivery of the property be defeated on account of the purchase, he will, nevertheless, be entitled to recover from the mortgagee the value of the chattel and its hire, after deducting therefrom the mortgage debt; *Henderson v. Warmack*, 5 C. 830.

27. *Right of purchaser from a trustee on a deed on trust.* The vendee of a trustee in a mortgage with power of sale, will get the title as it stood when the mortgage was executed, unaffected by any subsequent encumbrances or liens; *Brown v. Bartee*, 10 S. & M. 268. See *post*, 33.

V. Foreclosure of Mortgages.

1. By Trustee with Power of Sale.

28. *Trustee may foreclose without judicial proceedings.* A trustee in a mortgage with power of sale, on default in the payment of the debt, may execute the power without the intervention of a court of equity, and a sale by him, made in accordance with the terms of the mortgage, is a perfect foreclosure, and a bar to the equity of redemption; *Sims v. Hundly*, 2 H. 896. And if there be a junior encumbrance, any surplus which remains will go to that, and the trustee will hold it in trust for that encumbrancer; *O'Reilly v. Hendricks*, 2 S. & M. 383. See *post*, 59, 63.

See *TRUST AND TRUSTEES*, 60. *EJECTMENT*, 5.

2. By the Mortgagee.

29. As to this, see *ante*, 20.

30. *Mortgagees may sell on verbal authority.* If there be no power conferred by the mortgage on the mortgagee to sell, he may, nevertheless, sell personalty conveyed by the mortgage and in his possession, in pursuance of a verbal power or license given him by

the mortgagor to make a sale; *O'Reilly v. Hendricks*, 2 H. 388. But it is doubtful whether a power of sale of land, vested in the mortgagee, would bar the equity of redemption; and at all events, he has the right to go into equity for a foreclosure, notwithstanding such power; *Wofford v. Holmes County*, 44 M. 579. See *post*, 38.

3. Foreclosure by Bill in Equity.

A. WHO SHOULD BE PARTIES.

31. *As to effect of decree with proper parties omitted.* See *ante*, 25. EXECUTOR AND ADMINISTRATOR, 269.

32. *Junior encumbrancers as parties.* A junior incumbrancer by mortgage, has a right to be made a party defendant, to a bill by an older encumbrancer, to foreclose, so that he may attend to the taking of the account, and may have an opportunity to redeem, but for no other purpose. If he do not offer to redeem, he cannot, under cover of the bill of the first mortgagee, have his mortgage foreclosed; *Brown v. Nevitt*, 5 C. 801.

32a. After the death of the mortgagee, a bill to foreclose may be filed by the executor. His heirs are not necessary parties; *Griffin v. Lovell*, 42 M. 402

B. THE RIGHT OF THE PURCHASER TO EMBLEMENTS.

33. *Same.* Where land is sold under a mortgage, in virtue of a power of sale contained in it, and there be an ungathered crop on it at the time of the sale, the purchaser is entitled to it; *Planters' B'k v. Walker*, 3 S. & M. 409. But in this case, it will be noted, that the mortgagor made a voluntary surrender of the land to the purchaser, on the day of sale, and did not set up any claim to the crop; but the claim was set up by one of his creditors, who insisted that the crop was liable to his judgment.

C. THE NOTE SECURED BY THE MORTGAGE: ITS PRODUCTION: VARIANCE: INTEREST.

34. *Interest allowed, according to the mortgage.* Where the mortgage provides that the note secured by it shall bear interest from date, a decree of foreclosure will include interest from that time, though the note on its face only bears interest from its maturity; for the mortgage, though only a collateral security for the debt, is the foundation on which the jurisdiction of the Chancery Court rests; and relief may be given on its face, if it describe the debt intended to be secured, though no note be given; *Morse v. Clayton*, 13 S. & M. 373.

35. *Variance between mortgage and the note.* A mortgage is not invalid, even as to a subsequent purchaser, because it misdescribes, as to its date, the note intended to be secured by it. The mortgage is notice of the mortgage debt, and of the lien, and as to such purchaser may be foreclosed without a production of the note at all. Even the mortgagor's interest in the production of the note, is solely because it might be afterwards pre-

sented to him for payment; *Dean v. Lezardi*, 2 C. 424.

36. *Possession of the note by mortgagor.* Yet the possession of the note secured by the mortgage, by the mortgagor, is *prima facie* evidence of the satisfaction of the mortgage; *Johnson v. Nations*, 4 C. 147.

D. APPOINTMENT OF A RECEIVER.

37. *When allowed.* Upon the forfeiture of a mortgage, the legal title to the property becomes absolute in the mortgagee, and with it, as an incident, the right of possession, which right a court of law even, would secure to him. A court of equity may, therefore, appoint a receiver to take charge of the property, in virtue of this right of the complainant; for that is but conferring upon an officer of court, for the complainant's benefit, a right which the complainant has himself, without reference to the adequacy of the security to pay the debt; *Hill v. Robertson*, 2 C. 368. But where the mortgage is only an equitable one, or the statutory lien given in cases of sale by administrators, there being no contract by which the mortgagee shall have the rents and profits after defeasance, a receiver will not be appointed, unless an insufficiency of the mortgaged property to pay the debt be shown; *Whitehead v. Woolen*, 43 M. 523.

E. WHEN TECHNICAL FORECLOSURE ALLOWED.

38. *Same.* The courts do not favor a technical foreclosure of a mortgage; but where the mortgagee is in possession, and has disposed of the personal property, or a part, so as not to be able to return it to the mortgagor, a technical foreclosure will be ordered. But in such case the mortgagor must have time to redeem; and the decree must provide, in case he redeems, that as to the personal property which the mortgagee had sold, and is, therefore, unable to return, the mortgagor shall be exonerated from payment to the extent of its value at the time the mortgagee took possession, and its hire till the date of the decree. And if part of the property remain with the mortgagor, and he do not redeem, then, if the value of the property taken by the mortgagee and its hire, be insufficient to pay the debt, a decree will be entered to sell that part so remaining with the mortgagor for the balance. And four months from the date of the decree was allowed to the mortgagor to redeem; *McIntyre v. Whitfield*, 13 S. & M. 88. As to stating the account, see *post*, 44, 44a. See also *ante*, 30.

VI. Redemption of Mortgages.

1. The Barring of the Equity of Redemption.

39. *A contract barring the equity of redemption is void.* See *ante*, 14.

40. *Instance of construction where equity of redemption remained.* A stipulation in a mortgage, that if the mortgagor shall fail to pay the mortgage debt at maturity, the mortgagee shall take possession of the mortgaged property, and receive the profits of it

till the debt be paid, is lawful, and may be enforced; but if the mortgagee take possession, the property is not his absolutely, for the mortgagor's right of redemption still remains until foreclosed by decree of the court; and the rents and profits are to be credited on the debt; *McIntyre v. Whitfield*, 13 S. & M. 88.

40a. *Proof of purchase of right to redeem.* And when a mortgagee insists in defence of a bill to redeem, that he has purchased the equity of redemption, he should prove that fact by clear and satisfactory evidence; *Kent v. Albrittain*, 4 H. 317.

2. Who may Redeem.

41. *Same.* Those persons only who have an interest in, or a lien on the mortgaged property, have a right to redeem. Hence, a purchaser of the equity of redemption at execution sale, under a judgment against the mortgagor, has no right to redeem, for he got no rights by his purchase; *Boarman v. Catlett*, 13 S. & M. 149.

3. Miscellaneous.

42. *As to technical foreclosure and the right to redeem.* see ante, 38.

43. *Rule when redemption is prevented by a sale.* See ante, 26.

44. *Stating the account.* When a mortgage is made to secure an unfixed and unsettled indebtedness from mortgagor to mortgagee, it is proper, on a bill by the former to redeem, to examine all the matters of dealing between the parties previous to the mortgage, except such as shall appear to have been settled; *Williamson v. Downs*, 5 G. 402.

44a. *Notice of the account not necessary.* In suits to foreclose mortgages and deeds in trust, it is unnecessary for the commissioner to give notice to the parties of the taking of the account; Rev. Code of 1857, p. 547, art. 48; *Kilcrease v. Lum*, 7 G. 569; *Ingersoll v. Ingersoll*, 42 M. 155.

VII. Registration of Mortgages.

See REGISTRATION, 1.

1. Generally.

45. *Subsequent mortgage has precedence over one unrecorded.* A subsequent mortgage duly recorded, has precedence over a prior unrecorded mortgage, if the subsequent mortgagee had no notice of the first; *Pomet v. Scranton*, W. 406.

46. *Statutory mortgage need not be registered.* When property, real or personal, is sold on a credit by an administrator or guardian, under an order of the Probate Court, the statute creates a mortgage on it for the purchase money, which, without anything more being done, has all the force and efficiency of a mortgage duly executed by the purchaser to the seller, and regularly recorded; *Miller v. Helm*, 2 S. & M. 687; *S. P., Walker v. Fuqua*, 2 C. 640. And such a mortgage, like one recorded, is notice to all the world; and hence, always in a state of

presentation to the administrator of the mortgagor; *Miller v. Helm*, supra.

47. *Possession under mortgage dispenses with registration.* An absolute bill of sale, designed as a mortgage, if delivery of the thing sold be made to the mortgagee, need not be recorded, in order to be valid against subsequent judgment creditors of the mortgagor. A court of equity in treating it as a mortgage, will protect the rights of the vendee; and his possession is also notice of his claim, without registration; *Humphries v. Bartee*, 10 S. & M. 282.

48. *Registration not necessary as between parties and privies.* It is not necessary to the validity of a mortgage, that it be registered, or that its execution be proven for record. As between the parties to the mortgage, and all others claiming under them through it, the mortgage will be as good without registration as with it; *Hill v. Samuel*, 2 G. 307.

2. Foreign Mortgages.

49. *Need not be registered.* The registration laws of this State do not apply to mortgages executed out of the State, on personal property not then within the State. And if such property be afterwards removed hither by the mortgagor, the rights of the mortgagee will be protected without registration here; *Prewett v. Dobbs*, 13 S. & M. 431.

3. Notice Equivalent to Registration.

50. *Same.* The statute (H. C. 606, §5), enacts, "that all deeds of trusts and mortgages, whensoever they shall be delivered to the clerk to be recorded, shall take effect and be valid as to all subsequent purchasers for valuable consideration and without notice, and as to all creditors from the time when such deed in trust or mortgage, shall be acknowledged, proved, or certified and delivered to the clerk for record, and from that time only." It has been decided, in *Dixon v. Lacoste*, 1 S. & M. 70, that creditors equally with purchasers, were affected by notice of an unrecorded deed, but that decision will not be extended; *Henderson v. Downing*, 2 C. 106.

51. *The notice to creditors must be before judgment.* Under the above statute, purchasers at execution sale, are not regarded as subsequent purchasers. That term applies only to purchasers from the grantor directly. Creditors are not affected by notice of an unrecorded deed or mortgage, if such notice were not given before the judgment was rendered. If a creditor get a judgment before notice of the mortgage, his lien attaches, and it will not be divested by any subsequent notice given to him; and as the purchasers at the sale under this execution have the same rights as the creditor, notice given to them after the rendition of the judgment and before the sale, will not affect them. Hence, where on the day of the sale under execution, the trustee in a deed in trust had it recorded, and gave notice of it to the purchasers at the sale, and then filed his bill to avoid the sale; it was held, that the recording of the deed

after the judgment, and the giving notice of it to the bidders at the sale, were too late and did not affect the title of the purchasers; *Id.*

VIII. Assignment of Mortgages, and Marshalling Mortgage Assets.

52. *Assignment of the note carries the mortgage.* The assignment of the note secured by a mortgage, is an equitable assignment of the mortgage, and is *per se* an authority to the assignee, without any special authorization for that purpose, to enforce the mortgage; *Holmes v. McGinty*, 44 M. 94. And if there be several notes, all equally secured by the mortgage, the assignment of one is *pro tanto* an assignment of the mortgage, and nothing more—all being entitled to *pro rata* satisfaction; *Terry v. Woods*, 6 S. & M. 139; *Cage v. Her*, 5 S. & M. 410; *Henderson v. Herrod*, 10 S. & M. 631; *Dick v. Maury*, 9 S. & M. 448; *Lindsey v. Bates*, 42 M. 397; *S. P., Bk of England v. Tarleton*, 1 C. 173; *Parker v. Mercer*, 6 H. 320. And it is doubtful whether the mortgagee could make an assignment of one, so as to give it a preference over the others retained by him; *Henderson v. Herrod*, *supra*. But this preference can be given; *Bk of England v. Tarleton*, *supra*. See *post*, 55, 56.

But, where a decree was rendered in favor of the assignee of one of several of the notes secured by mortgage, and the whole debt to him was directed to be paid by the sale of the mortgaged property, and no suggestion was made in the pleading that the property was insufficient to pay all the mortgaged notes, the High Court will not reverse the decree upon the suggestion of counsel that the property is insufficient; *Terry v. Woods*, 6 S. & M. 139. See *post*, 55, 56.

52a. *Same: Case in judgment.* Where a bond secured by mortgage has been assigned as collateral security, for the payment of drafts to be drawn by the assignor on the assignee, the latter upon paying the drafts, will be an equitable assignee of the mortgage, and entitled to foreclose it in equity; *City of Natchez v. Minor*, 9 S. & M. 544.

53. *Loss by assignee of his right to equality.* If the assignee of one of several notes, secured by mortgage, arrest the debtor at law on *merne* process, and voluntarily discharge him, this will not interfere with his right to a *pro rata* distribution of the sale of the mortgaged property. It seems it would be otherwise if the arrest was made on final process, because that would be considered as a satisfaction of the debt. And so if such assignee be merely passive in the collection of his debt, his rights will not be prejudiced; and so if he take active steps, which are fruitless, the result will be the same; and so if by his diligence he gets another security, which proves unavailable; *Terry v. Woods*, 6 S. & M. 139.

54. *The different notes and instalments entitled to equality.* Where a mortgage is given

to secure several notes of the mortgagor to the mortgagee, due at different times, upon a sale of the mortgaged property, *after all the notes are due*, the proceeds should be applied *pro rata* to all the notes, although the note first falling due was additionally secured to the mortgagee by the endorsement of an accommodation endorser; *Parker v. Mercer*, 6 H. 320. See *ante*, 52, and *post*, 55.

And the rule is the same, where a vendor, who has only made a title bond, transfers one of the notes for the purchase money, all will be entitled to share equally; *Davidson v. Allen*, 7 G. 419.

55. *Equality among assignees: Priority.* All the debts secured by a mortgage, and due at the date of the foreclosure, unless a preference be given to some of them by the terms of the mortgage, are payable *pro rata*, in case of insufficiency in the mortgage fund to pay all; and this equality continues, notwithstanding an assignment of some of the debts to another, and the detention of the other notes by the mortgagor, or the subsequent assignment of them to other assignees. The several assignees, though deriving title at different periods, will stand on an equality; the first having no priority whatever over the others, unless the mortgagee, in making the assignment, designed to impart a right of prior satisfaction to the assignee, over those notes then retained by him; *Bank of England v. Tarleton*, 1 C. 173; *S. P., Pugh v. Holt*, 5 C. 461; *Trustees of Jefferson College v. Frenstiss*, 7 C. 46; *Coulter v. Herrod*, 5 C. 685. See *ante*, 25, 52, 54.

56. *Power to give priority: Allowed where so intended.* But it is in the power of the mortgagor, notwithstanding the doubt expressed in *Henderson v. Herrod* (see *ante*, 52), in making an assignment of part of the mortgaged debts—he being then the owner of all—to give to those assigned a priority over those retained; and such will be the effect of the assignment, if under all the circumstances, that appear to be the intention of the parties; *Bank of England v. Tarleton*, 1 C. 173.

57. *Instances of priority allowed and refused.* A creditor had his debt secured by mortgage, and by his consent the mortgaged property was sold on a credit, the purchase money being payable in seven instalments; and by the agreement the purchaser was to give a mortgage on the same property, and some other, to secure the purchase money, and the first five instalments were to be transferred to the creditor in satisfaction of the debt, and he was to satisfy the first mortgage. This agreement was carried out, and the last two instalments were also afterwards assigned, and there was an insufficiency in the property to pay all; *Held*, that the circumstances clearly showed that it was the intention of the parties to the first assignment, that the original creditor should have priority of satisfaction; that his rights did not originate with the last mortgage and assignment, but existed before; and that there were but a consummation and preservation of them in a

different form; *Bank of England v. Tarleton*, 1 C. 173.

But the fact that the assignee of the mortgage, in making the assignment of the first note falling due, guarantees its payment, is no evidence that he intended to confer on it the right of priority of satisfaction; *Trustees of Jefferson College v. Prentiss*, 7 C. 46. And this rule of equality was applied where the assignee of one of the notes held it as collateral security for a debt which was much smaller than the instalment assigned to him, the assignee of the other insisting that he should receive his *pro rata* on the amount of the debt thus secured, and not on the amount of the instalment; *Coulter v. Herrod*, 5 C. 685. And if one of the mortgage notes be transferred "without recourse," this will not prevent the assignee from receiving his *pro rata* with the others; *Davidson v. Allen*, 7 G. 419.

58. *Whether subsequent assignee bound by priority.* And if after such assignment of a part of the debt, with the right of prior satisfaction, the mortgagee assign the remainder, the subsequent assignees taking only an equity in the mortgage, by virtue of the assignment, will take it subject to all the equities existing between the mortgagee and the prior assignees; for where the equities are equal the first will prevail. If, however, the subsequent assignees take an assignment of the mortgage, without notice of the priority secured to the first, so as to acquire the mortgagee's legal title, the rule might be different; *Bank of England v. Tarleton*, 1 C. 173. But it was said in *Trustees of Jefferson College v. Prentiss*, 7 C. 46, that if a priority in satisfaction was secured by the first assignment, "that it was a mere secret equity at furthest, by which a subsequent assignee of another instalment should not be prejudiced."

See ASSIGNMENT, 17b. 22.

59. *Trustee disregarding equality by consent.* Where the mortgagee has transferred one of the notes as collateral security for a debt due by him, the trustee (with power of sale) making the sale, and realizing enough to pay all the mortgage debts, ought to pay to the assignee the note so assigned, if he have notice of the assignment; but if the assignee agree that the trustee shall pay to the mortgagee part of the proceeds thus due him, and that he will indulge the mortgagee a year for the balance, this agreement will exonerate the trustee from liability to the assignee, for making the payment in accordance therewith; *Carson v. Robson*, 7 C. 97. See *ante*, 28.

60. *Junior encumbrances entitled to surplus of the proceeds of the sale.* See *ante*, 28.

IX. Principal and Surety's and Creditor's Rights in Mortgages.

See PRINCIPAL AND SURETY, 47, 64, 65, 69.

61. *Mortgage by principal enures to creditor's benefit.* Where a principal debtor executes a mortgage to secure his surety, the

mortgage enures to the benefit of the creditor, and the surety cannot, by a release of the mortgage, prejudice the creditor's rights; *Dick v. Maury*, 9 S. & M. 448. See *post*, 63.

62. *When mortgage of indemnity commences to bind.* A mortgage given to a surety as indemnity, like other mortgages, binds the property from the time it is executed, and cuts out all subsequent conveyances affected with notice, though the right to enforce it may not occur until payment by the surety; *Watson v. Dickens*, 12 S. & M. 608.

63. *When mortgage for indemnity forfeited.* The condition of a mortgage executed by a principal debtor to his surety, to indemnify the latter against loss or damage arising from the payment of the debt, is not broken until actual payment made by the surety, and his right to foreclose does not accrue till that time; *McLean v. Ragdale*, 2 G. 701. So an endorser of a note, who has received a mortgage to save him harmless on his endorsement, has no right to foreclose until he has paid the note; *Lewis v. Starke*, 10 S. & M. 120. Nor in such a case can the creditor (when there is a trustee in the mortgage, with power of sale), compel the trustee directly to make sale. This can be done only by a bill in equity, to have the benefit of the deed to himself; *Ib.*

X. Extinguishment and Satisfaction of Mortgages.

64. *As to extinguishment or keeping alive mortgages,* see LIEN, 2, 3.

65. *Proof of satisfaction.* The possession by the mortgagor of the note secured by the mortgage, is *prima facie* evidence that he has paid it, and that the mortgage is satisfied; but it is only *prima facie* evidence, and if the possession of the note be shown to have been procured by fraud, there is no satisfaction; *Johnson v. Nations*, 4 C. 147.

66. *Same: Where payment was made by check.* The surety of the mortgagor gave the mortgagee his sight check for the debt, assuring him that it would be paid on presentation, and the mortgagee gave up the note secured by the mortgage, and entered on the record satisfaction of the mortgage. The check was not paid, the surety on the debt and drawer of the check having no funds in the hands of the drawee, and thereupon the mortgagee filed this bill to set aside the satisfaction of the mortgage, and to foreclose it: *Held*, that it not appearing that the mortgagor had paid anything to the surety on the faith that the surety had paid the debt, the mortgagee was entitled to the relief prayed for; *Holmes v. Bacon*, 6 C. 607.

67. *Payment by note.* But a mortgage once unconditionally released will not be revived, and the release cancelled, merely because the mortgagor's note, taken in part consideration for the release, remains unpaid, there being no fraud or mistake shown in procuring the release; *Burn v. Yeizer*, 5 C. 188.

68. *Possession by mortgagor no presump-*

tion of payment. The continued possession by the mortgagor of the mortgaged property, after condition broken, is no presumption of payment. *Aliter*, where the possession was once in the mortgagee, and is redelivered to the mortgagor; *Carpenter v. Bridges*, 3 G. 265.

69 *Effect of satisfaction without entry on record.* If the mortgage debt be fully paid, the mortgage is satisfied; yet this does not revest the mortgagor with the legal title without any entry of satisfaction on the record, or a re-conveyance. He will, however, have a complete equitable title, which will be liable to sale under execution against him; but the purchaser at the sale will only get an equitable title; *Wolfe v. Dowell*, 13 S. & M. 103; *Smith v. Otley*, 4 C. 291. Payment alone will revest the title under the Act of 1860. See *post*, 70.

70. *Entry of satisfaction.* The statute (H. C. 611) directs that upon payment of a debt secured by mortgage, "the mortgagee shall, at the request of the mortgagor, enter satisfaction upon the margin of the record of such mortgage, which shall forever thereafter discharge, defeat and release the same." When this entry is thus made, the whole title, legal and equitable, revests in the mortgagor, but until this is done or some other mode be pursued to revest the title, besides mere payment, the legal title will remain in the mortgagee; *Wolfe v. Dowell*, 13 S. & M. 103. But by an act passed 11th February, 1860, it was enacted that "in all cases proof of payment of the money secured by mortgage or deed in trust, has the effect to discharge and release the mortgage or deed in trust, and to revest the title in the mortgagor or grantor;" *Heard v. Baird*, 40 M. 793. And in *Griffin v. Lowell*, 42 M. 402, it was held that under the Act of 1857, payment alone, without entry of satisfaction on the record, would revest the title in the mortgagor.

70a *Agreement of the parties as to satisfaction.* Were the grantor, trustee and *cestui que trust*, all agree that the trust is satisfied, and that the property shall revest in the grantor, this, as to personality, is sufficient to revest the title in the grantor and make it liable to sale under execution against him, though the record show the trust unsatisfied. The rule would be different as to realty, a writing in that case being necessary to re-convey the title; *House v. Fultz*, 13 S. & M. 39. See S. C. 6 S. & M. 404; *Brown v. Bartee*, 10 S. & M. 268.

See *vide* Execution, 31.

XI. The Equity of Redemption and its Liability for Debt

71. *Conveyance of equity of redemption by grantor in deed in trust.* If the grantor in a deed in trust afterwards convey absolutely to the *cestui que trust*, this does not invest the latter with the legal title, which is still outstanding in the trustee; and hence, there can be no merger of the legal and equitable estates in such a case. The deed only conveys the equity of redemption and nothing more.

The grantor can convey only what he has. And if in such a case a judgment be rendered against the grantor in the deed in trust, between the date of its execution and the date of the conveyance of the equity of redemption, the conveyance is not such a satisfaction or extinguishment of the trust deed as to let in the judgment so rendered, the legal title being still outstanding. And if, after all this, and a sale under the judgment, the trustee sell to the *cestui que trust*, he will get a good title; *Brown v. Bartee*, 10 S. & M. 268.

72. *Liability of equity of redemption for sale under execution.* The equity of redemption in a mortgage is not subject to seizure and sale under execution, not even under a judgment rendered on the mortgage debt; *Thornhill v. Gilmer*, 4 S. & M. 153; *Brown v. Bartee*, 10 S. & M. 268; *Wolfe v. Dowell*, 13 S. & M. 103; *Boarman v. Catlett*, 13 S. & M. 149; *Marlow v. Johnson*, 2 G. 128; *Goodwin v. Anderson*, 5 S. & M. 730; *Prewett v. Dobbs*, 13 S. & M. 431; *Henry v. Fullerton*, 13 S. & M. 631. And the sale of such estate conveys no interest, not even the right to redeem; *Boarman v. Catlett*, *supra*. See on this subject, Execution, 31, *et seq.* Yet if the sale be made under a judgment procured on the mortgage debt, the purchaser will be subrogated to the mortgagee's interest to the amount of his bid, but he will get no title, and his purchase will be no bar to a bill to foreclose; *Baldwin v. Jenkins*, 1 C. 206; S. P., *Thornhill v. Gilmer*, 4 S. & M. 153. The same principle applies as to sales of interest of vendee who has a title bond and has not paid the purchase money; *Goodwin v. Anderson*, 5 S. & M. 730; *Harmon v. James*, 7 S. & M. 111; *Delafield v. Anderson*, lb. 630.

73. *Same: Case in judgment.* It was agreed between the *cestui que trust* and a purchaser at the trustee's sale, which was made for cash, that the purchaser's bid should be accepted, if he would give personal security and a mortgage on the land so bought, for its payment. The trustee made the deed, as if the purchase money had been paid; but on the deed was endorsed this agreement, reciting the notes given for the purchase money, and that they should "act as a lien on the bond" mentioned in the deed until the notes were paid. The agreement was duly signed and sealed, and acknowledged by the parties; *Held*, that the endorsed agreement made the deed a mortgage, and that the land was not liable to sale under execution against the grantor in the deed; *Baldwin v. Jenkins*, *supra*.

74. *May be sold, if mortgage satisfied.* But if the mortgage be fully paid, the mortgagor has a complete equity, and his interest may be sold under execution against him, but the purchaser will only get an equitable title. *Wolfe v. Dowell*, 13 S. & M. 103; *Boarman v. Catlett*, 13 S. & M. 149. And the purchaser claiming title under such a sale must show the satisfaction; *Henry v. Fullerton*, 13 S. & M. 631. And the interest of a vendee of land who has a bond for title, may be sold under execution if the purchase money has

been paid; *Thompson v. Wheatley*, 5 S. & M. 499; *Moody v. Furr*, 6 S. & M. 100.

75. *Equity of redemption liable to distress for rent.* But the statute makes any "interest or property of the tenant in the goods attached for rent, liable therefor;" and hence, the equity of redemption is liable to distress for rent against the mortgagor; *Prewett v. Dobbs*, 13 S. & M. 431; *S. P., Harmon v. James*, 7 S. & M. 111.

76. *When equity of redemption salable under execution.* But if a mortgage be executed on land to secure a contingent and prospective liability of the mortgagor to the mortgagee, and reserving the right of possession and enjoyment of the premises in the mortgagor, until default be made in the payment of such liability, the interest of the mortgagor in the land will be subject to seizure and sale under execution against him, and such a sale will convey a good title except as against the mortgagee; *Huntington v. Cotton*, 2 G. 253.

77. *Equity of redemption salable under the Act of 1857.* Art 12, p. 308, of the Rev. Code of 1857, is as follows: "Estates of any kind holden or possessed in trust for another, shall be subject to like debts and charges of the person to whose use or for whose benefit they are holden or possessed, as they would have been subject to if the person had holden the like interest in the thing holden or possessed, as he may own in the uses or trusts thereof, whether the trusts be fully executed or not, and may be sold under execution at law, so as to pass whatever interest the *cestui que trust* may have; and before a sale under a mortgage or deed in trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property in such mortgage or deed of trust, except as against the mortgagee and his assigns, or the trustee, after the breach of the condition of such mortgage or deed in trust."

Under this statute, the equity of redemption of a mortgagor or grantor in a deed in trust may be sold under execution at law, whether the debt be fully paid or not, or the trust be fully executed or not, at any time before a breach of the condition or afterwards, and before a sale under the same, except that such sale cannot be made under a judgment founded on the mortgage debt; *Carpenter v. Bowen*, 42 M. 28.

XII. Miscellaneous.

79. *Possession by mortgagor no evidence of fraud.* Possession by the mortgagor of personal property conveyed in the mortgage, where that has been duly recorded, is no evidence of fraud. That rule applies only to absolute conveyances; *Hundley v. Buckner*, 6 S. & M. 70. But if the mortgagor retain possession with a power to sell, this makes the mortgage fraudulent; *Summers v. Roos*, 42 M. 749.

79a. *Good mortgage not affected by subsequent fraud.* A valid and *bona fide* mortgage in its creation, will not be invalidated

by the subsequent illegal acts of the parties; *Ib.*

See FRAUDULENT ASSIGNMENT, 23 to 40.

80. *Lex loci governs.* A mortgage executed in this State by husband and wife resident here, is valid, if made according to our laws, though it be in contravention of a marriage contract which stipulated that the property of the husband and wife should be governed by the laws of Louisiana; *Lapice v. Gereadeau*, W. 480.

81. *Novation of the mortgage debt.* If a new note be executed by the mortgagor exactly like the first note, except that it contains a place of payment, which was omitted from the first, and the new note be delivered in lieu of the other, this does not release the mortgage; *Whitaker v. Dick*, 5 H. 296.

82. *Mortgage by lessee.* If a lessee mortgage the leased premises which he holds, on condition of the payment of the annual rent, and then sub-let the premises to others, who bind themselves for the payment of the rent, the sub-lessees cannot, after forfeiting for non-payment of the rent, take a new lease to themselves, and set up this lease against the rights of the mortgagee; *Morse v. Clayton*, 13 S. & M. 373.

83. *Duration of the lien of a mortgage.* There is no statute in this State (in A. U., 1850), which prescribes the duration of a mortgage lien; and it seems the lien will continue in force at least as long as the mortgage debt is binding; *Ib.*

84. *Mortgage presumed bona fide.* A mortgage is not *prima facie* fraudulent, as against a creditor of the mortgagor, but is *prima facie* valid; and hence, in a controversy between a person claiming title under the mortgage, and one claiming title under a sale made under an execution against the mortgagor, the simple production of the mortgage and the note secured by it, is all that is required to establish title under the mortgage; unless there be evidence offered impeaching the *bona fides* of the transaction; *Brown v. Bartee*, 10 S. & M. 268. And the rule is the same, where a trustee in a mortgage brings detinue to recover the property conveyed in the mortgage; *Huntley v. Buckner*, 6 S. & M. 70.

85. *Misdescription of the mortgage note.* See ante, 35.

86. *Effect of surrender of title bond on liability of vendee to pay for land.* M. sold J. land and took notes for the purchase money and executed a bond for title; J. (becoming embarrassed and being indebted to M. on other accounts, and M. also being J.'s surety), executed a mortgage on slaves to secure M. for the purchase money of the land, and at the same time it was agreed that M. should retain the title to the land to secure him for his other debts against J., and also for his suretyship. Afterwards, J. surrendered the title bond to M. and abandoned the purchase, and then a creditor of J.'s filed this bill to subject the property conveyed in the mortgage to his debt. The court below dismissed the bill, holding M.'s right to the prop-

erty under the mortgage good, and that the surrender by J. of his title bond, was not a release of him from his liability to pay the note given for the land. The decree of the court was affirmed by a divided court; Smith, C. J., being for an affirmation, and Handy J., *contra*. Fisher, J., being interested as counsel, gave no opinion; *Davidson v. Jones*, 4 C. 56.

87. *Mortgage of vessels.* Congress may pass laws for the registration of mortgages of vessels engaged in the foreign trade, or in the trade among the States. And a mortgage of such a vessel executed and recorded according to the laws of the United States, is good and valid, though not in accordance with the laws of the State where it was executed; *Shaw v. McCandless*, 7 G. 296.

88. *Effect of bankruptcy on mortgage.* Under the Bankrupt Act of 1841, notwithstanding a bankrupt is personally discharged from liability for the mortgage debt, the mortgage itself remains as a security for the debt, and the bankrupt also remains liable on his covenants of warranty of title, &c., contained in the mortgage; for the damages arising from a breach of these, are not provable under that act; *Bush v. Cooper*, 4 C. 599.

Motion.

1. *Proper to correct irregularities of officers.* The proper mode to correct irregularities of the clerk and other officers of court, is by motion, or writ of *audita querela*; *Hicks v. Murphy*, W. 66.

2. *Motion, a part of the record.* Every motion made in a cause is a part of the record, as much as the declaration, pleas and judgment; *Puckett v. Graves*, 6 S. & M. 381.

3. *Setting aside purchase made by deputy sheriff.* A purchase made by a deputy sheriff at a sale made by his principal, cannot be set aside by the court on motion, if the sale be regular on its face; *Flournoy v. Smith*, 3 H. 62.

4. *Notice of motion.* A motion against a sheriff for a failure to levy an execution, should be on notice to him; *Vance v. Connell*, W. 254; and so a motion to enter satisfaction of an execution, sustained without notice to the surety who paid it, is a nullity as to him, and no bar to his right to be subrogated to the rights of the plaintiff in the judgment; *Parchman v. Conway*, 5 C. 85.

5. *Motion to quash should set out the grounds.* A motion to quash a forthcoming bond should set out the grounds on which it is based; *Huston v. Hayter*, 6 H. 580.

6. *Not proper remedy to set up bankruptcy.* A motion to quash a levy and sale, is not the proper remedy for a bankrupt whose property, acquired after his bankruptcy, has been levied on to satisfy a judgment rendered before he made application as a bankrupt; *Gridley v. Duncan*, 8 S. & M. 456.

See *NEW TRIAL*, 51, *et seq.*

7. *Office of a motion.* The office of a motion is to bring to the court, some matter or subject in the progress of the cause, which

cannot be reached by demurrer or plea. If the declaration does not contain a cause of action, or if it set out a good cause defectively, the mode of submitting the question to the court is by demurrer, and not by motion to dismiss; *Tully v. Herrin*, 44 M. 626.

Mutual and Dependent, and Independent Covenants.

See *VENDOR AND VENDRE*, 6, *et seq.*

I. What covenants are mutual and dependent, or the contrary.

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I. What Covenants are Mutual, &c., or the Contrary.

1. The General Rule of Construction.

1. *Dependent covenants favored.* In a contract for the sale of land, the undertakings to convey and to pay the purchase money, are always construed to be mutual and dependent, unless a contrary intention clearly appears, for it is more just to hold them dependent, so that neither party shall be compelled to part with his property or money, without receiving the equivalent for which he stipulated; *Stockton v. George*, 7 H. 172; *S. P., Coleman v. Rowe*, 5 H. 460; *Green v. Finucane*, 1b. 542; *Liddell v. Sims*, 9 S. & M. 596; *Wadlington v. Hill*, 10 S. & M. 560; *Clopton v. Bolton*, 1 C. 78; *Peques v. Mosby*, 7 S. & M. 340; *Robinson v. Harbour*, 42 M. 795.

2. The Effect of Purchase Money being Payable in Instalments.

2. *Same.* Where the payment of the purchase money is by instalments, due at different dates, and the vendor covenants to convey title when the last instalment is paid; the promise to pay the last instalment as well as the others, is independent of the covenant to convey. The payment by instalments makes the covenants independent (citing *Pordage v. Cole*, 1 Saund. R. 15; *Champlain v. White*, 5 Cowen, 509; *Terry v. Duntze*, 2 H. Black, 389; *Robb v. Montgomery*, 20 J. R. 15; *Mason v. Chambers*, 4 Littel, 253; *Saunders v. Beall*, 4 Bibb, 342; *Gardner v. Corson*, 15 Mass. 471; *Bank of Columbia v. Wagner*, 1 Peters, 455; *Gibson v. Newman*, 1 H. 341; *Coleman v. Rowe*, 5 H. 460; *Huzlip v. Nolan*, 6 S. & M. 294; *Clopton v. Bolton*, 1 C. 73; *McMath v. Johnson*, 41 M. 439; *Bowen v. Bailey*, 42 M. 405; *Sandler v. Bowles*, 1b. 414. *Clopton v. Bolton*, and *McMath v. Johnson*, so far as they hold that the covenant and the promise to pay the last instalment are independent, where the covenant is to convey title on payment of last instalment, are overruled; *Robinson v. Harbour*, 42 M. 795.

3. *Same: Cases in judgment.* In *Gibson v. Newman*, *supra*, the action was upon the second and also the last instalment, and the

defence was, that the vendor could not and did not make title,—which was overruled, because both instalments were recoverable as independent promises. In *Hazlip v. Nolan*, the action was also on all the instalments. In *Clopton v. Bolton*, the sale was made on two payments, secured by two notes of the vendee, and the covenant of the vendor was to make title, "when the purchase money was paid," and an action was brought on both notes after their maturity, and the defence was, that the vendor had not made and tendered a deed, and it was held, that this was no bar to the action, as the covenants were independent. In *McMath v. Johnson*, there were seven instalments, and the action was on the third. The plea set up an inability of the vendor to convey, and an offer of the purchase money made to the vendor, and a demand of title, and a neglect to make it; and this was held bad, because the covenants were independent.

4. *Another instance.* A contract for the sale of land recited the payment in cash of a part of the purchase money, and contained a covenant by the vendee to pay the balance in two instalments, at specific dates, and then a covenant by the vendor to make title on payment of the first instalment. It was held, that the vendor could not maintain an action for the first instalment, without first tendering a deed, as the covenants were dependent; *Wadlington v. Hill*, 10 S. & M. 560.

4a. *Another instance.* In this case a sale of land was made by title bond, conditioned to make title when the purchase money was paid, and it was payable in three annual instalments, and an action at law was brought on all, and the plea was that no deed had been tendered: *Held*, that the plea was bad, and the covenants were independent; *Sandler v. Bowles*, 42 M. 414. And the same rule was applied to a bill for the specific performance filed by the vendor, there being four instalments, and the last was included in the bill; *Bowen v. Bailey*, 42 M. 405.

But the last instalment cannot be recovered without an offer to make a deed, that and the covenant to convey being dependent; *Robinson v. Harbour*, 42 M. 795.

5. *The ability to make title as an element in these covenants.* Even where the purchase money is payable in instalments, the vendor cannot recover the purchase money, if he be unable to make the title. The right to enforce payment is not distinct and independent of the ability to convey title. A party is not to be forced to pay out his money unless he can get that for which he stipulated; and hence, when the vendee is sued for the purchase money he may (even as to instalments prior to the last) set up an inability of the vendor to make title according to his covenant in the title bond, to make title on payment of the purchase money; *Peques v. Mosby*, 7 S. & M. 340.

6. *Same.* Where the vendor executed a title bond, to make title on payment of the purchase money, which was payable by instalments, an action on the last instalment was

defeated on the ground that the vendor could not make title, the covenants being held dependent; *Feemster v. May*, 13 S. & M. 275. But these two last cases seem to be overruled by *McMath v. Johnson*. See *ante*, 3.

3. The Fixing of a Day.

7. *Same.* Where a day is appointed for payment by the defendant, and that day is to happen before the thing is to be performed, which is the consideration of it, the covenants are independent; and so, where a day is fixed for payment and no time is fixed for the performance of the consideration. Hence, where the defendant promised to pay by a day certain, on consideration that plaintiff would (without any stipulation as to the time), procure a deed from an Indian reservee, and make all necessary proof for perfecting the title, the covenants are independent, and the defendant liable to an action on his promise though the deed had not been procured, it not appearing that there was no title in the reservee; *Rector v. Price*, 3 H. 321; S. P., *Robinson v. Harbour*, 42 M. 795.

8. *Same.* Where the note is payable at a particular day, and the covenant is to convey "as soon as the promisor shall pay his note," the payment is a condition precedent, and the covenants independent; *Leftwich v. Coleman*, 3 H. 167.

4. Covenants to Convey on Payment of Purchase Money, &c.

9. *Instances.* Where the covenant is to convey "when the purchase money is paid," the covenants to pay and to convey are dependent, and neither party can bring an action against the other without first performing or offering to perform his own covenant; *Stockton v. George*, 7 H. 172; S. P., *Harris v. Bolton*, *ib.* 167. And so where the covenant is to convey "on the payment of the purchase money;" *Wadlington v. Hill*, 10 S. & M. 560; *Lee v. Dozier*, 40 M. 477; *Cook v. Guice*, 6 C. 242; *Eckford v. Halbert*, 1 G. 273; *Klyce v. Broyles*, 8 G. 524.

II. The Remedy and the Performance.

10. *There must be performance, or valid offer to perform.* Where the covenants are mutual and dependent, neither party can have a remedy at law on the contract; or a remedy in equity for a specific performance, without a previous performance or offer to perform his part of the contract; See cases cited in *ante* 9; *McAllister v. Moore*, 1 G. 258; *Walton v. Wilson*, *ib.* 576; *Arthur v. Parson*, 5 G. 131; *Clopton v. Bolton*, 1 C. 78.

11. *What is a good performance, or offer.* Where the vendor tenders a deed which on its face conforms to the contract, if there be objections to it, on the ground of encumbrances, the vendee must point out the objections; *Bright v. Rowland*, 3 H. 398.

The vendee need not prepare a deed and offer it to vendor for execution; a simple demand is sufficient, if he wait a reasonable time for it to be complied with: *Standifer v. Davis*, 13 S. & M. 48. In *Johnston v. Beards*,

7 S. & M. 214, this was left in doubt. There must be a second demand. See *VENDOR AND VENDER*, 15.

A tender of a deed by the vendor in his bill for specific performance, will not do; the tender must be made before the bill is filed; *Klyce v. Broyles*, 8 G. 524.

An averment of readiness to perform will not do; *Robinson v. Harbour*, 42 M. 795.

III. Miscellaneous.

12. *Purchase money payable on same day.* Where the purchase money is to be paid first, though on the same day, the vendor is not bound to tender a title to enable him to sue; it is sufficient if he were ready and able to make title; *Bright v. Rowland*, 3 H. 398; *S. P., Robinson v. Harbour*, 42 M. 795.

If the money is to be paid after the doing of an act, then no action can be had for the money until after the doing or offering to do that act; *Robinson v. Harbour*, 42 M. 795.

13. *Relief when the covenants are independent.* Where the covenants are independent, relief will not be granted to the purchaser against a payment of the purchase money, on the ground that the title is defective, there being no eviction and no fraud; and it not being shown that the vendor is insolvent; *Coleman v. Rowe*, 5 H. 460.

14. *Rescission where covenants are independent.* It is admitted in this case, that where the covenants are mutual and independent, if the vendee offer to pay and demand title, he is entitled to it, or that the contract should be rescinded; but it was held, that inasmuch as the vendor had a complete equity, and as the state of the title was well known to the vendee when the purchase was made, and there being necessary delays in procuring the legal title, that the vendee could not rescind because the title was not made on his demand, and that the vendor should have a reasonable time to perfect it; *Green v. Finucane*, 5 H. 542.

15. *Where no time is specified to make title.* Where, in a bond for title, no time is specified in which the title is to be made, the vendor may retain the title till the purchase money is paid, if he so elect; *Hazlip v. Nolan*, 6 S. & M. 294.

Natchez, City of.

Is a port of entry; *Natchez v. Trimble*, W. 376.

New Trial.

See HIGH COURT, sub-division New Trial.
See also CHANCERY, same sub-division.

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I. For Newly Discovered Evidence.

1. *Rule on the subject.* A party asking for a new trial on the ground of newly discovered evidence, must satisfy the court that the evidence has come to his knowledge since the trial, and that it was not owing to want of diligence that it was not discovered sooner, and that it would probably produce a different result if a new trial be granted; *Hare v. Sproul*, 2 H. 772; *S. P., Rulon v. Lintol's Heirs*, 2 H. 891; *Garnett v. Kirkman*, 41 M. 94. The affidavit of the new witness must also be produced, in which the new evidence should be set out, or it should be shown that the affidavit could not be obtained; *Rulon v. Lintol's Heirs*, *supra*. The truth of the suggestion of newly discovered evidence must be fully established; *Hinds v. Terry*, W. 80.

2. *Diligence must be used.* A new trial will not be granted for newly discovered evidence, unless it appear that due diligence had been used to obtain it on the first trial; *Bledsoe v. Little*, 4 H. 13; *Hare v. Sproul*, 2 H. 772; *Wright v. Alexander*, 11 S. & M. 411; *Dean v. Young*, 13 S. & M. 118. And the affidavits must show the diligence; *Watson v. Dickens*, 12 S. & M. 608. Thus, where the new evidence was, that during the trial the applicant discovered the residence of a subscribing witness, whom he supposed to be dead, but had taken no steps to prove his handwriting—this was held negligence; *Bledsoe v. Little*, *supra*. In this case it appeared that the suit had been pending for two years before the trial, and the deposition of a witness had been taken one month before that time, and the newly discovered evidence was intended to overturn the deposition in a material point; and it also appeared that the new witness was to testify about a conversation between one of the defendants and the deponent in the deposition. It was held that there was no diligence, as one of the defendants must necessarily have known of the presence of the witness at the conversation referred to; *Watson v. Dickens*, 12 S. & M. 608.

3. *Instance of new trial granted.* The defendant, in his application for a new trial, swore that he was justly entitled to a credit—that he used every effort in his power to establish it, and had failed; that since the trial he has discovered two witnesses who heard plaintiff's intestate admit before his death the justness of the credit; the affidavits of the two witnesses to that effect were also produced; *Held*, he was entitled to a new trial; *Kane v. Burrus*, 2 S. & M. 313.

4. *Want of diligence in examining a witness.* It is no ground for granting a new trial, that the applicant has discovered that a witness who was examined on the trial will prove payment for the debt sued on, for by the use

of due diligence he might have discovered that before the trial, or by proper interrogation he might have then established it; *Wright v. Alexander*, 11 S. & M. 411.

5. *Cumulative evidence: Case in judgment.* A new trial will not be granted for the new discovery of evidence, which is merely cumulative; but the new evidence, in order to be cumulative in the sense of this rule, must not only be evidence which goes to establish the same point as the other evidence introduced on the trial, but it must be specifically the same, by being nothing more than the addition of the testimony of the new witness to the same facts, which were sworn to on the trial. In this case, the issue was *non est factum* to a bill single, and the newly discovered evidence was that of a witness who swore he was present at the execution of the bill, and that defendant's name was signed by one R., who is now dead, and who signed the name at the request of C., and that C. applied to witness to sign it. This evidence was held not to be cumulative to the evidence offered on the trial, which was in substance, that defendant could not write, and was absent in another State at the date of the bill; and a new trial was granted to the defendant; *Vardeman v. Byrne*, 7 H. 365.

6. *To show mistake of witness.* A new trial will not be granted to enable the applicant to show a mistake in the testimony of an opposing witness, unless the affidavit show by what evidence the mistake is to be established; and a good reason why it was not produced on the trial; *Ellis v. Kelly*, 4 G. 695.

II. For the Admission of Illegal Evidence.

See HIGH COURT, 87 to 89.

7. *When granted.* A new trial will be granted where the verdict is founded on illegal evidence; *White v. Englehard*, 2 S. & M. 38.

8. *Not granted, if admitted without objection.* The admission of illegal evidence may be made the ground of a motion for a new trial, if objection were made to it at the time it was offered, though no exceptions were taken to the ruling of the court admitting it; but if it be admitted without objection, this will be considered as a waiver of any legal objection which might exist to it; *McRaven v. McGuire*, 9 S. & M. 34; *Phillips v. Lane*, 4 H. 122. But the rule is different as to misdirections of the judge; *Phillips v. Lane*, *supra*.

9. *Not granted if the other evidence be sufficient.* A new trial will not be granted for the admission of illegal evidence to establish a fact, which is otherwise sufficiently proven by other and competent evidence; *Fore v. Williams*, 6 G. 533; *Hand v. Grant*, 5 S. & M. 508; nor if it appear that on another trial, there is little reason to believe that the result will be different, and it is clear that justice has been done. In a matter of doubt as to these points, the admission of illegal evidence is ground for a new

trial; *Barringer v. Nesbit*, 1 S. & M. 22; *McMullin v. Mayo*, 8 S. & M. 288.

10. *Not granted where the illegal evidence is impertinent.* A new trial will not be granted for the admission of impertinent and irrelevant evidence, which could have no influence on the verdict; *Pritchard v. Myers*, 3 S. & M. 42; nor where the evidence is immaterial, and the verdict is well justified without it; *Mary Washington Female College v. McIntosh*, 8 G. 671.

11. *Nor where merely cumulative.* A new trial will not be granted for the admission of illegal evidence, which is merely cumulative, if it be clear that if it had not been admitted, the result would not have been different, and that its rejection on another trial would not change the result; *Routh v. Agricultural Bank*, 12 S. & M. 161.

III. For the Rejection of Legal Evidence.

See HIGH COURT, 94 to 94a

12. *Not granted where the evidence is immaterial.* A new trial will not be granted for the exclusion of evidence in itself legal, but which is irrelevant and immaterial, as the case is made by the great preponderance of the evidence, and as found by the verdict,—there being no probability that a different result will be reached on another trial; *Magee v. Harrington*, 13 S. & M. 403.

13. *Not granted where it would not have changed the result.* A new trial will not be granted for the erroneous exclusion of competent evidence from the consideration of the jury, if it be manifest that the evidence, if introduced, would not have changed the result; *Cogan v. Frisby*, 7 G. 178. See *ante*, 9, 10, 11, 12.

14. *Not granted where the point to which it was offered is fully proven.* Nor will a new trial be granted for the erroneous exclusion of evidence, where the point to establish which it was offered, was fully established by the other evidence; *Drake v. Surget*, 7 G. 458; *Atwood v. Meredith*, 8 G. 635.

IV. For the Misdirection of the Judge.

See HIGH COURT, 95, *et seq.*

15. *Misdirection of judge always open for consideration on motion for a new trial.* The misdirection of the judge is always open for consideration upon a motion for a new trial, whether objections were made to it on the trial or not. But the rule is otherwise as to the admission of illegal evidence, for if no objection be made to it when it is offered, its illegality will be considered as waived; *Phillips v. Lane*, 4 H. 122.

16. *Misdirection is ground for new trial.* If there be several issues submitted to a jury, and the verdict be general, not specifying on which issue it was found, and if there be one of the issues in respect to which the verdict is unsupported by the evidence, and the verdict might have been on that issue, it will be set aside, if, in respect to that issue, there was an erroneous charge of the court; *Gay*

v. *Lemle*, 3 G. 309. And so if the evidence present doubts as to a material point, and in respect to that point there be an erroneous charge, a new trial will be granted; *Harper v. Tapley*, 6 G. 506.

17. *No ground for new trial where verdict is clearly right.* A new trial will not be granted for the misdirection of the judge, if the verdict be plainly and clearly right, according to the law and the justice of the case, and if it would have been the duty of the judge to set the verdict aside, if found for the other party; *Perry v. Clark*, 5 H. 495. Nor will a new trial be granted for erroneous charges where the verdict is plainly in accordance with the law and the evidence in the case; *Brandley v. Carter*, 4 C. 282; *Cameron v. Watson*, 40 M. 191; *Holloway v. Armstrong*, 1 G. 504; *Corbin v. Cannon*, 2 G. 570; *Hanna v. Renfro*, 3 G. 125; *Simpson v. Bowdon*, 1 C. 524; *M. & C. R. R. Co. v. Whitfield*, 44 M. 466. Nor will it be granted because the court erroneously left to the determination of the jury the construction of a written instrument, if it appear that the jury construed it correctly; *Fore v. Williams*, 6 G. 533. Nor will it be granted because the court erroneously charged that certain evidence was conclusive, when it was only *prima facie*, if the point it was introduced to establish was fully proven by the other evidence in the case; *Cartwright v. Carpenter*, 7 H. 328. Nor will it be granted in any case for error in giving or refusing a charge where the verdict is in accordance with the evidence, and the same proof should produce the same result on another trial; *Simpson v. Bowdon*, 1 C. 524. Nor where the result on that trial should not have been changed by a proper charge; *Pritchard v. Myers*, 11 S. & M. 169; *Hill v. Calvin*, 4 H. 231; *Wiggins v. McGimpsey*, 13 S. & M. 532. See *post*, 28. INSTRUCTIONS, 46. HIGH COURT, 96, 98.

18. *When not granted for irrelevant charges.* A new trial will not be granted because an irrelevant charge was given, if the jury were fully instructed on the points involved in the issue, and it appear they could not have been misled by the charge; *Holden v. Bloxum*, 6 G. 381. Nor will a new trial be granted because the court gave a charge which was abstractly correct, but was impertinent to the evidence, if it be apparent that the charge had no effect in producing the verdict; *Wood v. Gibbs*, 6 G. 559. Nor will it be granted for the giving of an instruction in itself legal, but which is inapplicable and irrelevant, as the case is made by the great preponderance of the evidence, and sustained by the verdict—there being no probability that a different result would be reached on another trial (citing *Barringer v. Nesbit*, 1 S. & M. 22); *Magee v. Harrington*, 13 S. & M. 403.

19. *Refusal to give charge already given.* The refusal to give a legal instruction is no ground for a new trial, if the rule of law stated in it has already been given to the jury in another instruction; *Mary Washington*

Female College v. McIntosh, 8 G. 671; *M. & C. R. R. Co. v. Whitfield*, 44 M. 466.

20. *Verdict against erroneous charge.* A verdict in accordance with the law and evidence will not be set aside because it is contrary to erroneous instructions given by the court; *Van Vacter v. Brewster*, 1 S. & M. 400.

V. Where Verdict is against the Weight of Evidence.

See HIGH COURT, 90, *et seq.*

22. *Rule on the subject.* Where the jury find against the great preponderance of evidence a new trial will be granted, even by the High Court, when it was refused by the court below, but there must be a clear preponderance of the evidence against the verdict; *Brown v. Forbes*, 8 S. & M. 498; *Sims v. McIntyre*, 8 S. & M. 324. To authorize the High Court, however, to interfere on such a ground, the error in refusing a new trial must be clear; for every presumption is to be indulged in favor of the verdict; *Peck v. Thompson*, 1 C. 367.

A new trial was granted in this case because the verdict was against the preponderance of the evidence; *McQueen v. Bostwick*, 12 S. & M. 604.

See HIGH COURT, 90.

23. *Rule where evidence is conflicting.* Where there is a conflict in the evidence, one part sustaining the verdict, and the other against it, a new trial will not be granted unless the verdict be very clearly wrong; *Garland v. Stewart*, 2 G. 314; *S. P. Gay v. Lemle*, 3 G. 309. The preponderance must be very clearly against the verdict; *Harris v. Halliday*, 4 H. 338. Where the mind cannot repose with entire confidence and certainty upon a conclusion in favor of either party, the verdict will not be disturbed; *Watson v. Dickens*, 12 S. & M. 608. See *post*, 28.

See HIGH COURT, 91.

24. *Where the evidence is opposed but does not conflict.* The plaintiff's evidence unexplained, entitled him to a verdict. The defendant's evidence was not at all contradictory to the plaintiff's, but went farther, and showed distinct facts not disclosed by the plaintiff's evidence, and thus showed that plaintiff had no rights. The jury found for the plaintiff, and a new trial was granted, it not being a case where the jury had decided on the weight of conflicting evidence, but one where they had found against the evidence; *Young v. Wilson*, 2 C. 694.

See HIGH COURT, 92, *et seq.*

25. *Where there is a variety of evidence and no charge asked.* Where a variety of evidence was submitted to the jury, and no charge asked by the court, and no point of law raised on the trial, the verdict will not be set aside, unless there be a very great preponderance of evidence against it; *Kellogg v. Budlong*, 7 H. 340.

26. *Where evidence is entirely circumstantial.* Where the evidence is entirely circumstantial, the verdict will not be set aside un-

less manifestly wrong; *Bolton v. Adcock*, 5 C. 758. See *post*, 28.

27. *Where verdict is in accordance with the evidence.* A new trial will not be granted, where the verdict is in accordance with the evidence, and there is no error of law complained of in the charges; *Jenkins v. Whitehead*, 1 S. & M. 157.

28. *Credibility of witnesses and circumstantial evidence.* A new trial will not be granted where the evidence is conflicting, and the propriety of the verdict depends upon the weight to be given to the testimony of the respective witnesses, and the inferences to be drawn from the facts proven and from the conduct of the parties, except for clear and manifest error in the rulings of the court; *Woods v. Gibbs*, 6 G. 559. See *ante*, 15, 16, 26.

29. *Credit of witnesses for the jury.* Where a witness swears positively one way, and facts and circumstances conduce to establish the opposite, and the jury find against the testimony of the witness, a new trial will not be granted, as the credibility of the witness is a matter exclusively for the determination of the jury; *Stovall v. Farmers' and Merchants' Bk*, 8 S. & M. 305.

VI. Where there is a Want of Evidence.

See HIGH COURT, 93, *et seq.*

30. *Rule on this subject.* A new trial will be granted where there is no evidence to sustain the verdict; *Crocket v. Young*, 1 S. & M. 241. And so where the verdict, considered with reference to the issue submitted to the jury, is not sustained by the evidence; *Otey v. McAfee*, 9 G. 348.

31. *Rule where the verdict is just and the evidence weak: Case in judgment.* If the evidence to prove demand and notice be weak and uncertain, as to showing the precise day on which demand was made and notice given, yet if its tendency be to show these dates, a verdict for the plaintiff being evidently just, will not be disturbed; *Skinner v. Collier*, 4 H. 396.

VII. Where the Damages are Excessive.

See HIGH COURT, 93a.

32. *Rule where the action sounds in damages.* In actions sounding in damages, where the law furnishes no legal rule of measurement, save the discretion of the jury upon the evidence before them, courts will not disturb the verdict upon the ground of excessive damages, unless it be so flagrantly improper as to evince passion, prejudice or corruption, in the jury; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660; *M. & C. R. R. Co. v. Whitefield*, 44 M. 466.

And the rule is the same, where the jury are by law authorized to assess a fine; *State v. Blennerhassett*, W. 7.

See DAMAGES, 22.

33. *The rule applied: Case in judgment.* In this case, the jury gave the plaintiff \$4,500 for damages, on account of the defend-

ant (who was a common carrier) carrying him four hundred yards beyond the station at which he was to be put off, and thus compelling him to leave the cars against his remonstrance and contrary to his request, that the cars should be backed to the station, where plaintiff might get off at the regular place. The defendant moved for a new trial, because the damages were excessive, which was refused. The High Court in reviewing the proceedings of the court below, expressed their regret that the jury had not acted with more leniency, but under the rules of law applicable to the granting of new trials in such cases, they did not feel at liberty to disturb the verdict; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660.

34. *In action for false warranty of soundness.* A new trial will not be granted in an action for a false warranty of soundness in a slave, merely because the jury found larger damages than the court approved, where they violated no rule of law in assessing them; *Steppacher v. Rneau*, 3 C. 114.

35. *Assessing excessive value in detinue.* A new trial is never granted for the assessment of excessive values of the property sued for in detinue, if it be in the power of the defendant to deliver the specific property whose value is so assessed; *Jennings v. Gibson*, W. 234.

VIII. Surprise as a Ground for a New Trial.

36. *Rule in relation to.* When a party or his counsel is taken by surprise in respect to any material circumstance which could not have been reasonably anticipated, and where want of skill, care or attention cannot be justly imputed, and injustice has been done, a new trial will be granted; *Dorr v. Watson*, 6 C. 383.

37. *Application of the rule: Surprise at failure of evidence.* The defence relied on was, that the defendant was a surety, and that there had been a valid contract for forbearance, and the defendant's attorney made oath that he had been informed by a witness who was privy to the contract (and who was the attorney who drew up the contract between the creditor and the principal), that it contained a stipulation by the plaintiff not to sue the maker of the note now sued on, for one year; that, relying on this, he had said witness subpoenaed, and made no other efforts to get evidence of such agreement, except to give notice to the plaintiff to produce it; that when it was produced on the trial, he was surprised to find that no stipulation for delay was in it; that the witness still stated that he was confident that said promise not to sue, was in a writing held by the principal debtor, who lived too far from the court to have him present at that term. The affidavit of the witness was also read, which stated he was confident such a contract existed in writing. The verdict being against the surety, he moved for a new trial on the ground of surprise: *Held*, that this was a surprise without negligence, and that the attorney had a right to

rely upon the positive statements of the witness as to the existence and contents of the contract, and that it was in possession of the plaintiff; *Ib.*

37a. *Another instance: Surprise at testimony not anticipated.* The defendant held the plaintiff's attorney's receipt for a credit. On the trial, the attorney, as a witness for the plaintiff, swore that the credit was conditional, and that the condition upon which its validity depended, had not been complied with, and upon this the jury disallowed the credit. The defendant's affidavit for a new trial, stated that he was surprised at the attorney's testimony, and went on to detail circumstances which tended to show the attorney's mistake; and the affidavit stated, also, that on another trial the defendant could prove the mistake: *Held*, that although the defendant knew before the trial that the credit would be resisted, yet he had a right to claim that he was surprised at the testimony of the attorney, to the effect that his unconditional receipt was in fact conditional, and that a new trial should be granted; *Arthur v. Mitchell*, 10 S. & M., 326.

37b. *Surprise for the absence of witnesses.* The defendant's counsel made the following affidavit, as the foundation of a motion for a new trial: "When the case was called, he understood the sheriff to report that all the witnesses for the defence for whom he had subpoenas, were present but one, and thereupon he went into the trial of said cause. After the testimony had been adduced on the part of the State, it was discovered that only two witnesses for defendant were present, and they were unimportant. The counsel was thus surprised, and not prepared with the expected testimony in the case:" *Held*, the motion for a new trial was properly overruled; *Lundy's Case*, 44 M. 669.

38. *There must be diligence and also merits.* To entitle a party to a new trial on the ground of surprise, there must be merit in the applicant's case, and the surprise must be such as care and prudence could not provide against. The slightest negligence will defeat the application, or occasion the imposition of the most rigorous terms, as a condition of granting it; *Thompson v. Williams*, 7 S. & M. 270; S. P., *Green v. Robinson*, 3 H. 105; *Rupert v. Grant*, 6 S. & M. 433; *Smith v. Natchez Steamboat Co.*, 1 H. 479.

39. *Instance of want of merits: Bankruptcy.* It seems that the defence of a discharge in bankruptcy, being a mere personal privilege of the defendant, and not at all going to the merits of the case, is not such meritorious defence as the court will grant a new trial to enable the defendant to set it up; *Thompson v. Williams*, 7 S. & M. 270.

See LIMITATION OF ACTIONS, 173.

40. *Instance of negligence: Failure to plead.* When a discharge in bankruptcy has been granted to the defendant since the institution of the suit, but for more than six months before the trial, it was held negligence not to plead it at the first term after it was granted, and a failure to do so, was such neg-

ligence as would prevent the granting of a new trial, to enable the defendant to apply to the court for leave to plead it; *Ib.*

41. *Other instances: Inattention of counsel: ignorance of legal proof.* It is no ground for a new trial, that the defence was not made because the counsel was ignorant that the cause was called, when it was regularly reached on the docket; *Green v. Robinson*, 3 H. 105. Nor will it be granted because the party applying was ignorant of the legal effect of a record, which he relied on as evidence. Thus, where he offered in evidence a record which was improperly authenticated, and it was therefore rejected, he was refused a new trial, because he ought to have had it properly authenticated, and his ignorance of the law on that point was no excuse; *Dorsey v. Maury*, 10 S. & M. 298. So if a deposition be improperly taken and on that ground ruled out at the trial, this is no such surprise as will authorize a new trial; the counsel should have known of the irregularity; *Smith v. Natchez Steamboat Co.*, 1 H. 479; *Rupert v. Grant*, 6 S. & M. 433. And surprise which results from a mistake as to any kind of legal evidence, is no cause for granting a new trial; *Curry v. Kurtz*, 4 H. 24.

42. *Same: Omission of counsel to read evidence.* The omission of counsel who were first employed at the commencement of the trial (the original counsel being absent), to read evidence at his command—the omission arising from ignorance of its importance or surprise, is not sufficient ground for a new trial, if the evidence be immaterial and legally insufficient, if used to produce a different result; *Garnett v. Kirkman*, 41 M. 94.

43. *Discrediting applicant's witness.* Two witnesses, on whose testimony the defence was based, were discredited on the trial by general evidence as to their character, the defendant having no notice of any intention to attack them. The witnesses resided in a different county from the one in which the trial was had, and so far distant that their neighbors, after the attack was made, could not be produced to testify in their behalf. The defendant showed, on a motion for a new trial, by *ex parte* affidavits, that the witnesses were of good character: *Held*, that every witness is presumed honest and truthful, and the defendant, until notice was given of an intention to attack these witnesses, had a right to rely on this presumption, and was not bound to summon witnesses to sustain them. That the adversary evidence was a surprise, and the defendant, not having had an opportunity of sustaining his witnesses, was entitled to a new trial on the *ex parte* showing that he had made of their good character; *Wilson v. Clark*, 5 C. 270.

IX. Misconduct of the Jury and of the Officer attending them.

44. *Intrusion upon the jury: Separation.* A new trial will not be granted (in a civil case) because several persons intruded upon the jury in their retirement, and because one of

the jury separated himself entirely from the others for a short time. These facts constitute irregularities, but they do not vitiate the verdict, if it do not further appear that any influence was attempted on the jury by the intruders, or on the absentee, by any person, to produce the verdict rendered by them; *Graves v. Monet*, 7 S. & M. 45.

See CRIMINAL LAW, sub-division New Trial.

45. *The jury improperly taking out with them papers.* The taking out by the jury, in their retirement, of a deposition not read in evidence, is a strong ground for a new trial; *Taylor v. Sorsby*, W. 97.

But a new trial will not be granted because the paper containing the instructions asked for and refused by the adverse party, were taken out by the jury, unless it be shown that the paper was read and considered by the jury; *Goode v. Linecum*, 1 H. 281.

46. *Impeaching partiality of juror.* Where a new trial is asked for, on the ground that one of the jury, before the trial, had expressed opinions in favor of the side on which the verdict was rendered, it is necessary to show that fact by the clearest evidence. And it must also be shown that the applicant was not aware of the fact when the jury was empanelled. A statement by a witness that he was under the impression that the juror had expressed himself favorable to the side which gained the verdict, is not sufficient to show the juror's bias; *Mullins v. Cotrell*, 41 M. 291.

47. *Omission of jury to assess value of a slave.* The omission of a jury to assess the value of a slave, proven to have been sold by the plaintiff to defendant, is good ground for a new trial. For where no value is expressly proven, the jury may and ought to find the value according to the average value of such slaves at the time of the sale; *Lewis v. Furrish*, 1 H. 547.

X. The Granting of two or more New Trials: Power of the Court.

See HIGH COURT, 105 to 108.

48. *Effect of two concurring verdicts.* Two concurring verdicts may operate as a persuasive reason for not granting a third trial, but they are not an absolute bar to the granting of such trial. On a complicated state of facts, however, a second verdict is entitled to great weight, and should stand unless manifestly against the law; but where the facts are undisputed, and the error is a mistake of the jury in applying the law to the facts, it is the province of the court to correct it; *Stamps v. Bush*, 7 H. 255. In the absence of any statute limiting the power of the court to grant more than one new trial, after two concurring verdicts, a new trial would be granted where no error of law is complained of, only in an extraordinary case; *Munn v. Perkins*, 1 S. & M. 412; S. P., *Turner v. Bird*, 44 M. 449.

49. *Power of court to grant more than two new trials.* The statute (H. C. 876), declares

that no more than two new trials shall be granted to the same party, in the same case. Whether the court can grant more than two new trials under this statute, even for a misdirection of the judge; *Quære? Stamps v. Bush*, 7 H. 255; *Munn v. Perkins*, 1 S. & M. 412. The court under this statute has no jurisdiction to grant a third new trial, or to hear a motion for it; but this does not prevent the court from setting aside the verdict and awarding a *venire de novo* for errors of law committed by the court during the progress of the trial, as often as that may occur; *Ray v. McCary*, 4 C. 404; S. P., *Thornton v. West Feliciana R. R. Co.*, 7 C. 143; *Field v. Weir*, 6 C. 56.

Where two new trials have already been granted to the same party, exceptions taken to the rulings of the court during the progress of the third trial, by the party who has had the two new trials, should be incorporated in a bill of exceptions taken before the jury retired from the bar. If incorporated in a bill of exceptions taken to the judgment of the court overruling his motion for a third new trial, they will not be noticed, since the object of that bill is solely to present the question whether the court erred in overruling the motion; and the court being prohibited by the statute from granting the motion, has no jurisdiction over it, or over a bill of exceptions taken to its judgment in overruling the motion; *Ray v. McCary*; *Thornton v. West Feliciana R. R. Co.*, *supra*.

But in *Garnett v. Kirkman*, 4 G. 389, the court take no distinction between a new trial and a *venire de novo*, and hold, that the statute prohibiting the granting of more than two new trials to the same party, does not apply where the application for the third trial is based on misdirections of the judge during the progress of the trial; and in such a case the High Court will grant a third new trial when the bill of exceptions was taken during the progress of the trial to erroneous rulings of the court.

XI. The Granting of a New Trial where Justice has been done, and there is no Probability of a Different Result.

50. *Rule on this subject.* A new trial will not be granted for the admission of illegal evidence, where it appears that there is no probability of a different result on another trial; and where it also appears that justice has been done; *McMullen v. Mayo*, 8 S. & M. 298; *Routh v. Agricultural Bank*, 12 S. & M. 161; S. P., as to where there is no probability of a different result; *Burringer v. Nesbit*, 1 S. & M. 22; *Magee v. Harrington*, 13 S. & M. 403; S. P., as to both points; *Bohr v. Steamboat Baton Rouge*, 7 S. & M. 715. Nor will it be granted for the exclusion of legal evidence if its admission will not change the result; *Cogan v. Frisby*, 7 G. 178. A new trial will not be granted, unless it is clear that justice has not been done; *Leflore v. Justice*, 1 S. & M. 381. But if it is manifest

to a reasonable certainty, that justice has not been done, a new trial will be granted; *Taylor v. Sorsby*, W. 97.

A new trial will not be granted where there is no probability of a different result on another trial, though there is a preponderance of evidence against the verdict; *Philbrick v. Holloway*, 6 H. 91. And where the evidence is weak to sustain the verdict, a new trial will not be granted where justice has been done; *Skinner v. Collier*, 4 H. 396. See *ante*, 31.

XII. The Motion: Taking it under Advisement, and Continuance.

51. *Motion must state the grounds on which it is based.* The statute requires the reasons for a motion for a new trial to be set out in the motion; and on the hearing of the motion, no ground not thus set out, can be noticed either in the court below or in the High Court; *Barney v. Scherling*, 40 M. 320.

52. *Motion: Part of the record.* A motion for a new trial is a part of the record; *N. O. J. & G. N. R. R. Co. v. Allbritton*, 9 G. 242; *S. P., Puckett v. Graves*, 6 S. & M. 384.

53. *The taking under advisement should be noticed on the record.* Where a motion for a new trial is taken under advisement by the circuit judge to be determined in vacation, that fact should be noticed on the record, or else upon the adjournment of the court the motion will be considered as overruled; *Ross v. Garey*, 7 H. 47.

54. *May be sustained within the time limited.* The statute authorizes circuit judges to take motions for new trials under advisement, and to return in vacation to the clerk's office a written opinion, either sustaining, or overruling the motion, within a limited time. If such a motion be sustained within the time limited, it will be error to strike the cause from the docket at the next term. If the new trial was improperly granted, the remedy is by writ of error; *McClure v. Houston*, 10 S. & M. 392.

55. *Power of the judge.* The power of the circuit judge to grant a new trial in vacation, expires within four months from the time he took the motion under advisement. His decision, if not made within that time, cannot affect the original verdict. His power also ceases with his official term; and if made afterwards, no consent of the parties can give it the force of a judicial act. And, if after a motion is so sustained by a judge, after his official term has expired, the appearance to the suit and defence of it by the party against whom the decision was made, without objection on his part to the irregularity, will not confer jurisdiction on the Circuit Court, nor preclude him from denying jurisdiction, in this court; *Coopwood v. Prewett*, 1 G. 206; and in such case judgment will be entered in this court on the verdict so illegally set aside in vacation; *Ib.*

56. *Statement of the clerk as to consent in such a case.* The statement of the circuit

clerk on the minutes of the court made in vacation, that the opinion of the judge sustaining a motion for a new trial, which had been taken under advisement, "was handed in and entered on the minutes by consent of of parties," is no part of his official duty, and therefore, no evidence of such consent; *Ib.*

57. *Continuance of the motion.* A motion for a new trial may be continued till the next term of the court, but where there is no such order entered on the minutes, the motion will expire with the term at which it was made; *Kane v. Burrows*, 2 S. & M. 313.

XIII. Absence of Party or his Counsel, as Ground for a New Trial.

58. *Rule on this subject.* The absence of a party, caused by unavoidable circumstances, may be a good ground for a new trial; but such application will be watched with jealousy, and relief granted with caution; but if it be shown that injustice has been done and the absence was unavoidable, a new trial will be granted; *Vannerson v. Pendleton*, 8 S. & M. 452.

59. *Application of the rule: Instances.* The affidavit of the applicant for a new trial, stated that he was prevented from reaching the court by high water; that being in the habit of attending the court, he had no counsel to whom he had communicated the facts of the case; that his demand was correct, and injustice had been done to him. Two other affidavits were also filed in support of the justice of the claim. A new trial was granted; *Vannerson v. Pendleton. supra.* And so, where a party was sued on notes which were given on a condition which had not been complied with, and a judgment by default was taken against him during his absence, which was caused by high water, a new trial was granted; *Brooks v. Whitson*, 7 S. & M. 513. But if the party be absent in consequence of information given by his attorney, that his case will not be reached until a later day, on which he was present, a new trial will not be granted; *Cole v. Harman*, 8 S. & M. 562.

60. *Rule as to absence of counsel.* The absence of counsel, who had been retained in the case, and who was familiar with it, is not alone sufficient ground for a new trial. It must also be shown that there was probable merits in the party's cause, which sustained prejudice by the counsel's absence. And however positive the applicant's affidavit may be as to the justice of his cause, and the injury sustained by the absence of his counsel, the court will determine this matter for itself, upon the law and facts of the case; *Garnett v. Kirkman*, 41 M. 94.

XIV. The Action of High Court on New Trials.

61. *As to this*, see HIGH COURT, 87 to 115.

XV. Miscellaneous.

62. *Negligence of applicant.* A new trial will not be granted, where the alleged injus-

tice in the verdict was the result of the negligence of the party or his counsel. *Green v. Robinson*, 3 H. 105. Nor will it be granted, because the applicant was forced into trial when he was not ready, if he was guilty of negligence in preparing for it. And it is no excuse for a want of preparation in either party, that before the court commenced, it was agreed that the parties should meet and set the cause for a particular day, which they failed to do, whereby the cause was tried when it was regularly reached on the docket; *Moody v. Harper*, 4 G. 465. See *ante*, 2 to 6, 36, *et seq.*

63. *Incompetent juror.* A new trial will not be granted because the court erroneously decided a juror to be competent, if he were excluded from the jury by peremptory challenge; it not appearing that the objector exhausted, before the jury was empanelled, all his peremptory challenges; *Ferriday v. Selser*, 4 H. 506.

See *JURY*, 21.

64. *Effect of Remittitur.* Where a remittitur is entered for the excess in the verdict, not warranted by the evidence, a new trial will not be granted; *Young v. Englehard*, 1 H. 19.

65. *Withdrawal of witness.* The voluntary withdrawal during the trial of a witness subpoenaed by the adverse party, is no ground for a new trial; *State v. Blannerhassett*, W. 7.

66. *Failure of witness to disclose all he knew.* That counsel did not press the examination of an unwilling witness, lest the court should commit the witness for contempt, is no ground for a new trial; *Hines v. Terry*, W. 80.

And it is no ground for a new trial that a witness from inadvertence failed to state a fact beneficial to the applicant, and which fact was within the knowledge of the applicant at the time. He had the opportunity to cross-examine the witness at the time, and it was his fault, that the witness was not made to disclose all he knew on the subject; *Houston v. Smith*, 2 S. & M. 597; *S. P., Davis v. Preston*, 5 S. & M. 459.

67. *Effect of mistrial on granting new trial.* In this case the court, in granting a new trial, on the ground of newly discovered evidence, remark, that they do it the more readily, because there had been a mistrial; *Hardeman v. Byrne*, 7 H. 365. But it seems that a mistrial will be an additional reason for refusing a new trial, to that party upon whom the burden of proof rests; *Philbrick v. Holloway*, 6 H. 91.

67a. *Difference between granting and refusing a new trial.* The granting of a new trial is entitled to greater indulgence than the refusal of one, since the granting is not a final settlement of the case, and the party against whom it is granted has another opportunity of establishing his rights; *Dorr v. Watson*, 6 C. 383.

67b. *Rule as to granting.* It is a well established rule, that a verdict of a jury will not be disturbed, unless it is manifest from

the whole record that it was clearly wrong, or unless misdirection of the court, or other error apparent on the record, may have tended to produce it; *Kelly v. Miller*, 10 G. 17.

68. *Province of jury.* It is the peculiar province of a jury, where the evidence is conflicting, to weigh it, and give credit to those facts and circumstances, which, in their judgment, are entitled to the greatest consideration; and it is not for courts, in such cases, to rejudge their judgment; *Ib.*

69. *Finding of a court.* If an issue of fact, by agreement of the parties, be submitted to a probate judge "in lieu of a jury," the decision of the judge will have the same force and effect as the verdict of a jury, and will not be set aside except for reasons which would justify the setting aside of a verdict; *Ib.*

70. *Judgment set aside under ordinance of 1865.* By the ordinance of the convention of 1865, it was provided that any judgment rendered prior thereto, and after the 9th January, 1861, may be set aside, on an affidavit that the party against whom it was rendered, was unavoidably absent from the court, when rendered, and had no attorney present, and that the judgment was unjust. If this ordinance be valid (and this is not decided), the applicant is entitled to have the judgment set aside, upon the filing of the affidavit required; *Walker v. Hasser*, 41, M. 90.

71. *Granted on condition.* If a new trial be granted, upon the applicant's paying the costs of the suit by a stated day in the succeeding vacation, the payment of the costs is not a condition precedent to the granting of the new trial. But, if it was, then an arrangement made between the applicant and the clerk in the proper time, by which the clerk dispensed with actual payment, and held himself liable as having received the costs, would be a waiver of the condition; *Johnson v. Taylor*, 3 S. & M. 92.

72. *Affidavit for, no part of record.* An affidavit for a new trial is no part of the record, unless made so by bill of exceptions; *Ross v. Garey*, 7 H. 47.

Nominal Plaintiff.

See *ACTION*, 4, *et seq.*

1. *Rights of.* The nominal plaintiff has no right to settle or compromise the action without the consent of the usee; *Emmons v. Myers*, 7 H. 375. But if it appear on demurrer to the declaration that the assignment was illegal, the suit may progress in the name of the nominal plaintiff; *Lee v. Gardiner*, 4 C. 521.

2. *In what cases there may be a nominal plaintiff.* The assignment of the beneficial interest in a suit so as to make the assignee entitled to the proceeds of it, is an equitable assignment of the suit, and after judgment will entitle the assignee, if another suit on the judgment be necessary, to bring the action in the name of the plaintiff for his use; *Ib.*

The suit must be in the name of the party who has the legal title. If there be an equitable assignment, the assignee may be usee; *Wilson v. McElroy*, 2 S. & M. 241; S. P., *Vanhouten v. Reily*, 6 S. & M. 440.

3. *No usee in replevin and detinue.* Actions of detinue and replevin are not of the class of cases in which the suit may be brought for a usee, and if so brought, the action will be considered as brought by the nominal plaintiff alone; *Hundley v. Buckner*, 6 S. & M. 70; *Brown v. Thomas*, 4 C. 335; S. P., *Lee v. Gardiner*, 4 C. 521; *Pearce v. Twitchell*, 41 M. 344. *Sed vide* REPLEVIN, 14. TRESPASS, 22.

4. *Death of nominal plaintiff.* If he be dead before the suit is commenced, the action will abate; if he die pending the suit, by statute the suit may proceed to judgment; *Humphreys v. Irvine*, 6 S. & M. 295. If usee die, suit may go on in the name of nominal plaintiff without revivor; *Lee v. Gurdiner*, 4 C. 521. See ACTION, 10. Post, 8.

5. *Usee is real plaintiff.* The usee is the real plaintiff, and all bonds required by law of plaintiff, including attachment bonds, may be executed by him; *Grand Gulf Bk. v. Conger*, 9 S. & M. 505.

6. *Bill of discovery by and against.* The nominal plaintiff may file a bill of discovery at law against the defendant; *Minor v. Graw*, 11 S. & M. 322. And not being compellable to testify against his interest, a bill of discovery may be filed against him; *Watts v. Smith*, 2 C. 77. See ACTION, 11.

7. *Is competent as a witness for defendant.* The nominal plaintiff, if he do not object, is a competent witness for defendant; *Blundell v. Vaughan*, 12 S. & M. 625; *Coopwood v. Foster*, 1b. 718; *Smith v. Elder*, 1 S. & M. 507.

8. *Effect of death of nominal plaintiff.* A suit will not abate because the nominal plaintiff was dead when it was commenced. In such case the declaration may be amended by inserting the name of the administrator of the nominal plaintiff in his stead; and it seems that the suit might be prosecuted to final judgment in the name of the nominal plaintiff, although he was dead when it was instituted; *Denton v. Stephens*, 3 G. 194. See ante, 4. ACTION, 10.

9. *Who nominal plaintiff, and who usee in action on clerk's bond.* In an action on a circuit clerk's bond for failure to discharge an official duty in relation to a suit brought by a nominal plaintiff for the use of another, the obligee in the bond (viz., the governor, or the State), must be plaintiff, and the usee in the first suit must be usee in the second; *Brown v. Lester*, 13 S. & M. 392.

10. *When assignee of execution may be usee.* But in an action against a sheriff on his bond for a failure to pay over money collected by him on an execution, the nominal plaintiff being the governor of the State, the usee may be the assignee of the execution, upon the ground that the sheriff's bond contains a stipulation to pay the money so collected to the plaintiff, or his assignee, and

moreover, the statute authorizes the bond to be put in suit by any person injured. The rule would be different but for this stipulation in the bond; *Matthews v. Bailey*, 3 C. 33.

11. *Nominal plaintiff not made by a replication.* Where a suit is brought by the payee of a note, to which it is pleaded that the note has been assigned to another, and the replication is that the suit is brought and prosecuted for the assignee's use, this does not make the assignee a usee in the suit, and if after judgment the plaintiff die, it cannot be enforced without revivor; *Peck v. Ingraham*, 6 C. 246.

Nom Damnificatus.

See BOND.

Non est factum, and Pleadings under Oath.

See BILLS OF EXCHANGE, 173, *et seq* PLEADING, 115, 131a, 181.

1. *Statute.* The statute of 1824, provides that wherever a suit is founded on a writing, whether under seal or not, it shall be taken as evidence of the debt &c., "and it shall not be lawful for the defendant to deny the execution of such writing, unless it be by plea, supported by affidavit of the truth thereof;" and if the defendant is not the person purporting to be the maker of the instrument, the same rule is applied, unless he will deny, under oath, on his belief, that the apparent maker did not execute the instrument.

2. *Same: Act of 1836.* (H. C. 852, art. 6, §§ 2, 3.) This statute provides, that when parties are sued as partners, on any writing purporting to be executed in the partnership name, or in any abbreviation thereof, it shall not be lawful for any of the defendants to deny the name or names or signature to such writing, unless by plea, supported by the oath of the party denying the same, or of some other credible person. And this rule of proof is declared "to extend to all pleas of payment, and other pleas and legal proceedings, wherever the same can be made to apply."

2a. *Same: Section 4.* "All pleas to the action shall be deemed and adjudged as admitting the parties, and the character of the parties suing, and in no case shall the plaintiff or complainant be required to prove any written signature, identity of persons, description of character, or the persons comprised in any partnership, which may be set forth in their respective bills, declarations, writs or pleadings, either as plaintiff, or as persons through whom the plaintiff may claim, unless the signature, person, partnership, or description of character, be denied by plea, and its truth attested by oath."

These provisions are substantially incorporated in the Rev. Code of 1857, p 518. § 7.

3. *What is a sufficient plea of denial under this statute.* Under this statute, a plea of *non assumpsit* to an action on a note, supported

by an affidavit that the defendant did not execute the note, nor authorize any person to do the same, is sufficient; the statute gives the plea verified by oath the qualities of a plea of *non est factum*, and puts in issue the execution of the note, and its continuance as such at the time of the plea; *Sumpter v. Geron*, 4 H. 263. But the plea of *non assumpsit* merely, though sworn to, will not do; either the plea or the affidavit in support of it should contain a direct denial of the signature or execution of the note; *Thornton v. Alliston*, 12 S. & M. 124 (citing *Sumpter v. Geron* 4 H. 263; *Fairchild v. Grand Gulf Bank*, 5 H. 597; *Vicksburg Waterworks Co. v. Washington*, 1 S. & M. 536; *Lake v. Munford*, 4 S. & M. 312; *Hemphill v. Bk of Ala.*, 6 S. & M. 44; *Anderson v. Tarpley*, 6 S. & M. 507; *Prewett v. Bennett*, 7 S. & M. 101). And a plea of *non assumpsit* admits the character of the parties suing, and if it be sworn to, its character is not changed, the oath merely attests its truth, including its effect to admit the character of the parties; *Peck v. Thompson*, 1 C. 367. If the defendant, being sued on a note as a member of a firm, deny on oath the execution of the note, this is a sufficient denial of the partnership, and will entitle him to a verdict, if no proof be introduced showing that he executed the note; *Fairchild v. Grand Gulf Bank*, 5 H. 597.

4. *Plea denying character in which plaintiff sues*—When the plaintiff sues as a corporation, a plea of *non assumpsit*, supported by an affidavit, in which it is stated that the plaintiff is not a corporation, is sufficient to put the burden on the plaintiff of proving his corporate character, and so *null tiel* corporation sworn to is a good plea; *Vicksburg Waterworks Bk v. Washington*, 1 S. & M. 536. If a partner sue in his individual name on an account contracted with the firm, the defendant can make the objection only by plea, supported by oath. A plea of *non assumpsit* admits that the debt was contracted with the plaintiff in his individual character; *Anderson v. Tarpley*, 6 S. & M. 507. And so if plaintiff sues as endorsee, if his right as such is contested, the plea must be supported by affidavit; *Lanier v. Trigg*, 6 S. & M. 641. A plea denying the character in which plaintiff sues (as that he is executor), if not sworn to is a nullity, and may be stricken out on motion; *Prewett v. Bennett*, 7 S. & M. 101. And where a plaintiff sues as president of the board of trustees of a school section, if the general issue be pleaded, or any other plea to the action, it will be an admission of the character in which the plaintiff sues, and even if it be agreed between the parties that a plea should be considered as filed, denying that the plaintiff is such president, nevertheless, the character in which the plaintiff sues will be admitted. That cannot be questioned, except by plea supported by affidavit, denying it, unless, perhaps, there be an express waiver of the oath, or an agreement that the necessary affidavit should also be considered as filed; *Cole v. Harman*, 8 S. & M. 562.

5. *When plea under oath necessary*. The

defence that the written contract sued on was altered after it was made, may be set up under the plea of the general issue without affidavit; *Henderson v. Wilson*, 6 H. 65; *Oakey v. Wilcox*, 3 id. 330. So, if the defence be that the note sued on was signed in blank, and it was filled up by the agent for too great an amount, the plea need not be sworn to; for the note is void only for the excess (overruling *Hemphill v. Bank of Ala.*, 6 S. & M. 44); *Goss v. Whitehead*, 4 G. 213.

See *BILLS OF EXCHANGE*, 175.

If one be sued as endorser, he admits that he is such, unless he deny it under oath; *Wade v. Staunton*, 5 H. 631; *Tillman v. Ailes*, 5 S. & M. 373; and so if plaintiff sue as endorsee; *Lanier v. Trigg*, 6 S. & M. 641.

And so if the execution or endorsement purports to be by an agent, his authority must be denied under oath; *Ellis v. Planters' Bk*, 7 H. 235; *Cook v. Martin*, 5 S. & M. 379.

A plea denying that a defendant sued on his subscription for stock, is a stockholder in the railroad company must be sworn to; *Thigpen v. Miss. Cent. R. R. Co.*, 3 G. 347.

As to altered note, see *BILLS OF EXCHANGE*, 176.

Pleading in chief admits the execution of the note sued on; *Green v. Robinson*, 3 H. 105; *Anderson v. Tarpley*, 6 S. & M. 507. The character in which a party sues is admitted by pleading in chief; *Reed v. Benton & Manchester R. R. Bk'g Co.*, 4 H. 257; *Wade v. Staunton*, 5 H. 641.

And this principle was applied, where a plaintiff sued as bearer of a note made in Alabama, where the statute prohibits the transfer of the note without endorsement, so as to exclude the objection of want of endorsement; but plaintiff's want of title may be shown under the general issue; *Hemphill v. Bk of Ala.*, 6 S. & M. 44.

6. *Executor must plead under oath*. Where an executor or administrator is defendant he should also deny under oath to the best of his knowledge. He is not excused from this by the statute, which exempts him from pleading specially; *Thornton v. Alliston*, 12 S. & M. 124.

Pleading in chief admits the character in which a party sues as payee, endorsee, &c., but does not admit he has any interest or legal title to the instrument sued on; *Lake v. Hastings*, 2 C. 490; *S. P., Lanier v. Trigg*, 6 S. & M. 641.

Nonsuit.

1. *Compulsory nonsuit not allowable in this State*. There is no such thing as a compulsory nonsuit in this State, where the plaintiff has taken proper issue on all the pleas; *Ewing v. Glidwell*, 3 H. 332; *Winston v. Miller*, 12 S. & M. 550.

2. *Nonsuit for failure of plaintiff to reply*. A nonsuit cannot be entered at the imparlance term, for a failure of the plaintiff to reply to a special plea of the defendant; but at the issue term, the court may order a non-

suit, if the replication be not filed *instantly*; *Kain v. May*, 5 S. & M. 368; S. P., *Williams v. Montgomery*, 10 S. & M. 311.

3. *Writ of error to judgment of voluntary nonsuit*. If the plaintiff, in consequence of an erroneous ruling of the court excluding legal evidence, suffer a voluntary nonsuit, he is not entitled to a writ of error, to revise that decision. He cannot complain of a judgment which he consented to. If he desire to revise the action of the court excluding his evidence, he should go on with the trial to final judgment, after taking proper exceptions; *Ewing v. Glidwell*, 3 H. 332; *Thornton v. Demoss*, 5 S. & M. 609; *Copeland v. Mears* 2 S. & M. 519.

4. *Nonsuit after verdict*. Where the action is founded on a tort, as assault and battery, false imprisonment, trover and the like, and is brought against several defendants, though they all join in the same plea and be found jointly guilty; yet the plaintiff may, after verdict enter a *nol. pros.* as to some of them, and take judgment against the others; *Hardy v. Thomas*, 1 C. 544.

Notary Public.

1. *Office of not abolished by the constitution of 1832*. The office of notary public was not abolished by the constitution of 1832; and there was such an officer in legal existence in 1833, on whom powers could be conferred by a statute of that date; *Dennistoun v. Po ts*, 4 C. 13.

2. *Justice of peace's powers as notary*. By the Act of 1836, justices of the peace were authorized to act as notaries public; *Wilcox v. Mitchell*, 4 H. 272.

3. *As to powers, duties and responsibilities of notaries in making protest*, see *BILLS OF EXCHANGE*, 24, 25.

4. *As to the effect of notarial record as evidence*, see *BILLS OF EXCHANGE*, 26, 28. *EVIDENCE*, 104, 105.

Notice.

See *BILLS OF EXCHANGE. ATTACHMENT. JUDGMENT. VENDOR AND VENDEE. TIME.*

1. *Notice by recitals in deeds*. A purchaser is presumed to have notice of every fact disclosed by any recital, in any deed essential to his title; *Chew v. Calvert*, W. 54; S. P., *Gordon v. Sizer*, 10 G. 805. And so where a party cannot make out his title, but by a deed which leads him to another fact, he shall be presumed to have notice of that fact. Hence the purchaser of land, at sheriff's sale, under execution against the original enterer from the United States Government, will be held to have had notice of the assignment by the judgment debtor, of his certificate of entry, made in the land office, whence it was issued, and before the rendition of the judgment, the law not requiring either the certificate of entry or the assignment to be registered; *Martin v. Nash*, 2 G. 324.

2. *Notice from possession*. Possession is notice to the world of the title of the occu-

pant, and if the occupant's title be by unregistered deed, his possession under it is equivalent to its registration; *Dixon v. Doe*, 1 S. & M. 70; *Edmondson v. Orr*, 12 ib. 541; *Jones v. Loggins*, 8 G. 546; *Perkins v. Swank*, 43 M. 349. See *post*, 13.

But the agent's possession of personality at the time a sale is made of it by the principal, is not notice to the purchaser of any prior unrecorded mortgages executed by the agent on the property, in favor of another; *Harmon v. Short*, 9 S. & M. 433. See *post*, 13.

3. *Notice from want of possession*. Where the payee in a bond (who has actually assigned it) contracted with the obligor, that, in consideration of property sold by the latter to the former, he would surrender the bond to the payee at a future day; this executory agreement to deliver the bond is evidence conducing to show that the obligor had notice of the assignment; *City of Natchez v. Minor*, 9 S. & M. 544; S. P., *Bank of Kentucky v. Coffman*, 41 M. 212, 214.

4. *Note payable to a trustee*. If a note be payable on its face to A., as administrator, or guardian, or trustee, it is notice to an endorsee that it is trust property, and if he trade for the note and pay for it, without seeing it, still he is bound by the notice on the face of the paper, when it is delivered, to the same extent as if it had been delivered in the first instance; *Miller v. Helm*, 2 S. & M. 687.

5. *Notice arising from inadequate price*. Where property is sold under execution for less than half its cash value at the time, it is a circumstance, though not of a conclusive character, from which it may be inferred that the bidder had notice that the defendant's title was not perfect; *Baldwin v. Jenkins*, 1 C. 206.

6. *Same: With unusual circumstances as to mode and time of sale*. Where slaves were brought from Texas to this State, passing the markets of New Orleans and Vicksburg, and sold here at a private house in the country late at night, for one half their cash value, it was held that these circumstances were well calculated to excite suspicion, and to put the purchaser on inquiry as to the nature of the seller's title; *Calhoun v. Burnett*, 40 M. 599.

7. *Silence where there is notice*. A person standing by in silence when a sale of his property is being made, is not thereby deprived of his right, if the purchaser had notice of the time of his title; *Chew v. Calvert*, W. 54.

8. *Judgment without notice*. Nothing short of a positive enactment of the Legislature will authorize a judgment against a party without notice. If the act be silent as to notice, it must be given. Can the Legislature dispense with notice; *Quere? Demoss v. Camp*, 5 H. 516.

9. *Notice to partners*. Notice to one partner is notice to all; *Fitch v. Stamps*; 6 H. 457. See *PARTNERSHIP*, 15, 16.

9a. *Notice to agent*. See *BILL OF EXCHANGE, &c.*, 51, *et seq.* *PRINCIPAL AND AGENT*, 9, 10, 89, 90, 91. *VENDOR AND VENDEE* 51b, 137, 138.

10. *Judgment liens and statutory mortgages.* Judgment liens are matters of record and notice to all the world; *Andrews v. Wilkes*, 6 H. 554. And so is a registered mortgage, and the statutory mortgage secured to administrators, &c., on sales made by them, is to be treated and considered as a mortgage duly recorded; *Miller v. Helm*, 2 S. M. 687.

11. *Notice arising from accepting a bill, &c.* If a client draw an order in his own favor on his attorney, to be paid out of money to be collected by the latter for the former, and the attorney accept it being then informed that the order was drawn and the acceptance obtained with a view of transferring it to some one of his creditors; this is not equivalent to notice of the transfer, where it shall be subsequently made, and the attorney may be compelled to pay the money, when collected to the client, if he receive no other notice of the transfer; *Shields v. Taylor*, 3 C. 13.

12. *Contemporaneous notice of a contract and its rescission.* Where the only notice that a purchaser of land has of a prior executory agreement of the vendor to sell to another, is the statement of the vendor, who at the same time states that such agreement has been rescinded; the purchaser is justified in acting on this last information as to the rescission, without applying to the prior purchaser—the land being unoccupied; *Curtis v. Blair*, 4 C. 309.

13. *Possession of right of way.* The use as a passway of an unenclosed alley in a city, by one owner of an adjoining lot, is not notice to the world, that the party so using it claims exclusive title to the alley, if it be so situated, that the occupants of the other adjoining lots might also use it. The right of way is a mere incorporeal hereditament, of which the actual and visible possession requisite in law to constitute notice, is not predicable; *Gordon v. Sizer*, 10 G. 805. See *ante*, 2.

14. *Inquiry excited is notice.* Whatever is sufficient to excite attention, or put a party on inquiry, is notice of every thing to which such attention, or inquiry might reasonably lead; *Parker v. Foy*, 43 M. 260.

15. *Notice of unregistered deed.* See DEED, 45 to 53. JUDGMENT, 113. REGISTRATION, 15, 16, 20. VENDOR AND VENDEE, 64.

Nuisance.

See CHANCERY, sub-division Injunction.

Nul tiel Record.

See PLEADING, 128 to 131a.

1. *Issue on, how tried.* The issue of *nul tiel record* is to the court; and where the record to which this plea is interposed, is read to the jury without objection, it must be presumed, either, that the issue was disposed of, or that the plea was waived; *Thompson v. Williams*, 7 S. & M. 270.

2. *How pleaded: Argumentative plea.* A plea to an action on a judgment which avers

"that if there be record of any such supposed judgment, the defendants were not made parties to the suit in which it was rendered, and therefore that the court had jurisdiction to render the judgment against them, and this they are ready to verify," is bad: 1st. Because it is but an argumentative denial of the record; and 2d. Because if it be considered as a plea of *nul tiel record*, it ought to have concluded with a verification by the record; *Cannon v. Cooper*, 10 G. 784.

3. *When a proper plea.* Where the action is not founded on a record, but a record is only inducement—as where a creditor having a judgment, sues an administrator on his bond for a *devastavit* on not paying it—a plea, that there is no such judgment, is not properly a plea of *nul tiel record*, but is merely matter in abatement; *Cogan v. Duncan*, 1 C. 274.

See RES ADJUDICATA, 22.

Unкупative Will.

See WILL, 24 to 35.

Oath.

See AFFIDAVIT. For juror's oath, see JURY, 28, 30.

Obligation.

See BOND AND CONTRACT.

Office, Officer and Official Bond, &c.

See QUO WARRANTO.

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I. What is an Office and Officer.

1. *Meaning of "office."* The term "office" has no legal meaning attached to it different from its ordinary acceptation. An office is a continuing charge or employment, the duties of which are defined by rules prescribed by law and not by contract, and the person who fills it is an officer; *Shelby v. Alcorn*, 7 G. 273.

2. *What is a civil officer.* By the 26th section of the 3d article of the constitution of this State, it is declared, that "no senator or representative, during the term for which he shall have been elected, nor for one year thereafter, shall be appointed to any civil office under the State, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people." This provision extends to every civil charge, or employment of a civil nature, the duties of which are prescribed by law, and not by contract, and for the performance of which the incumbent is entitled to receive a stated salary or fees; *Ib.*

3. *Same: Case in judgment.* The law creating the office of levee commissioner of Coahoma county (Acts of 1850, p. 218, and Acts

of 1854, pp. 186, 576). and defining the duties thereof, provide that the incumbent shall receive his appointment from the board of police of Coahoma county, and hold his office for two years; and that he shall give an official bond and shall act as treasurer, and as such shall receive and disburse public money; that he shall take an oath "that he will in all things touching his office, seek to promote the best interests of his county and of the State of Mississippi;" that he shall make a report of building and repairing the levees on the Mississippi river, and thereupon the board of police is required to levy a tax to meet it; and that he shall receive a salary of \$1,500, payable out of the levee funds. The levee commissioner is also charged with other duties to the public, and is subject to removal from office for malfeasance or misfeasance, by the board of police: *Held*, that the post of levee commissioner was a civil office within the meaning of the 26th section of art. 3d of the constitution; see *ante*, 2; *Id.*

4. *Pension agent not an officer.* A pension agent of the United States is not an officer of the Federal government, and he may lawfully hold an office of trust or profit under this State; *Lindsey v. The Attorney General*, 4 G. 508.

II. Appointment and Election to Office.

6. *Unconstitutional appointment.* It is of the nature and essence of the fundamental law of a State, that it avoids every act done in violation of its provisions; and hence, the appointment of a member of the Legislature to an office in violation of sec. 26, art. 23, of the constitution (see *ante*, 2), is absolutely void, both for want of capacity in the appointee to accept, and for want of power in the functionary, in whom the appointment is vested, to make it. And the rule of the common law, which holds as valid in respect to the public and third persons, the acts of persons who are officers, *de facto* acting under color of office, by an election or appointment not strictly legal, does not apply in this case, and the acts of such an incumbent are absolutely void; and the unconstitutional appointment may be so declared whenever it comes, even incidentally, into question; *Shelby v. Alcorn*, 7 G. 273.

See CONSTITUTIONAL LAW, 141, 142.

6a. *Illegal appointment.* The Board of Police has no power to appoint a successor, where the commissioner to classify lands, provided for in the Revenue Act of 1842, resigns; but if they make such appointment, it gives such color of authority to the appointee, that as to the public and third persons, his act will be valid; *Ray v. Murdock*, 7 G. 692.

III. De facto Officers.

7. *Officer acting without oath or bond.* By the statute of 1822, it is provided that the governor shall appoint an assessor and collector of taxes for each county, "who shall,

before he enters on the duties of his office, take and subscribe the oath prescribed in the constitution, and enter into bond to be approved by the County Court, which bond with a certificate that the sureties named have been approved as aforesaid, and the oath of office thereon endorsed, shall be recorded," etc. And the act further provides "that if any assessor and collector of taxes shall presume to execute the duties of his office, before he shall have given bond or taken the oath of office, agreeably to the directions of this act, all such his acts and proceedings done under color of office shall be absolutely void, and he shall for such offence be liable to be indicted and punished for a misdemeanor."

By the revised constitution of 1832, it was declared, that all the officers of the State, executive and judicial, before they enter upon the duties of their respective offices, shall take the oath of office prescribed therein, which oath was the same as that prescribed in the constitution of 1817. The revised constitution of 1832 also provides that, upon conviction of a county officer by a *petit jury*, of a wilful neglect of duty, or a misdemeanor in office, he shall be removed from office; and all laws then in force in the State, and not repugnant to the revised constitution, were retained in full force until changed.

By the Act of 1833, the election of an assessor and collector for each county by the people, was provided for; and it was also enacted, that he should give bond and security, before entering on the duties of his office, "as heretofore required by the existing laws of the State."

SHARKEY, C. J., on consideration of these provisions, was of opinion that the Act of 1822, making void the acts of an assessor and collector done without bond, was still in force; and moreover, that if such person duly elected, exercised the duties of his office, without having taken the oath of office, his acts were null, and that he was liable to refund to each tax payer the taxes he may have collected from him; and that neither he nor his sureties were liable to the State for such collections.

CLAYTON, J., was of opinion that the above provision of the Act of 1822 was impliedly repealed by the constitution of 1832 and the Act of 1833, as above quoted; and that if it were not so repealed, still the person so acting without oath, was an officer *de facto*, and that neither he nor his sureties could defeat a recovery on the bond, for the taxes so collected by him; and that his official acts were binding on him and his sureties, and that the Act of 1822 had no other effect than to give the State the right to eject an officer from his office, if he failed to give the bond and take the oath as required by it.

THACHER, J., being interested, gave no opinion; *McNutt v. Lancaster*, 9 S. & M. 570.

8. *As to members of the Legislature acting without an oath to support the Constitution of the United States*, see CONFEDERATE STATES, 8.

9. *Acts of deputy sheriff without oath.*

The effect of the statute which declares the acts of a deputy sheriff, who has not taken the oath of office, to be void, is to make such acts void as to third persons who may be affected by them, at their election. They are valid and binding on the sheriff, if such third parties so elect; *Pickens v. McNutt*, 12 S. & M. 651.

10. *Acts of school trustees without oath or bond.* The statute which enacts that the trustees of the sixteenth section, before they discharge the duties required of them by law, shall give bond, and take an oath of office, is merely directory, and it does not declare that the acts of such persons, without oath and bond, shall be void. And if such trustees shall act without oath or bond, their acts will come within the rule, that where one comes into office by color of title, his acts performed in the discharge of the duties of such office, are valid, so far as the rights of the public, and of third persons, who have an interest in such acts, are concerned (citing *McNutt v. Lancaster*, ante, 7); *Rhodes v. McDonald*, 2 C. 418.

11. *Same.* Hence, a lease made by such trustees would be valid, unless, perhaps, the lessee knew of their failure to enter into bond and take the oath, and such knowledge were accompanied by an improper motive on his part. And the lease being valid, a note given for the price would also be valid, and the president of such unsworn and unbonded trustees, could maintain suit on it, as he would have no interest in it. But it seems, in such a case, that the acts of the trustees, so far as they would be beneficial to themselves, as individuals, would be void; *Rhodes v. McDonald*, 2 C. 418.

12. *Unsworn officer liable for his own acts.* It does not lie in the mouth of a public officer who has accepted an office and exercised its powers, to allege his own default in omitting to take the oath prescribed by law, as a ground for exemption from liability for his official acts; *Marshall v. Hamilton*, 41 M. 229. See post, 16, 20.

13. *That an appointee to office, who holds in violation of the constitution of the State, is not a de facto officer.* See ante, 5.

14. *That an appointment merely illegal makes the officer de facto.* See ante, 6.

14a. *Official acts of de facto officer good.* At common law, where a person claims to hold an office, and does actually hold it, his title thereto shall not be questioned in an action to which he is not a party; but whilst he holds the office, his acts are good; *Cooper v. Moore*, 44 M. 386.

IV. Official Bonds, and the Remedy thereon.

15. *The time of giving the bond.* The Act of 1822, which vacated the appointment of county treasurer, on his failure to give bond according to law, within ten days from the date of his appointment, is repealed by the constitution of 1832, making such officers elective by the people, and by the subsequent election

law, allowing returning officers of elections, fifteen days in which to make their returns; and by the omission of this last statute to make any provision for the election of a successor, in case a bond is not given. Hence, a bond executed in the year 1835, by a person elected as county treasurer, is not invalid, by reason of its not being executed within ten days from the time of his election; *Taylor v. Arthur*, 9 S. & M. 183.

The codes of 1857 and 1871, both require bonds of election officers to be executed within a prescribed time, and the failure to do so vacates the offices.

16. Remedy on bond of de facto officer.

A plea to an action by the president of the Board of Police, as successor in office to the obligee named in a county treasurer's bond, that the principal in the bond was not county treasurer, at the time of the execution thereof, is good, notwithstanding the recitals in the bond, that he was duly elected and qualified as such. But such a bond would be a good common law obligation, and enforceable in a suit by the obligee or his personal representatives, for any breach of its conditions by the principal, though he were not in law county treasurer, if he in fact acted as such. A suit in the name of the successor in office of the obligee, can be maintained only when the bond is in accordance with the statute, and has been given by a person who is required in his official capacity to execute it; *Taylor v. Arthur*, 9 S. & M. 183. See ante, sub-division III.

17. *Official bonds not statutory: Remedy.* If an official bond be not given according to the statute, it may, nevertheless, be good as a common law obligation; but in such case the remedy on it must be in accordance with the common law: a statutory remedy provided for a proper bond given in pursuance of the statute, will not apply to such a bond; *Taylor v. Arthur*, 9 S. & M. 183; *Tucker v. Hart*, 1 C. 548; *Summers v. Foote*, 6 C. 671. Hence, an official bond made payable to the governor and his successors in office (the statute requiring it to be made payable to the State) cannot be enforced in an action in the name of the successor of the governor; *Tucker v. Hart*; *Summers v. Foote*, supra.

18. *Same: Variation in penalty: Remedy.* If a public officer, voluntarily, and without fraud, or oppression, or circumvention being used for the purpose of procuring it, execute a bond with sureties in a larger or smaller penalty than is prescribed in the statute, the obligors therein will be liable for a breach of its conditions; but whether in such a case it is a valid statutory bond, which can be enforced in the summary mode pointed out in the statute; *Quære? Matthews v. Lee*, 3 C. 417.

19. *Same.* The object of the statute in requiring a tax collector to give a bond in a penalty of the "full amount of the State and county taxes and ten per cent. additional," was to have a bond of at least that amount, and it does not prohibit the taking of a bond with a larger penalty, and though the pen-

alty be larger, it is a good statutory bond. But if such bond were on that account defective, it would not be a good answer to a plea setting up the excess in the penalty, that the probate judge who took the bond was ignorant that the Legislature had changed the penalty, and that the parties in making and receiving the bond, intended to conform to the law, and that the bond was taken without any intention to evade the statute; *Ib.*

20. *Bond of school trustees: Penalty approved by action on it.* It is no objection to the validity of an official bond executed by the trustees of the 16th section, that the penalty of the bond was not fixed by the Board of Police; nor that the bond was not approved by them; nor that the trustees never took the official oath. The provision of the statute in reference to the oath is directory, and the suit on the bond is an acceptance and approval of it; *Marshall v. Hamilton*, 41 M. 229. See *ante*. 12.

21. *Same: Where one of the obligors is an official obligee.* And it is no objection to such a bond, that it is made payable to one of the obligors as president of the Board of Police, for he has no interest as payee or obligee in the bond; *Ib.*; S. P., *Connell v. Woodard*, 5 H. 665, digested in PARTIES, 2.

22. *Breach not waived by subsequent statute.* If there has been a breach of an official bond for non-compliance with a duty prescribed by law, when it was executed, an action can be maintained for the breach, notwithstanding a subsequent statute may be passed, which no longer includes within the officer's official duties, the performance of that act; *Tucker v. Stokes*, 3 S. & M. 124.

23. *Breach of condition: Who may sue for.* Where the condition of the bond of a public officer is "for a faithful performance of his duties as prescribed by law," the failure to do any duty thus prescribed, is a breach of the bond, for which an action on the bond may be maintained by any person injured thereby. And such action must be brought in the name of the obligee (as the governor, or the State), for the use of the party injured; and hence, where the breach was in relation to a suit in the name of a nominal plaintiff, for a use, the latter and not the nominal plaintiff must be used in the action on the bond, as he is the party injured; *Brown v. Lester*, 13 S. & M. 392. S. P., *Baugh v. Lamb*, 40 M. 493.

24. *Official bond signed by sureties on condition: Escrow.* A. and B. were sureties on the official bond of Graves, as treasurer of the State, and were sued for his default. A. pleaded that he signed the bond under the belief that B., whose name was on the bond when he signed it, had validly and legally executed it, but that he had not, because B. had delivered the bond to Graves to be binding on him, upon the condition that C. would also execute it, and that C. had never executed it, whereby the bond was not binding on B., and by reason of that it was not binding on A.; *Held*, that this was not a good plea

of escrow, because 1st. It was not averred that the delivery was upon any condition. 2d. The delivery was not to a stranger, but to a party to the bond; *Graves v. Tucker*, 10 S. & M. 9.

25. *Same: Fraud.* And it was held further, that no such fraud in obtaining the bond was alleged as would vitiate it, as to the defendant (A.) pleading it. The fraud, if any, was committed by the principal (Graves) on his sureties, and not by the State, and as they (the sureties) trusted the principal with a bond apparently good as to them, they must suffer the consequences; *Held* also that the facts pleaded, did not release B.; *Ib.*

26. *Liability of sureties, where officer holds longer than the term fixed.* When the statute fixing the term of an office provides that the officer shall hold for a stated period, "and until his successor is appointed and qualified," the sureties on the official bond of the officer will continue liable for his official acts after the expiration of the stated period, and before the appointment and qualification of his successor; *Thompson v. The State*, 8 G. 518.

27. *Swamp land scrip, covered by bond of commissioner.* Scrip issued under the 12th section of the act of 2d March, 1854 (Session Laws, p. 81), is covered by the stipulation in an official bond of a swamp land commissioner, appointed in pursuance of the act of 16th March, 1852 (Session Laws, p. 33): "That the commissioner will safely keep all the funds that shall come into his hands, arising from or connected with the disposal of said swamp lands (i. e., those situated in his county), and apply the same as the law directs;" *Ib.*

V. The Tenure, Terms and Salaries of Offices.

28. *All terms limited.* The tenure of all offices in this State (under the constitution of 1832), is for some limited time, and the old medical board, created under the constitution of 1817, the tenure of whose office is not limited, was abolished by the constitution of 1832, which contained the provision to limit all official terms to some stated period; *Bryant's Case*, 1 H. 351, overruled. See *post*, 34.

29. *Tenure of clerk of Superior Court of Chancery.* The clerk of the Superior Court of Chancery was by statute to be appointed by the chancellor, and his term of office was fixed at four years; *Held*, that each successive appointee was entitled to a term of four years, commencing with the date of his appointment, whether his predecessor had filled out his full term or not; that the terms of the office were not cycles of four years, at the expiration of each of which a vacancy occurred, but that each appointee could hold for a full term of four years from his appointment; *Hughes v. Buckingham*, 5 S. & M. 632.

30. *Term of superintendent of penitentiary.* The statute creating the office of superintendent of the penitentiary, fixed his term

of office at two years from the date of his election, and until his successor was duly elected; but it did not fix any day at which the term should commence or end. It also provided, that should a vacancy occur during the time when the Legislature was not in session, the governor should fill it by appointment "until the meeting of the Legislature." Should that body meet in extraordinary session, it has power under this statute then, to elect a superintendent, when the office has been filled by executive appointment, and the person then elected would not hold his office merely for the unexpired part of the two years for which the person vacating the office had been elected, but for two full years from the date of the election at the extraordinary session (citing *Smith v. Halfacre*, 6 H. 582; *Hughes v. Buckingham*, 5 S. & M. 632; *McAfee v. Russell*, 7 C. 84).

31. *Term: Where the officers are elected by the people.* The foregoing rules in *ante*, 29, 30, do not apply where the officers are elected by the people. The terms of such are fixed in cycles of two, four and six years, commencing and ending with general elections, which are held biennially; *Smith v. Halfacre*, 6 H. 582.

See CONSTITUTIONAL LAW, 10.

32. *Terms of elective officers.* The constitution of 1832 fixed the first Monday and day following in November, in every second year, for the holding of a general election, and the terms of county officers were fixed at two years from their election. The two years thus fixed, means the period from one general election to another, though this may be, in some instances, a few days over, and in others, a few days under two years. Hence, a sheriff elected at the general election on 3d November, 1841, held his office till the next general election, which took place on the 7th November, 1843; *Thornou v. Boyd*, 3 C. 598.

33. *Provision for officers to hold till successors appointed.* The constitution of 1832 provided that all persons then holding office in this State, should continue to exercise the duties of their offices until they should be superseded pursuant to the provisions of the constitution, and until their successors shall be duly qualified. The successor to an office, in the sense of this clause, is one who performs duties of the same nature as those which were performed by the predecessor; and under this provision an officer, at the adoption of the constitution, would continue to hold his office until the office itself was abolished or a successor appointed; *Dennis-toun v. Potts*, 4 C. 13.

33a. *Effect of providing for officer to hold till successor elected, &c.* If the Legislature create an office, and provide that the officer shall hold his office till the next general election, and until his successor is elected, and yet make no provision for the election of a successor, the law will not be wholly unconstitutional; the officer will hold till the next general election, but cannot hold longer; *Houston v. Royston*, 7 H. 543.

33b. *Terms of judges appointed by the military governor.* Judges appointed by the military governor were entitled to remain in office till the Legislature organized the judicial districts, under the constitution of 1870; *Cooper v. Moore*, 44 M. 386.

34. *Effect of provision for limited term, on prior office unlimited.* The term of the office of notary public, created by the Act of 1822, was during "good behavior." The constitution of 1832 declared, that no officer shall be appointed or elected "during good behavior, but that all offices should have a specified term;" *Held*, that the constitution of 1832 did not abolish the office of notary public, but only required that a term should be fixed to it; *Ib*.

This overrules the decision in *Bryan's Case*; see *ante*, 28.

35. *Salary commences from election.* A judge, under the constitution of 1832, is entitled to draw his salary from the day of his election, though his commission be not issued till afterwards; *Swann v. Turner*, 1 C. 365.

36. *When salary draws interest.* An officer, whose salary is payable out of the State treasury, is entitled to interest on the same from the time he has applied to the auditor for his warrant therefor, and is refused; *Ib*.

37. *Salary where officer is ousted.* If an officer be kept out of his office by the person who is incumbent when his term commences, and he recognize such ouster, and bring no suit for the recovery of his office, but waits till his predecessor voluntarily vacates the office, he cannot hold the State liable for the salary which belongs to the office, for the time during which he was not actually in the office and did not discharge its duties; *McAfee v. Russell*, 7 C. 84.

38. *Salary not a contract, and may be reduced.* A law giving a certain salary to an officer at the time of his election to office, is not a contract between the officer and the State in the sense of that clause of the Constitution of the United States, prohibiting the States from passing laws impairing the obligation of contracts; and, therefore, such salary may be lawfully reduced by the Legislature, during the term, unless prohibited by the State constitution; *The State v. Smedes & Marshall*, 4 C. 47.

VI. Miscellaneous.

39. *Removal of an officer.* The clerk of a court can be removed in no other mode than that prescribed in the constitution; *Runnells v. State*, W. 146. But the power of removal is incident to the power of appointment, where there is no constitutional or statutory provision to the contrary; *Newsom v. Locke*, 44 M. 352. The power of removal is also limited to the power of appointment; *Peyton v. Cibaviss*, *Ib*, 808.

40. *Official act must be done in officer's district.* Where an officer is confined, in the execution of his duties of office, to a particular district or county all his official acts must show on their face that they were performed

within such district or county; *Saunders v. Erwin*, 2 H. 732.

41. *Value of official certificate.* An official certificate is evidence only so far as the matter certified is made the official duty and cognizance of the officer; *Newman v. Harris*, 4 H. 522.

42. *Cannot falsify his official act.* A public officer is incompetent as a witness to falsify his official act; *Stone v. Montgomery*, 6 G. 83.

43. *Power of auditor to give instructions: Duty to obey.* The auditor of public accounts is authorized by the revenue act of 1846, § 65, to transmit to assessors and collectors of taxes, such instructions as he may consider useful in enforcing the revenue laws, and these instructions, though founded on an erroneous construction of the statutes, when given, are mandatory on these officers, and a justification for acts done in obedience thereto. Hence, where a collector of taxes, acting under such instructions, collected from a vendor of slaves, taxes not imposed by law, and paid the same into the State treasury, without protest on the part of the vendor, he will not be liable to refund the money so collected; *Newman v. Elam*, 1 G. 507.

44. *Courts take judicial notice of executive officers.* The courts will take judicial notice of the changes in the executive department of the State, and of the date of the inauguration of the governor, and a commission which is uncertain in omitting to state the date of the election of an officer by the Legislature, may be rendered certain in that respect, by a reference to the date of the inauguration of the governor who signed it; *Lindsey v. The Attorney General*, 4 G. 508.

Onus Probandi.

See EVIDENCE, and ALTERATION OF WRITINGS.

Orphan.

See GUARDIAN AND WARD.

1. *Legal meaning of.* The legal meaning of the term "orphan" is, a fatherless child; *Stewart v. Morrison's Ex'r*, 9 G. 417.

Ouster.

See EJECTMENT, and ADVERSE POSSESSION.

Parent and Child.

See DESCENT AND DISTRIBUTION. GUARDIAN AND WARD. EXEMPT PROPERTY.

1. *Delivery of a chattel to a child, presumed a gift.* Where a parent delivers possession of personal property to a child upon marriage, or after marriage, it is presumed a gift, in consideration of the relationship between them; *Fatherree v. Fletcher*, 2 G. 265; *Falconer v. Holland*, 5 S. & M. 689; *Woods v. Sturdevant*, 9 G. 68.

2. *Purchase by parent in name of child.* And so, if the father purchase land, in the name of the child, no trust will result to the

father. Such transactions are presumed to be intended as advancements, unless a contrary intention appear; *Gee v. Gee*, 3 G. 190; *Lisloff v. Hart*, 3 C. 245. And a subsequent sale by the father, of the land, and a destruction by him of the deed to his son, is no proof to rebut this presumption. Such acts of the father are void, as he has no power to revoke the settlement, though voluntary; *Lisloff v. Hart*, *supra*. S. P., as to inability of a voluntary settler to revoke the gift, decided in *Norman v. Burnett*, 3 C. 183.

3. *Posthumous child.* Is entitled to a share in his mother's allowance for support for a year, as the widow of his father; *Wormack v. Boyd*, 2 G. 443.

4. *Title to money given to child for education.* Where the father gives his son money to defray his expenses in attending college, the money still remains the property of the parent, and in case it be stolen from the son at an inn, the father is the proper person to sue for its recovery; *Epps v. Hinds*, 5 C. 657.

5. *Right of mother and testamentary guardian to possession of child.* The mother will not, at the instance of the testamentary guardian of her infant female child, be deprived of the custody and care of the child, who prefers to stay with her, if she be a suitable person to rear and educate it. The right of the father (and of the testamentary guardian), to the possession of his infant child, is not absolute. In determining the question who is to have the custody of the child, the court will look to all the circumstances, and ascertain what will be for the real and permanent interest of the child; and if it be of sufficient discretion, the court will consult the child's wishes; *Foster v. Alston*, 6 H. 406.

6. *Same: Case in judgment.* The father died in Tennessee, and appointed his brother testamentary guardian of his two infant daughters. The mother afterwards married and removed to this State, the guardian refusing to allow the children to come with her. Afterwards the mother by force, took the children, who were then respectively aged nine and eleven years, and brought them to this State. The guardian sued out a writ of *habeas corpus* for the possession of the children. It appeared that he was a bachelor, but a gentleman of high character for morals and intelligence. The mother and her second husband, were shown to be highly respectable and pious, and of sufficient means to raise the children in good society. The children expressed a wish to remain with the mother, and the court refused to surrender them to the guardian; *Id.*

7. *Father's right to the custody of the child.* By the common law, the father as against the mother, is entitled to the custody of his infant child, unless the child be so young as to render the care and attention of the mother necessary to its nurture, or unless it be shown the father is of such character, or is in such circumstances as to render it prejudicial to the health, comfort or morals of the child, that it should be in

his keeping. And proof that the father had been twice divorced for adultery, and that he is addicted to intemperance to such an excess as to be guilty of the grossest vulgarity and obscenity, in actions and language in the presence of others, both male and female, is sufficient to deprive him of the custody and care of his female child of three years of age, in favor of the mother, against whom no objection exists on the ground of morals. And so, on divorce of father and mother for the adultery of the former, the mother will be entitled to the custody of the children, if she be not shown unfit for that duty; *Cocke v. Hannum*, 10 G. 423.

8. *Power of courts to dispose of custody of child on decreeing divorce.* Art. 17, p. 334, of the Rev. Code of 1857, which gives the Chancery Court the power in making a decree for a "divorce," in its discretion to make all orders touching the care, custody, and maintenance of the children * * * having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just," annuls the paramount right of the father, as it exists at common law, to the custody of the children, where the parents are divorced, and vests the power of disposing of the child in the court. And if the court in pronouncing the decree for divorce, fail to make any order in respect to the custody of a child, the fruit of the marriage, any other court, before which the right to the custody of the child may be litigated, may regard the mere legal right of the father as at an end, and make such disposition of the child as may appear equitable and just; *Ib.*

9. *Right of child to be consulted.* If the claim of the parent to the custody of his child be asserted by *habeas corpus*, and the child be of sufficient age to judge for itself, and to make a rational choice as to where it will go, the child's choice will be respected; *Ib.*

10. *Recognition of bastard: Legitimacy.* A. claimed to be the son and heir of K., and it was shown that he was born before K.'s marriage with his mother, and that K. was a mulatto, his father being a negro: *Held*, that K.'s subsequent marriage with A.'s mother and recognition of him by K. as his son, would not constitute him heir under our laws: *Held*, further, that proof that A. was considered a white man, yet that he married a slave, and never claimed to vote, or act as a juror, or to testify against a white man, was sufficient to show that he was a mulatto; *Raby v. Batiste*, 5 C 731.

11. *As to the legitimization of bastards and their right to inherit.* See *BASTARDY*, 1, 2, 3.

Parties.

For parties in Chancery Court, see that title, sub-division *Parties*. For parties in Probate Court, see that title.

For nominal plaintiff and usee, see *ACTION*, 3 to 11. *NOMINAL PLAINTIFF*. For necessary parties to an action on a note or bill,

whether endorsed or not, see *ACTION*, 12 to 19.

1. *When administrator of a surety may sue on the contract.* It is no objection to an action on an executor's bond, for the use of an assignee of a legacy, that the usee is administrator of a surety on the bond, but is not sued in that action; *Judge of Probate v. Johnston*, 1 H. 297.

2. *When same plaintiff may be defendant at law.* The rule which prevents a party from being both plaintiff and defendant in an action at law, does not apply when on one side he is a corporation, and the other an individual. Trustees of school lands are a quasi corporation, and when they sue as such, though in their proper names, it is no objection that some of them as individuals are defendants; *Connell v. Woodward*, 5 H. 665; *S. P., Marshall v. Hamilton*, 41 M. 229, digested in *OFFICE AND OFFICERS*, 21.

3. *Same.* Nor does that rule apply, so as to prevent a plaintiff from suing on any contract, to which he is no party, although he may have entered into a covenant with one of the makers of the contract, by which he bound himself to pay the legal share of that maker in the debt. To exclude the plaintiff from suing, he must be a party to the contract and under a direct legal obligation to pay it; *Stone v. Brooks*, 6 H. 373. Nor will the fact, that he is a party bound jointly and severally to discharge the contract with others, exclude him from suing on it, if he be not made a party defendant. Therefore, under our statute, making all notes made by two or more persons joint and several, a party may be co-plaintiff in an action on a note, made by a firm of which he is a member, the action being against his associates alone, and not against him; *Morris v. Hillery*, 7 H. 61. See *PARTNERSHIP*, 54d.

4. *Executor and surviving maker cannot be sued.* The executor of a deceased maker of a note, and the surviving maker, cannot be sued in the same action; *Poole v. McLeod*, 1 S. & M. 391. (This is now changed by statute.)

5. *Motion against attorney claiming a lien.* An attorney claiming a lien on money in the hands of the sheriff, is not a proper party defendant to a motion against the sheriff, to compel him to pay over the money; the sheriff may make the defence that the attorney has the lien so as to retain the fund in his hand to that extent; *Pugh v. Boyd*, 9 G. 326.

6. *Who are considered parties.* All persons are bound as parties to a judgment who have the right to contest the proceedings in the cause; to make defence; to adduce and cross-examine witnesses, and to appeal from the decision when an appeal lies; *Lipscomb v. Postell*, 9 G. 476.

7. *Husband and wife.* Generally, the husband is a necessary party to all suits affecting the separate property of the wife; *Winston v. McLendon*, 43 M. 254.

Partition.

See CHANCERY, sub-division Partition.

1. *Parties must have notice.* In making partition of an estate among heirs and devisees, notice must be given to all the parties interested, or they will not be bound; and so of a sale for a division; *Vick v. Mayor of Vicksburg*, 1 H. 379.

2. *Complainant must show title.* If the title of a party seeking partition be denied by the defendants, he should show his right to have a decree made in his favor; *Ingram v. War*, 5 S. & M. 746. And the title must be clear and undisputed; if it be denied or is suspicious, a court of equity will not grant relief until it is established at law; *Shearer v. Winston*, 4 G. 149.

3. *Effect of payment of rent as an estoppel in partition.* The fact that the defendant in a bill for partition, who was in possession and a half owner of the premises, paid rent for the other moiety to the complainant, supposing the latter had title, will not estop him, when sued in equity for rent and partition, from disputing complainant's title; *Id.*

4. *Report of commissioners to make partition.* By the Act of 1821 (H. C. 670, § 112), the Probate Court has power to appoint commissioners to make division of the land of an intestate among his heirs, "the metes and bounds of each heir's share to be ascertained" by them and reported to the court. Under this act, the commissioners reported that, "the three other heirs and H. for himself and Mrs. P. came before them and agreed to the following division: H. takes lots 2 and 5, for his share and Mrs. P.'s, and the others take the remainder;" *Held*, that the report was illegal; that Mrs. P.'s share could not thus be set off to H. by the commissioners and her title thereby diverted; and if the report were construed to mean that lots 2 and 5 to go to H. and Mrs. P. jointly, that then it was void in not ascertaining each one's share as required by the statute; *Willey v. Bonney*, 6 C. 710.

5. *Partition by parol.* A parol agreement between coparceners for the partition of lands held by them as such, when carried out by the parties taking possession in severalty, according to the agreement, is valid, and not within the statute of frauds; *Willey v. Bonney's Lessee*, 2 G. 644.

6. *Same.* And so a parol agreement, by which the parties to an action of ejectment, stipulated that judgment should go for the plaintiff for the whole of the premises in controversy, but that his title extended only to a part, and that defendant's title was good to the remainder, and that the parties would occupy the premises in severalty, according to their title as thus agreed to, if carried out by each party taking possession of the portions conceded to him, is in effect a settlement by the parties of their claim to the parts of land to which they are respectively entitled, and a parol partition of it, executed by possession in severalty, which it is well settled is valid and binding between the par-

ties; *City of Natchez v. Vandervelde*, 2 G. 706.

7. *Partition only by those in possession.* The general rule is, that partition can be made only between those in actual or constructive possession. Other claimants must establish their rights by suit, and obtain actual seisin before they are in a condition to demand partition. Hence, a mortgagor in possession is the proper party to divide the premises with his co-tenant, and when the partition has thus been made, the mortgage attaches to his moiety in severalty; *Price v. Crone*, 44 M. 571.

Partnership.

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I. Who are Partners, and Proof of the Partnership.

1. *Holding themselves out as partners.* Where persons conduct themselves before the world as partners, they will be so treated as to all credits given them by third persons, notwithstanding any private agreement or understanding between them, that they are not to be considered and held as partners in respect to debts contracted by either on account of the partnership business; *Perry v. Randolph*, 6 S. & M. 335.

2. *Sharing profits: Dormant partnership.* A dormant partner is liable for all the partnership debts contracted during the partnership, whether his connection with the firm be known or not to the creditor. His liability arises by operation of law, independent of his intention, and from the mere participation in the profits of the business, as the credit is manifestly given only to the ostensible partner; and it is based on a principle of justice to the community, as by his receipt of a portion of the profits, he takes from the creditors a part of the fund which is a proper security for the payment of their debts; *Lea v. Guice*, 13 S. & M. 656. See *post*, 10.

3. *Same.* An arrangement by which one party furnishes another money, and also goods for sale, and with this fund to buy cotton, the latter to have one fourth of the net proceeds, constitutes them partners in the enter-

prise *inter se*. It is not a simple agency; *Tharp v. Marsh*, 40 M. 158.

4. *Stipulation that there is no partnership as to debts.* Articles of agreement in the ordinary form of partnership articles, were drawn up in reference to making and keeping a race course; and it was stipulated that each party was to pay one-half the expense of constructing the course, and that they should share the profits equally, and further, that the agreement should not constitute them partners in contracting debts; *Held*, that this stipulation would not protect one partner from liability, for a debt lawfully contracted for the partnership by the other; *Perry v. Randolph*, 6 S. & M. 335. See *post*, 22 to 24, as to private limitations on powers of partners.

5. *Partners, as to realty.* Land purchased by partners (who are merchants), to which they take deeds in their individual names, is not personal property, unless it is essential to the objects and purposes of the partnership, or unless it appear from the contract of partnership that it was designed to constitute a part of the joint stock, and to be sold as such for the payment of debts, and the surplus divided between the partners.

And so, where the scope and object of a partnership is the acquisition only of land, and does not extend to its subsequent sale, or its use as partnership stock, the land acquired by the firm will be considered as real estate, which upon the death of one of the partners will go to his heirs and not to his executor; *Dilworth v. Mayfield*, 7 G. 40.

6. *Though only joint tenants as to the land, they may be partners in its use.* If the partnership agreement collaterally relate to land, and it constitutes them tenants in common, or joint tenants as to the land, this does not alter the main agreement, if it otherwise would constitute them partners. Hence, articles of agreement, which constitute the parties partners in reference to erecting and keeping up a race course, is not affected in this respect, by the fact that the articles constitute them only joint tenants in the land on which the course is located; *Perry v. Randolph*, 6 S. & M. 335.

6a. *Partners as to realty: Its disposition for debts.* When land is purchased with firm assets in the firm name, a court of equity, would regard it as personal assets for the payment of the firm debts, so far as might be necessary, and the residue would immediately resume its quality as realty. Such land on the death of one of the partners would descend to his heirs as co-tenants with the survivors, and the land would be regarded as realty at law. It would not be subject to execution under a judgment against the survivors alone, and could only be made liable for debts by a proceeding in the Probate Court, by the administrator of the deceased partner, or by proceeding in chancery; equity would at the instance of creditors condemn the whole land, as personal assets to the payment of partnership debts; *Scruggs v. Blair*, 44 M. 406. See *DOWER*, 5.

7. *Proof of partnership by conduct of parties.* When partnership articles are lost, proof of their contents may be made, and proof of the conduct of the parties is also admissible to show the nature, extent and terms of the copartnership, as it really existed; and hence, where one of the partners being sued on a debt contracted by the other, denies the partnership as to that debt, which was created for work and labor done, it may be shown that the defendant was present when the work was done, and gave directions concerning it; *Ib. Perry v. Randolph*, 6 S. & M. 335.

8. *Admissions of one partner as proof of a partnership.* In an action against one sought to be charged as a partner, the admissions of the alleged associate are not admissible to prove the existence of the partnership; but the partnership being shown, his admissions are competent to show that the transaction upon which the suit is founded, is a partnership matter; *Lea v. Guice*, 13 S. & M. 656; *S. P., Jameson v. Franklin*, 6 H. 376. See *post*, 17, 18, as to admission of partners.

9. *Proof as between partners.* As between the partners, the partnership must be proven by the production of the articles, or legally accounting for their absence; *Bonnafee v. Fenner*, 6 S. & M. 212.

II. Dormant Partners.

See *ante*, 2.

10. *Liability of secret partner.* Where a secret partnership is established, and it is proven that the transaction is on account of the partnership, the secret partner thereby becomes bound by it. Whether the contract was made by the ostensible partner in his own name, or in the partnership name, if it had one; and this is so, though the credit is given exclusively to the ostensible partner individually. This rule is founded on a principle of justice to the public, as the secret partner shares the profits, and to that extent deprives a creditor of a fund to which he has a right to look for payment; *Lea v. Guice*, 13 S. & M. 656.

11. *Same: Partnership in planting: Case in judgment.* In an action against an alleged secret partner, upon a note made by the ostensible partner in his own name, it was shown that the articles of partnership between them recited that they owned certain land, and slaves, and other property, which were to be cultivated, employed and used for their mutual benefit, under the management of the ostensible partner, and each sharing equally the necessary losses and the profits; *Held*, that these articles gave the managing partner a discretion as to the mode in which the partnership property should be managed, and authorized him to conduct the firm business, according to the customs and usages of those engaged in the occupation of planting; and as the partnership was secret, it was competent to prove what these customs and usages were, in order to bring the debt sued on within them; and that it was incompetent for the secret partner to show the customs of

planting partnerships in that portion of the country. And it having been shown that it was the custom and usage with planters to borrow money when needed for the purpose of planting, that power was held to be vested in the ostensible partner; *Ib.*

III. Powers of Partners to bind the Firm.

1. Power when Acting within Scope of Partnership.

12. *General rule on the subject.* A partner cannot bind the firm by an act clearly not within the partnership business; yet he has power to bind the firm in all parts of the business in which it is engaged, and in all transactions whether direct or incidental, appertaining to its business. And though the partner exceed the terms of the partnership, yet so far as third persons having business with it are concerned, and who are without notice that this power has been exceeded, the copartners are bound, if the transaction be such that the public may reasonably conclude to be embraced in the partnership business, or be incident or appropriate to such business according to the course and usage of carrying it on; *Heirn v. McCaughan*, 3 G. 17.

12a. *Same: Another statement of the rule.* One partner, by virtue of that relation, is constituted a general agent for his associates, as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged; *Faler v. Jordan*, 44 M. 283.

13. *Tort by partner.* The tort of one partner is considered the joint and several tort of all, wherever the wrongful act complained of is connected with the business of the firm, or is incidental to it, as the business is carried on; and the partner who has no direct participation in the tort of his associate, is chargeable *civilliter* to the same extent (including exemplary damages) as the real actor is bound; *Heirn v. McCaughan*, 3 G. 17.

14. *When bound criminally.* Under art. 9, p. 199, of the Rev. Code of 1857, a partner is liable to indictment for the sale of vinous and spirituous liquors by his associate, without his knowledge, to an intoxicated person; *Whitton & Ford's Case*, 8 G. 379.

15. *Power to receive notice generally.* Notice to one partner in relation to a partnership transaction is notice to all. Hence, where an order was drawn on two attorneys in partnership, assigning a part of a judgment in their hands for collection, to another, and the assignee gave notice of the order to one partner, it was held that the other partner was bound by it, though he afterwards, without actual notice of the assignment, purchased the judgment from his client for a valuable consideration; *Fitch v. Stamps*, 6 H. 487.

16. *Notice of protest.* Notice of non-payment and protest given to one partner is notice to all, and if one be dead, notice to the survivor will bind the representatives of the

deceased partner, though the holder knew of his death; *Dabney v. Sedger*, 4 S. & M. 749.

See BILLS OF EXCHANGE, 87.

17. *Admissions of partner.* Where both parties are served with garnishee process, the admission of a firm indebtedness in the answer of one, will justify a judgment against both; *Anderson v. Wanzer*, 5 H. 587. And if a partnership be admitted or established, an acknowledgment made by one of the partners should go to the jury as evidence against the other; but if the latter show that the partnership was dissolved when the admission was made, it will not be binding on him, and the jury should be so instructed; *Jameon v. Franklin*, 6 H. 376. All the statements, representations and admissions made by a partner, in reference to a firm transaction, are of the same effect as if made by all the members of the partnership; *Faler v. Jordan*, 44 M. 283. That the admissions of one are not admissible to prove the partnership, see *ante*, 8, and *post*, 25.

18. *Admissions after dissolution.* But the declarations of one partner, though made after the dissolution of the firm, in relation to facts which took place during the existence of the copartnership in the regular course of the business of the firm, and not creating a new liability, are admissible against his associate. And especially is this so where the declarations are made by a partner who is also a party to the suit; *Curry et al. v. Kurtz*, 4 G. 24.

19. *Power of partners to make sealed instruments.* A partner has no right to execute and acknowledge a deed in the name of the firm, without the previous consent or subsequent ratification of his associates; and if a deed, purporting to be executed by a firm, is acknowledged by one of the partners, its execution is not properly proven, unless the authority of such partner to execute it be shown *aliunde*; *Shirley v. Pearne*, 4 G. 653 (decided in 1857). Deeds or bonds so made by one partner, his authority not being shown, are regarded as absolutely void, as to the absent or non-assenting partners, but valid as to those who execute them; *Doe v. Tupper*, 4 S. & M. 261 (decided in 1845). Whether a partner has a right to execute a bond in the name of the firm, in a judicial proceeding, in which the firm are parties. *Quære?* But if such power were conceded, it does not extend to the execution of a forthcoming bond, which is to become the foundation of a judgment, without further notice to the partner, who did not sign it; and such a bond is void as to him, and the statutory judgment on it is void also; and all sales made under it of his separate property are void. And such a judgment and bond being void may be attacked collaterally at any time. And if such a bond could become good by acquiescence, it would not be on the ground that it was voidable merely, but on the ground that such acquiescence was evidence of an original special authority, conferred to execute it; *Doe v. Tupper, supra*.

20. *Same: Attachment bond.* But in *Wallis v. Wallace*, 6 H. 254 (decided in 1842), an attachment bond was executed by one partner alone, and in his own name; and the court say, in answer to the objection that all the partners did not execute it, "We think it is sufficient that it is signed by one of the members of the firm, who was acting as the agent of the other partners. The fact is apparent from the whole record, and it surely cannot be denied that one partner can bind his firm by deed in all matters which concern the prosecution of suits in which they are interested. The bond is obligatory upon the firm, as much so as if signed by the several members composing it. The law makes each partner the agent of the others in all matters coming necessarily within the scope of the partnership. This proceeding was peculiarly so. The law having made him agent, his signature affixed to the bond, binds him and the other partners as much as if he had said in express terms, that his signature was for himself and his partners, naming them;" *Wallis v. Wallace*, 6 H. 254.

21. *Power to sign individual names of partners.* It is no objection to the validity of a note made by a partner in the course of the partnership business, and for the benefit of the firm, that he signed it with the individual names of the members instead of the firm name; *Holden v. Bloxum*, 6 G. 381.

21a. *Power to sign firm name to negotiable paper.* The power of each partner to put the firm name to negotiable paper, is so essential to the conducting of its business, that it is implied from the very existence of the firm; and stipulations among the partners, restricting the right to one or more, will not affect third parties without notice. Persons dealing with a partner in the firm name have a right to presume he has the power. And whenever the firm name appears on commercial paper, the firm is *prima facie* bound, and the *onus* is on the firm and each member to show that it or he is not liable; *Faler v. Jordan*, 44 M. 283.

21b. *Same: Case in judgment.* F. and M. were partners, doing business at an inland village in this State, as general merchants, buying and selling goods, merchandise and groceries. M. signed the firm name to a note for borrowed money, but it was not known what he did with the money: *Held*, that the firm was liable; *Ib.*

2. Private Limitation on Power of a Partner.

22. *When the act is within apparent scope of partnership.* The partners are bound by the act of their associate, though it be unauthorized, if it be within the apparent scope of the partnership, and such as the public may reasonably conclude was within the partnership business, or incident or appropriate to it; *Heirn v. McCaughan*, 3 G. 17 (see *ante*, 12). And a stipulation in the articles of partnership, that the members are not partners as to the contracting of debts, does not bind third parties treating with a partner, within the apparent scope of the partnership,

if such parties have no notice of the limitation or restriction; *Perry v. Randolph*, 6 S. & M. 333 (see *ante*, 4).

23. *Where the act is done against the express agreement of the parties.* The endorsement by one member (made in due course of trade, as in the payment of a partnership debt), of a note payable to the firm, is binding on the firm, though made against the express agreement of the partners, to make another application of the note, if the endorser have no notice of this agreement; *Com'l Bank of Manchester v. Lewis*, 13 S. & M. 226. And if the note so endorsed, by agreement with a retired partner, was to be applied to the debts of the firm, contracted whilst he was a member, the rule would be the same, as the retired partner would have but an equity in the note, which he could not set up against a *bona fide* endorsee for value and without notice, holding the legal title. The statute allowing equities between maker and payee, as against an innocent endorsee, does not apply in such a case, as the retired partner was no party to the note. And the taking of the note in payment of an antecedent debt, or the receiving of it as collateral security for such debt, after payment of the endorsed note and the credit of its proceeds on the debt, constitute the endorsee a holder for value (citing *Fellows v. Harris*, 12 S. & M. 462); *Ib.*

24. *When third parties have notice of the restriction.* But the restriction will have full force to exempt the other partners from liability, where it is known to the party contracting with the partner violating it; and this is so, though the partnership derive a benefit from the contract. Thus, where C. and H. were partners, and C. was to furnish the capital and H. the labor, and W., who knew of this arrangement, agreed with H. to perform labor for the use and benefit of the partnership, it was held, that C. was not liable for the labor so performed; *Pollock v. Williams*, 42 M. 88.

3. Acts done outside the Scope of the Partnership.

25. *Firm not bound by such acts.* A partnership is not bound by the act of the partner, though done in its name, in a transaction not within the scope of the partnership, unless the other partner assented to it; *Goodman v. White*, 3 C. 163; *Goode v. Linecum*, 1 H. 281. And in order to bind the firm for goods purchased by a member and not within the scope of his business, it must be proven that they were furnished for the benefit of the firm, or that the other members assented to the purchase. And the statement of the partner purchasing, made at the time of the purchase, that they were for the benefit of the firm, is not admissible in evidence to show that fact; *Goode v. Linecum*, 1 H. 281. As to admissions of partner, see *ante*, 17, 18.

26. *Same: Case in judgment.* G. and M. were partners in Memphis, in the warehouse and commission business, and plaintiff handed to M. some uncurrent money to be sold, and

the proceeds applied to plaintiff's credit on the books of the firm. M. used the money and made no entry of the transaction on the firm books, and G. had no knowledge of the transaction, and was living at the time fifty miles distant: *Held*, that G. was not liable; *Goodman v. White*, 3 C. 163.

27. *Partner's agency extends only to the firm business.* In all matters pertaining to the partnership business, each partner is the agent of the firm, and may act for the firm, in their common name, without the consent of his associates. But this agency does not extend to transactions concluded by one member in the firm name, for third persons, and unconnected with the ordinary business of the association; and hence, one partner has no right to execute, in the firm name, a power conferred upon all the members of the firm individually, by a stranger; *Cummings v. Parish*, 10 G. 412.

28. *Same: Case in judgment.* A deed in trust, made to secure the indebtedness of the grantor to a partnership, provided that, in a named contingency, "the said D. B. & J. P., partners, under the name and style of B. & P., parties of the third part, are hereby empowered to appoint a successor" to the trustee, "with full power to carry out the provisions of the trust." The deed in trust was executed by B. & P., as parties of the third part, in their individual names. Afterwards, one of the firm, in the firm name, appointed a successor to the original trustee: *Held*, that the appointment was invalid, it not having been made by both partners (Handy, J., dissented); *Ib.*

4. Proof as to Scope of Partnership, and as to debt being without it.

29. *As to admissions of partners to show the act within the partnership*, see *ante*, 8, 25.

30. *As to proof of custom and usage, to show scope of partnership*, see *ante*, 11.

31. *Contracts in firm name pre-umed legal.* All debts contracted in the partnership name, are to be considered as partnership debts, until the contrary appears; *Mayson v. Beazley*, 5 C. 106; *Langan v. Hewett*, 13 S. & M. 122; *Robinson v. Aldridge*, 5 G. 352. Hence, a partner denying his liability on a note signed by his associate, in the firm name, must show that it was done without the scope of the partnership; *Langan v. Hewett*, *supra*. And this presumption exists to the extent that if debts so contracted mature after the death of a partner, and the survivor have possession of the evidences of the debts, it will be further presumed, in a proceeding against the survivor by the administrator of the deceased partner, that the survivor paid them; *Mayson v. Beazley*, 5 C. 106.

5. Ratification of Unauthorized Acts.

32. *Onus of proof.* When a contract is shown to be outside of the scope of the partnership, and the consent or ratification of the partners is relied on to bind them, such con-

sent or ratification must be affirmatively shown; *Robinson v. Aldridge*, 5 G. 352.

33. *Case of ratification.* If a partner, after a note has been signed by his associate, in the firm name, with a knowledge of all the facts, expressly approve the act, he cannot afterwards object that he is not bound, because the note was given outside of the firm business; *Langan v. Hewett*, 13 S. & M. 122.

IV. The Use of Firm Name as Surety for Others.

34. *Such use is illegal.* One partner has no power to sign the partnership name, as surety for another, without the consent of his associates, and if he do so, it will not be binding on the others, if the payee have notice that they are sureties. The appending to the partnership signature to a note, of the word "sureties," where there are other joint makers, is such notice; *Andrews v. Planter's Bk.* 7 S. & M. 192.

35. *Onus to show assent: Case in judgment.* And it is the duty of such party seeking to hold them liable, to show that they assented; this may be done by circumstances; but it was held that, where such signing was done by the active business partner, the other being a farmer and residing in the country, though visiting the place of the firm's business every day, it was not sufficient proof of his assent, to show that the business partner was in the habit of signing the firm's name as sureties to notes in bank, and that notices that such notes were about to mature were frequently left at their place of business, it not appearing that the other partner had any actual knowledge of the habit, and it being too much to presume that he had such knowledge from the circumstances above mentioned; *Ib.*

36. *Limitation of foregoing rule.* One partner has no power, without the assent of his associates, to sign the firm's name as surety for another, as was held in *Andrews v. Planter's Bank* (see *ante*, 34, 35), which case is confirmed. But this rule has application where such signing is about a matter in which the firm has no interest, and which is really, and not merely in form, a suretyship; and it was held not to apply, where the firm owing a debt sold property, and took the note of the purchaser, payable to one of their creditors, and the acting partner signed the firm's name as surety to the note, and delivered it thus signed to the creditor in payment of their debt. And the rule, which is recognized, that one partner cannot, in violation of known stipulation in the articles of partnership, bind the firm even for money, which is applied in payment of partnership debts, does not militate against this power; *Langan v. Hewett*, 13 S. & M. 122.

V. Use of Firm's Assets and Firm's Name to Pay a Separate Debt of a Partner.

37. *Such application is illegal.* It is well settled that any act done by one partner, in regard to the property or contracts of the

partnership beyond the scope and objects of the association, do not bind the other partners, unless they have given their assent to it. Therefore, when one partner pays his individual debt with the property of the firm, it is an illegal conversion of the fund, and the creditor has no more title to it than the partner who sold it had; and this is so, it seems, whether the creditor had notice or not, that the property taken by him in payment of the separate debt of one partner belonged to the firm; *Minor v. Gaw*, 11 S. & M. 322.

38. *Same*. Hence, also, if a debtor of the partnership settle his debt with one of the partners, by setting off against it an individual indebtedness of that partner to him, the payment is not binding on the partnership; *Ib*.

39. *Same*. If a creditor of an individual partner, being ignorant of the fact, that his debtor is a member of a partnership, employ him to furnish materials and do work for him, and such work and furnishing be really a partnership matter; still, the creditor cannot set off, even with the consent of the debtor copartner, his debt on the debtor partner, against the claim of the partnership on him for the work and materials. The rule is that one partner cannot, without the consent of the other, apply the partnership securities to his individual debts, even though the separate creditor had no knowledge when he took the property, that it belonged to the partnership (citing *Minor v. Graw*, ante, 37, 38); *Buck v. Moseley*, 2 C. 170. And a surviving partner has no such power *Scott v. Tupper*, 8 S. & M. 280.

40. *Giving partnership note for separate debt*. A partner has no right to bind the firm by executing a note in their name, in discharge of his private debt; *Robinson v. Aldridge*, 5 G. 352.

VI. Liability of Partnership Property for Separate Debt of a Partner.

41. *The legal interest of partner seizable: How execution levied*. The legal interest of a copartner in the partnership property, is his proportionate share of the property belonging to the partnership, and not his proportionate share of what remains after a settlement of the partnership affairs; and it is this legal interest which the sheriff seizes and sells, under an execution or attachment against one copartner for his individual debt; but the solvent partner may at any time, whilst the separate creditor is pursuing his remedy against the debtor copartner, through the interposition of a court of equity, upon proper showing, limit such creditor to the actual interest of the debtor copartner in the partnership, after the settlement of the partnership affairs. The sheriff, in making the levy, must seize the whole partnership property, if necessary to pay the debt, and not the undivided and unascertained interest of the debtor partner; and it is his duty after making the levy, to remain in the exclusive possession of the whole property, until it can

be disposed of according to law. The effect of the levy is to dissolve the partnership, and to make the sheriff and the other partners tenants in common; *Sanders v. Young*, 2 G. 111.

42. *Interest of partner seizable under execution*. The interest of a copartner in the partnership property is not his *pro rata* share of any particular portion of the partnership effects, but his due proportion of the balance of assets remaining after a general account, embracing the whole of the partnership business, has been stated between him and his associates; and it is this interest which is the subject of seizure and sale under a separate execution against him, and which the purchaser at sheriff's sale acquires. The sheriff in levying the execution seizes that partner's interest alone, but in making the levy, he takes into possession all of the partnership property, and sells the debtor's interest in the whole of it. He cannot sever from the whole any particular portion of it, and sell that portion as the property of the debtor partner. And if a part of the property of the partnership be levied on under an execution against one partner, and there be a trial under the statute of a claimant's right to it, it being the duty of the plaintiff in execution to show the liability of the property to the execution, he will for the above reasons fail—the levy cannot be made on a part. And it was declared that *Sanders v. Young* (see ante, 41) was not inconsistent with this; and *Mobley v. Lonbat*, post, 43, and *Bowman v. Riley*, post, 48, were cited in support of it; *Atwood v. Meredith*, 8 G. 635.

43. *Same: Case in judgment*. An attachment was taken out against two members of a firm composed of three persons, upon a debt due by the firm, and a debtor of the firm was summoned as garnishee, who answered, admitting an indebtedness to the firm: *Held*, that judgment on the attachment could be rendered only against the two members sued, and then only against them as individuals, and that it did not bind the other not sued, and that it could only be levied on the partnership effects in the same way as judgments for individual and separate debts could be levied; and that it not appearing what was the separate individual interest of the two partners sued, in the debt garnisheed, that no judgment could be rendered against the garnishee at all; *Mobley v. Lonbat*, 7 H. 318.

VII. Liability of Separate Estate of Partners for Firm Debts.

44. *Separate estate liable*. Each partner's separate property is liable to the payment of the partnership debts, but it cannot be subjected unless the creditor obtain a judgment against that partner whose separate estate he seeks to subject in that way. Hence, where it is shown in a trial of the right of property levied on under execution against a firm, that the claimant was a partner, but there is no judgment against him, it is no reason for sub-

jecting his property to the payment of the judgment against the others; *Strong v. Hines*, 6 G. 201.

46. *Same: Distribution of an insolvent partner's separate estate.* Under the statute (H. & H. 409, § 50) which directs that when a decedent's estate is insolvent, the assets shall be distributed among all his creditors *pro rata*, and under another statute (H. & H. 595) which makes the contracts of partners joint and several, the rule is here (contrary to the English rule), that when the estate of a person who owes both individual and partnership debts is declared insolvent, his individual estate shall be distributed *pro rata* among his partnership and his separate creditors alike (Sharkey, C. J., dissented); *Dahlgren v. Duncan*, 7 S. & M. 280.

47. *Same.* If in such a case, however, a partnership creditor receive any payment from the other partners, the insolvent estate will be entitled to the benefit of it; and so if the creditor looks alone to the separate estate of the insolvent, the representatives of that estate will be substituted to the creditor's rights as to the other partners; *Id.*

This case is overruled, and the English rule recognised in a case decided at October term, 1871.

VIII. Interest of Partners in Partnership Property.

48. *What is the interest?* The interest of a co-partner is not his *pro rata* share of any particular portion of the partnership property, but his due proportion of the balance of the assets after a general account, embracing the whole partnership business, has been stated between him and his associates; and, therefore, a decree dividing the proceeds of a portion of the partnership property between the copartners, without a general account having been taken, is erroneous; *Bouman v. O'Reilly*, 2 G. 261; *S. P. Atwood v. Meredith*, ante. 42. See also ante, 41.

IX. The Lien of Partner and Creditors.

49. *Extent of partner's lien.* Each partner has a specific lien on all the partnership property, both real and personal, for the payment of any balance that may be due him on a settlement of the partnership accounts; *Dillworth v. Mayfield*, 7 G. 40. So each partner has a lien on the partnership effects for the discharge of all the debts due by the partnership; *Freeman v. Stewart*, 41 M. 138.

50. *Lost by a sale of his interest.* If a copartner, upon the dissolution of the firm, sell his entire interest in the partnership to a third person, who agrees to indemnify him against the partnership debts, he thereby parts with his whole interest in the assets, and he also loses his lien on them for the payment of the partnership debts, although his vendee has failed to comply with his agreement to pay them; *Andrews v. Mann*, 2 G. 322.

51. *When lien does not attach to property partly bought with the firm assets.* If one of several copartners purchase a slave in his

own name, and with his own means, except about one-sixth of the price, which was paid out of the partnership assets, and if he permit the slave to be used about the firm business and under their management and control, without any charge against the firm therefor, this slave will not be regarded as the property of the firm; nor will the other partner have a lien on the slave for the repayment of the firm assets used in the purchase, if it appear that the several partners were in the habit of using the firm assets for their own separate use without objection; *Cubaniss v. Clark*, 2 G. 423.

52. *Lien of creditors.* The creditors of a firm have no such lien as that of the partners. They have something approaching a lien, of which they can avail themselves in equity, with the assent of a partner, but not otherwise. And it is only in case of a dissolution by the death, or bankruptcy of a partner, that the firm creditors have this *quasi* lien on the partnership effects; and then only as a derivative or subordinate right, under and through the lien of the solvent or surviving partner; *Freeman v. Stewart*, 41 M. 138.

X. Remedies between Partners.

53. *One partner cannot sue another at law in reference to partnership matters.* As a general rule, one partner cannot sue another at law for a sum of money due on account of the partnership, unless it be an ascertained balance of a separate account, or a general balance of all accounts; *Bonnafre v. Fenner*, 6 S. & M. 212; *Murdock v. Martin*, 12 S. & M. 660; *Thornton v. McNeill*, 1 C. 369; *Sturges v. Swift*, 3 G. 239; *Anderson v. Robertson*, 3 G. 241; *Hunt v. Morris*, 44 M. 314. The rule applies to suits by a surviving partner against the administrator of a deceased partner; *White v. Waide*, W. 263.

54. *Exceptions to the rule.* But this rule does not preclude a partner from suing on a note made payable to him by the other partner; that is, a separation of that sum from the partnership matters, and an acknowledgment of that much as due him, and this is so when the note is payable to the partner for the use of the firm; *Bonnafree v. Fenner*, 6 S. & M. 212; *Anderson v. Robertson*, 3 G. 241; *Sturges v. Swift*, 3 G. 239. And to a suit on such a note, though given on a partial settlement of partnership accounts, the defendant cannot set off the written acknowledgment of the plaintiff, that since it was given he had received a sum of money on partnership account; *Sturges v. Swift*, supra; nor an unadjusted indebtedness of the plaintiff to the firm; *Anderson v. Robertson*, supra. Wherever an actual separation of the partnership effects is made, so that certain specific articles are assigned as the separate share of each partner, an action at law will lie for either party. But if there is only an agreement to divide certain articles, and no actual division, they remain joint assets, and there is no remedy at law; *Hunt v. Morris*, 44 M. 314.

54a. Exemption when the items are few. A court of equity will not entertain a bill for an account even between partners, when the items, both of debit and credit, are few, and for fixed and definite sums, and easily ascertained in an action at law, by the verdict of a jury; *Lesley v. Rosson*, 10 G. 368.

54b. Proof excluded at law where the debt sued for is a partnership account. Where there is proof in an action at law, showing that the indebtedness sued for is a partnership account between plaintiff and defendant, it will be proper to exclude any evidence from the jury tending to show its correctness, until proof be offered to show that it is not a partnership account; *Murdock v. Martin*, 12 S. & M. 660.

54c Action for breach of partnership agreement. An action at law, however, can be maintained by one partner against his associate for damages occasioned by a breach of the articles of partnership. Hence, where the declaration showed that plaintiff and defendant were partners in farming—the defendant to furnish the land, team, gear &c., and the plaintiff to work as a laborer, and to receive one-sixth of the proceeds, and it was averred as a breach, that defendant, after plaintiff had worked two months, dismissed him, and would not allow him to carry out the contract; it was held that a demurrer to it would not lie, even if it were conceded that the parties were partners; *Terry v. Carter*, 3 C. 168.

54d. Where two firms have a common partner. Where the same person is a partner in two distinct firms, no contract made between the firms can be enforced at law; resort must be had to a court of equity; *Calvit v. Markham*, 3 H. 343; *Chapman v. Evans*, 41 M. 113. *Sed vide Morris v. Holloway*, in PARTIES, 3, and in BILLS OF EXCHANGE, &c., 181.

55. Specific performance of articles of partnership. Generally it is necessary, to enable complainant to procure a decree for a specific performance of articles of partnership, that the contract should be for carrying on the business for a definite time, for if it be in the power of the defendant to render the decree abortive by an immediate dissolution, the court will not interfere. But this rule does not prevent a decree for specific performance, in a case of a partnership of indefinite duration, so far as to vest in the complainant a legal title to his share in the partnership property; *Whitworth v. Harris*, 40 M. 481.

56. Same: Case in judgment. A bill for a specific performance of articles of partnership, showed that by the joint exertions of both parties in raising subscriptions to build a college on the defendant's land, the college had been erected, and that the defendant had agreed to convey to complainant a half interest in the land: *Held*, that the complainant was entitled to a decree for specific performance of the agreement, though it was for an indefinite period, to the extent of having the half interest conveyed; *Ib*.

56a. Injunction against partner for misconduct. §c. Complainant and defendant formed a partnership for the purpose of sawing lumber from timber to be taken from the land of complainant, it being the object of the complainant to convert his timber into lumber. The defendant was the managing partner, and he ceased to procure the timber from complainant's land, but obtained it elsewhere and from others: *Held*, that this was using the mill in an improper manner, and an injunction would be granted against such use; *New v. Wright*, 44 M. 202.

56b Same: Appointment of a receiver, dissolution of the partnership. The appointment of a receiver, at the instance of one of the partners, has the effect to put an end to the partnership, and is always a delicate duty. To justify such action, on account of the misconduct, abuse, or ill-faith of one of the partners, it is not sufficient to show merely that there is a temptation to such misconduct, &c., but it must also be shown by overt acts, or gross departures from duty, that the danger is imminent, or the injury already accomplished; *Ib*.

56c Dissolution for want of harmony. §c.: *Receiver.* Where partners in any kind of a firm are engaged with each other in controversial suits in relation to the business and management of the firm, and it is apparent that there can be no agreement between them for its continuance, a receiver will be appointed; *Ib*.

57. Statute of limitations between partners. The statute of limitations will run against a bill for a settlement of partnership accounts. It will also bar a bill by a partner to subject to sale partnership property for the payment of a partnership debt, which is itself barred by the statute; for in that case, the complainant has no more rights than the creditor whose debt is barred. And it will also run against the claim of a partner to recover as partnership assets, property purchased by one of the partners in his own name, with the partnership effects, even though he afterwards acknowledged in writing that he purchased for the partnership; *Prewell v. Buckingham*, 6 C. 92.

See LIMITATION OF ACTIONS, 188, 189.

58. Where partnership considered as still existing after dissolution. Till an account has been settled and the business closed, by a sale of the partnership property, a court of equity will, for certain purposes, regard the partnership as still in existence, and will require the survivor to account for whatever profits he may have made by the use of the property or capital of the partnership; *Mayson v. Beazley*, 5 C. 106.

59. Mistake in settlement: Relief. Where partners, upon the dissolution of the firm, have had a settlement, and afterwards one brings a bill for a settlement of matters not embraced in, but expressly excluded from, the first settlement, he will be entitled to relief, if he show clearly that the subject matter of the bill was not embraced in the former

settlement, but excluded from it; *Thorn'ou v. McNeill*, 1 C. 369.

XI. Settlement of Partnership Accounts.

60. *Case, where partners were held equal in gains, &c.* Where two persons commenced living together and planting in partnership, with nearly equal capital furnished by each, and the subsequent additions to the capital furnished by each, were not greatly disproportionate, and the business continued through nearly fourteen years, and until the death of one, without any division of the profits, each party was held to be entitled to an equal share in the profits, and in all the property, real and personal, purchased by either, and used in the partnership, whether bought in their individual or joint names, notwithstanding it may be shown in the evidence, that they used separate marks for cattle on the plantation, and that each gave in to the assessor, for taxation, a separate list of slaves on the plantation; *Quine v. Quine*, 9 S. & M. 155.

61. *Agreement to take by survivorship.* It was also shown, that the two persons thus circumstanced, frequently, each of them, spoke of a wish or agreement, that, upon the death of the one, the other should have all the property by survivorship: *Held*, that their conversation was evidence rather of an agreement in the contemplation of the parties, and not of one consummated, and that this view was strengthened by the survivor applying for letters of administration on the other's estate; *Ib.*

62. *Books, evidence in taking an account.* The books of a partnership, contained by the survivor, are the best evidence, where an account is sought against the survivor; *Mayson v. Beazley*, 5 C. 106.

63. *How profits made by survivor, estimated.* The profits made by the survivor by use of the partnership property, belong to the partnership, but in estimating them, the survivor is entitled to be credited with the losses arising from bad debts. He will be accountable only for what he has actually made, and not for what he ought to have made under a more judicious management; *Ib.*

64. *Survivor not chargeable with uncollected debts.* And in stating the account, the survivor is not to be charged with uncollected debts as money, but if they should afterwards be collected, the money arising therefrom, is to be divided; *Ib.*

65. *Survivor entitled to expense of taking care of the property.* The survivor is also entitled to be credited with whatever sums he may have paid out, which were necessary for the recovery, protection and safe keeping of the partnership property; *Ib.*

66. *Entitled to cost of property supplied and used in making profits.* And if he has supplied property, as a boiler to a steam engine, he is entitled to the cost of it, where he has been made to account for the profits made in using it; or, at all events, he is entitled, where there has been a sale, concurred in by all parties, of the engine and boiler in

gross, to have a credit for whatever sum the boiler adds to the price in the sale; *Ib.*

67. *Sale by survivor and representatives of deceased partner.* If the survivor, with the heirs of the deceased, make a sale of the partnership property, he will not be liable for any loss which may occur from the subsequent insolvency of the securities which he has taken for the purchase money, if they were good when taken; *Ib.*

XII. Surviving Partners.

68. *Death is dissolution: Power of survivor over partnership property.* By the death of a partner, the firm is dissolved; the legal title to the property survives to the survivor, or enable him to pay debts; but, as to the beneficial interest in it the survivor and the legal representatives of the deceased partner, are tenants in common; *Mayson v. Beazley*, 5 C. 106.

The survivor has the right to sell the partnership property for partnership purposes; *Stewart v. Buckhalter*, 6 C. 396. He may transfer the assets for the payment of the debts of the firm, but he cannot apply them to his own debts; *Scott v. Tupper*, 8 S. & M. 280. The legal title to the choses in action of the firm, is in the surviving partner, and he may apply them to the debts of the firm, in any manner he may see proper, without the consent of the personal representatives of the deceased partner; but the power of disposition to pay debts, extends only to the payment of such debts as were contracted by the firm before the dissolution, and does not extend to new contracts made by the survivor; *Bank of Port Gibson v. Baugh*, 9 S. & M. 290.

69. *Same: Power to mortgage and to carry on business, &c.* A surviving partner has no power to carry on the business of the firm, nor to contract new debts, nor even to borrow money to pay the firm debts. All new contracts made by him, are binding on him alone, even though he applies the proceeds to the partnership debts. In such case, he may become the creditor of the firm, in the settlement of the partnership accounts, but this does not give the party with whom he contracts, any such rights. Hence, a mortgage, executed on the partnership property, by the surviving partner, to secure a loan of money, which he applied to the partnership debts, is not binding on the interest of the deceased partner. Whether such a power, if conferred by the articles of partnership, would be valid; *Quære? Ib.*

70. *Profits made by survivor belong to firm.* But if he do actually carry on the business with the partnership property, the profits will belong to the firm; *Mayson v. Beazley*, 5 C. 106. See *ante*, 58.

71. *As to mode of accounting by surviving partner.* see *ante*, 62 to 67.

72. *Enforcing judgment.* A judgment in favor of a surviving partner, can be enforced only in his name; or, if he be dead, then in the name of his administrator. After his death, the administrator of the partner who

first died, has no right to have it revived in his name; *Copes v. Fultz*, 1 S. & M. 623.

72a. *No executor de son tort, where there is a survivor.* An intermeddler with partnership assets, after the death of one partner, is liable to the survivor, and is not an executor *de son tort*, of the deceased partner; *Hunt v. Drune*, 3 G. 243.

XIII. Bankruptcy of Partners.

72b. *As to this*, see BANKRUPTCY, sub-division Bankruptcy of Partners, 23, *et seq.*

XIV. Remedies of Third Persons against Partners.

73. *Contracts joint and several, and the partners may be sued jointly or separately.* By statute, in this State, all contracts of partners are joint and several; "and they may be sued jointly, and in that case, a discontinuance may be entered as to one not found; *Lyons v. Jackson*, 1 H. 474; or one or more may be sued separately; *Morris v. Hillery*, 7 H. 61; *Keerl v. Bridges*, 10 S. & M. 612; *Nutt v. Hunt*, 4 S. & M. 702. S. P., as to their contracts being joint and several; *Dahlgreen v. Duncan*, for which see *ante*, 46.

74. *When they must be sued jointly.* But where they are makers of an endorsed note or bill, then, by statute, all resident parties, including partners, must be sued jointly in the same action. In such an action, if one sued as a partner deny the partnership under oath, and the plaintiff fail to prove the partnership as to him, and the other by pleading admit partnership, judgment may be rendered in his favor and against the other defendants; *Fairchild v. The Grand Gulf Bank*, 5 H. 597.

75. *Service of writ on partners.* The service of the writ on one partner, is no service on the others; *Pilman v. Planters' Bank*, 1 H. 57; *Demoss v. Brewster*, 4 S. & M. 661; *Fuqua v. Tindall*, 11 S. & M. 465. And if the return be "executed on A. & Co.," the firm of the defendants, it is not good as to any,—it not being good as to all, and it being uncertain on which the service was made; *Demoss v. Brewster*, *supra*; *Mitchell v. Greenwald*, 43, 167. And a judgment on a forthcoming bond, executed in the name of the firm, by one partner, is void as to the partner who did not execute it, and it is no notice to him, so as to conclude him from moving to quash the bond, after the return term; *Doe v. Tupper*, 4 S. & M. 261, and *ante*, 19. But where both partners are served with garnishee process, one may answer for both; *Anderson v. Wauzer*, 5 H. 587.

See BILL OF DISCOVERY, 17.

76. *Confession of judgment and cognovit by partners.* One partner has no right to bind his associate, by a warrant of attorney, to confess a judgment or *cognovit actionem*; but, if it appear from the record, that it was proven that the *cognovit* was executed by all, and process was served on all, then a confes-

sion on the *cognovit* by one will be good as to all. And a statement in the record that a *cognovit*, which was signed in the firm name by one of the partners, was proved to be executed by all the defendants, means that all the partners who were served with process assented to its execution; *Hull v. Garner*, 2 G. 145.

77. *Plea of denial of partnership.* If one be sued as a partner on any contract alleged to be a partnership contract, the partnership is admitted, if he do not deny it under oath; *Jameson v. Franklin*, 6 H. 376; *Nutt v. Hunt*, 4 S. & M. 702; *Cook v. Martin*, 5 S. & M. 379. But if he deny the execution of the note sued on, it is equivalent to denying that he is a partner; *Fairchild v. Grand Gulf Bank*, 5 H. 597.

78. *When non est factum not necessary.* Under the Act of 1824, a person sued as a partner on a note signed in the firm name, and which name does not disclose that the defendant was a maker, need not deny under oath that he was a partner. The plaintiff will be bound to prove it if he plead the general issue not sworn to; *Baughan v. Graham*, 1 H. 220. The rule, however, is different now.

79. *Remedy where one partner is dead.* At law the joint creditors of a firm can, after the death of one, proceed only against the survivor to subject the partnership effects. The creditors have no remedy against the separate estate of the deceased partner except in equity, and the remedy in equity is only against the separate estate, the creditors' remedy being ample at law to reach the partnership effects by suit against the surviving partner. A bill cannot, therefore, be maintained in equity against the surviving partner to enforce the collection of a firm debt, not reduced to judgment out of the real estate of the partnership. And it seems now, since our statute allows suits to be brought at law against the administrator of a deceased partner, that the jurisdiction of a court of equity in that respect is very much limited; *Freeman v. Stewart*, 41 M. 138.

80. *When part may be omitted as defendants in equity.* When a partnership consist of a great number of persons, a part may be omitted as defendants to a bill in equity against the partnership.

See CHANCERY, sub-division Parties.

81. *As to forthcoming bond executed by a partner*, see *ante* 19, 22. As to garnishment against partners, see GARNISHMENT, 41, 42c.

XV. Miscellaneous.

82. *Partner giving his note for firm debt: Effect as payment.* Where two of three partners give their note for a partnership debt, existing in an open account, it will be considered a payment of the debt, if it appear that it was the intention of the creditors to receive the note in absolute extinguishment of the debt, and that it was the agreement, that the makers of that note were to be accepted as the sole debtors; otherwise it will

be no payment; and this is a question of fact for the jury; *Keerl v. Bridgers*, 10 S. & M. 612.

83. *As to who is to be considered a bona fide holder for value of a partnership security, so as to cut out latent equities, see ante, 23.*

83a. *Partners as witnesses: Where firm is interested.* A partner cannot by any act of his, or his associates, so far divest himself of his interest in the partnership, as to make him a competent witness in a matter relating to the partnership business, whilst he was a member; *Collins v. Flowers*, 1 H. 26. He is not competent for his copartner, unless they mutually execute general releases to each other; *Scott v. Watkins*, 2 S. & M. 255. He is a competent witness, if not sued in that character, against his copartners, and is competent to establish the copartnership when denied; and it was said, that *Collins v. Flowers* and *Scott v. Watkins*, *supra*, were rulings in relation to the competency of a partner as a witness for his associates; *Lake v. Munford*, 4 S. & M. 312. One partner is not a competent witness for another, when the latter is sued on a partnership liability; nor is he competent, having made the contract as partner, to disprove the alleged partnership; *Randolph v. Govan*, 14 S. & M. 9.

83b. *Competency of person assuming partnership debts.* A person purchasing the interest of a partner, and binding himself to pay his vendor's share of the partnership debts, is not a competent witness in a suit against the other partner on a partnership liability, to prove that the same has been paid; *Perry v. Randolph*, 6 S. & M. 335.

84. *Power after dissolution.* After dissolution, a partner has the power to compromise a debt due by the firm, and is entitled to contribution from his associate for the payment made on such compromise; *Bass v. Taylor*, 5 G. 342. And the declarations of a partner, made after dissolution, in relation to facts which took place during the existence of the partnership, in the regular course of business of the firm, and not creating a new liability, are admissible against his associate. And especially is this the case, where the declarations are made by a partner who is a party to the suit in which they are sought to be introduced as evidence; *Curry v. Kurtz*, 4 G. 24.

85. *Power of commissioner to wind up partnership.* An unincorporated banking company was formed in 1838, and issued a large amount of change tickets. Under a provision contained in the articles of association for the admission of new members, L. and M., in 1839, became members, and afterwards the association was dissolved, and a commissioner appointed to wind up the business, who issued a certificate for the deposit of these change tickets; *Held*, that as to L. and M., who had pleaded *non est factum* to an action on the certificate, there was no liability, it not being shown that the certificate was for tickets issued after they became members, nor that they had consented to become liable from the beginning, nor that the commissioner had

authority to bind the partners by any new undertaking; *Held*, also, that the certificate showing on its face only that it was for a deposit of "tickets," without showing that they were the tickets of the association, did not of itself impose any liability on the defendants, and that it was necessary to show that the tickets deposited were those issued by the association; *Lake v. Munford*, 4 S. & M. 312.

86. *Business done by professional partner after dissolution.* Where business is given to a partnership requiring the personal services of the partners (as professional business to a law partnership), and there is a dissolution, and after it the services are rendered by one partner alone, with the consent of the other, the party rendering the services may sue for and recover the price of the services, in his individual name; *Anderson v. Tarpley*, 6 S. & M. 507.

87. *What included in assignment of "net profits."* An assignment by a partner of his interest in the "net profits" of the partnership, does not include within it a debt due by the firm to him for his personal expenses in managing the business of the partnership; *Stewart v. Sebbins*, 1 G. 66.

88. *Declarations of partner setting up adverse title.* The declarations of a partner, setting up title in himself, adverse to his associate, are not admissible in evidence against the latter, unless made with his knowledge, and acquiesced in by him; *Coppage v. Barnett*, 5 G. 621.

89. *Wife may show that the ostensible interest of her husband in a firm, is hers.* Though the husband may hold himself out to the world as a member of a partnership, and thus become liable to the partnership creditors, yet this will not prevent the wife from showing, in a controversy between her and a separate creditor of the husband, who is seeking to subject an alleged interest of the husband in the partnership property, to the payment of his debt, that such interest is in reality hers, and therefore not subject to the separate debt of the husband; *Atwood v. Meredith*, 8 G. 635.

90. *Husband cannot make wife a partner.* The husband cannot, without the consent of the wife, make her a member of a partnership; *Ib.*

91. *Evidence: Opinion of a partner as to who are his associates.* The opinion of one partner as to who are his associates, is not competent evidence; *Ib.*

92. *Effect of words in liquidation.* The words "in liquidation," attached to the signature of a firm to a contract, do not necessarily import that the partnership was then dissolved; and these words may be omitted as superfluous in a declaration on a contract so signed; *Fairchild v. Grand Gulf B'k*, 5 H. 597.

93. *Revivor: Where partner dies.* Under the statute (H. & H. 585), which provides that if there be two or more plaintiffs, and the cause of action survives by law, upon the death of one, and if there be two or more

defendants, and the cause of action survives against the others, if one die, and that the suit shall proceed in the name of the surviving plaintiff or plaintiffs, and against the surviving defendant or defendants; it is unnecessary, in case one of two partners, who are plaintiffs, die, to enter a formal judgment of abatement as to him. It is sufficient, if his death be suggested on the record; *Sprawles v. Barnes*, 1 S. & M. 629.

Payment.

See **BILLS OF EXCHANGE**, 212, *et seq.*

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I. What is Payment.

1. Conditional payment by bill of exchange.

A bill of exchange given by a debtor as conditional payment of the debt, becomes an absolute discharge, if notice of its dishonor be not given to the debtor and the bill returned; *Stam v. Kerr*, 2 G. 199.

2. The giving of a note for an account.

If two of three partners give their note for a partnership debt, existing in open account, it will be considered a payment, if it were the intention of the parties and the agreement that the note should be accepted in absolute satisfaction, and that those partners who signed it, should be considered sole debtors; otherwise, it will be a mere collateral security. And this is a question of fact for the jury; *Keel v. Bridgers*, 10 S. & M. 612.

See *post*, 4 to 14. **BILLS OF EXCHANGE**, 224. **CONTRACT**, 45, 94. **EXECUTOR AND ADMINISTRATOR**, 169, 171a.

3. *Payment of a mortgage by check.* A surety of the mortgagor gave the mortgagee his sight check for the debt, assuring him that it would be paid on presentation, and the mortgagee gave up the note and entered satisfaction of the mortgage. The check was not paid, the drawer having no funds in the drawee's hands to meet it; and thereupon the mortgagee filed this bill to set aside the entry of satisfaction of the mortgage, and to foreclose it: *Held*, that it not appearing that the mortgagee had paid anything to the surety, on the faith that the latter had paid the debt, the mortgagor was entitled to relief; *Holmes v. Bacon*, 6 C. 607.

4. *Conditional payment by note.* Where the note of the debtor of a third person is received as conditional payment of a debt, its subsequent transfer by the creditor makes it operate as an absolute payment; *Wren v. Hoffman*, 41 M. 616. But the mere reception of the note of the husband for the debt of the wife, is not a satisfaction of the wife's debt, and she is liable, unless there be an agreement that it shall operate as satisfaction; *Guion v. Doherty*, 43 M. 538.

5. *Payment by substitution of new note.* A note, with six endorsers, was over-due, and the fourth endorser being absent and without his knowledge, the holder agreed to take part payment in money from the maker, and to re-

new the remainder by another note of the parties. The new note was given by the maker, endorsed by all the endorsers on the old note but the fourth, and the old note was delivered to the sixth endorser, in order that the fourth endorser might be sued on it, for the use of the party to the last note, who might pay it. This last note was paid by the fifth endorser, and the old note delivered to him, who brought the action on it: *Held*, that the fourth endorser was not liable; that whilst it is true that the fifth endorser might have maintained the suit if he had given his own note for the original, yet the taking up of the original by the substitution of a new note of the maker, all the parties to the first note were discharged from liability on it, unless they entered into some new contract to continue it; *Lapice v. Hughes*, 2 C. 69.

6. *Payment in cotton.* Where cotton is delivered as a payment on a note, if there be no special agreement proven in reference to the price of the cotton, or as to the disposition to be made of it by the creditor, the market price of the cotton at the time and place of delivery, is the amount for which the debtor is to have credit; and where the only evidence of the delivery of the cotton is an endorsement on the note, as follows: "Received on this note \$1,236.32, it being proceeds of forty bales of cotton, shipped on account thereof to Liverpool," the maker is entitled to prove the value of the cotton at the time and place of delivery; *Phillips v. Com'l Bk of Manchester*, 1 S. & M. 636.

7. *Fraudulent payment.* If a debtor transfers to his creditor paper in satisfaction of the debt, knowing at the time there was nothing due on it, and concealing that fact from the creditor, it is a fraud and no payment, and the creditor may recover upon the original indebtedness; *Hoopes v. Newman*, 2 S. & M. 71. And so if a debtor sell property to the creditor in payment of the debt, but afterwards sell and deliver the same property to another, this is no payment; *Blake v. Morrison*, 4 G. 123.

8. *Payment to an agent, except in coin.* The court in deciding that an attorney had no right to receive, in satisfaction of his client's judgment, a debt due by the attorney to the debtor, say, without the consent of the plaintiff, nothing short of payment of the judgment in lawful money is a satisfaction; *Keller v. Scott*, 2 S. & M. 81.

See on this subject, **ATTORNEY AT LAW**, 26, 27.

9. *As to payment and satisfaction of executions and judgments*, see **EXECUTION**, 51, 62. **JUDGMENT**, 76, 81.

10. *Payment to an administrator in property.* An executor or administrator has the power to compound and settle debts due the estate, in cases where it is shown that such course is beneficial to the estate, and free from fraud, negligence, or misconduct. But this power does not authorize the reception by the administrator of a slave or other property, in payment of a debt due the estate, by a debtor who is perfectly solvent; and

such a payment does not discharge the debtor; *Gulledge v. Berry*, 2 G. 346.

10a. *Case decided to be a payment and not a transfer.* The payee of the note sued on, testified that upon presenting the note for payment to one of the makers, the latter gave him a letter to the plaintiff, which witness did not read. Upon plaintiff's reading the letter, he paid witness the amount of the note, and thereupon he wrote a receipt upon the back of the note, which he left with the plaintiff, stating that the money was gotten from the plaintiff. He also stated there was no other contract between him and the plaintiff about the note than this: *Held*, that the transaction was a payment and not a sale of the note; *Blundell v. Vaughan*, 12 S. & M. 625.

See ASSIGNMENT, 12, 13.

10b. *Unexecuted agreement as payment.* A direction by the administrator of a debtor, given to the executor of the creditor to retain the debt out of the distributive share of the debtor in the estate of the testator, if not acted on, is not a payment of the debt; nor can the one debt be set off against the other; *Wadlington v. Gary*, 7 S. & M. 522.

See ACCORD AND SATISFACTION, 4. See, also, DEBTOR AND CREDITOR, 12.

II. Presumptions of and Proof as to Payment.

11. *Possession of order by drawee.* The possession by the drawee, of an order requesting him to pay a certain sum of money, and stating "and this shall be your receipt for the same," is evidence *per se* of payment of the order; *Witherspoon v. Cain*, W. 407.

12. *Possession of bill of exchange by accommodation acceptor.* But the mere production of a bill of exchange by an accommodation acceptor, is not even *prima facie* evidence that it has been paid by him, unless it be shown that it has been in circulation after acceptance, and that the endorsements relied on as evidence of circulation, are in the handwriting of parties authorized to make them; and there can be no presumption that the endorsement is in the handwriting of such party; *Curry v. Kurtz*, 4 G. 24.

13. *Receipt for note on account of debt.* A receipt by the payee, for certain promissory notes "for account of a note which he holds" against the maker, though not full proof of payment, is yet a link in the chain of evidence, and should be admitted as evidence under the plea of payment by the maker; *Wells v. Patterson*, 7 H. 32.

14. *Giving note as presumption of payment and settlement.* The giving of a promissory note is only presumptive evidence that an open account, in favor of the maker, against the payee, existing and overdue when the note was made, is settled and paid, and if such open account be pleaded as a set-off to the note, it should be left to the jury to determine, from the whole evidence, whether it is paid or not; *Carpew v. Canavan*, 4 H. 370.

See BOND, 8.

16. *Presumption of payment of decree from lapse of time.* The lapse of twenty years

is presumptive evidence of the payment of a decree. Hence, where a party is in possession of land under a decree directing the conveyance of the legal title to him, and directing payment by him of the purchase money by instalments, and the retention of a lien on the land as security for the decree, and he so remains for twenty years after the last instalment falls due, payment will be presumed, and the title held perfect; *Doe v. Gildart*, 5 H. 606.

17. *Presumption of payment of a bill single, from lapse of time.* When the statute of limitations bars an action on a bill single, at the end of sixteen years, it is a very serious question whether the failure to sue on it for nine years, even with additional circumstances, would warrant a presumption of payment. The failure to sue for three years, whilst the holder was in good circumstances, affords but a slight presumption against him. And when the debtor removes to a neighboring State, the presumption of payment arising from lapse of time, is repelled during the period when the debtor and creditor resided in different States; *Mann v. Manning*, 12 S. & M. 615.

18. *Rebuttal of such presumption.* A bill single, overdue for many years, was presented to the maker for payment, and he said he would make inquiry in another State, where the bill single was made, to ascertain if the debt had not been paid, and if not paid, he would pay it; but he took no steps to make the inquiry: *Held*, that this was a circumstance to repel the presumption of payment arising from lapse of time; *Id.*

19. *Parol proof.* Proof of payment of a bond may be made by parol; *Tinnin v. Garrett*, 4 S. & M. 207.

19a. *Declaration of creditor as affording presumption of payment.* The declaration of the creditor to the surety, that he was indebted to the principal, and there was to be a settlement between them, and that he would look to the surety no longer for payment, though not good as a release of the surety, is yet presumptive evidence that the principal's claim against the creditor is sufficient to satisfy the debt; *Foster v. Walker*, 5 G. 365.

19b. *Offer to pay as proof.* When defendant has pleaded payment, proof that, after the date of the alleged payment, he offered to pay the whole amount of the debt sued on, without saying anything about the alleged payment, is a fact proper to go to the jury, to be judged of by them, but is not conclusive against the plea of payment; *Mangum v. Ball*, 43 M. 288.

III. Pleadings.

20. *Plea under statute in Poindexter's Code.* The plea of payment as regulated by statute (Poindexter's Code, 118), is confined to actions of debt on bills single, or penal bonds, and to debt or *scire facias* on judgments; it does not extend to actions of covenant for the delivery of specific articles; *Barnes v. Lloyd*, 1 H. 584.

21. *Proven without bill of particulars.* Ac-

tual payment may be proven under a plea of payment (or even under the general issue), without a bill of particulars filed with it; *Miller v. Brooks*, 4 S. & M. 175.

22. *Plea of partial payment.* Under a plea of payment in full, proof of a partial payment may be made; *Cage v. Her*, 3 S. & M. 410.

See PLEADINGS, 133 to 136.

IV. Miscellaneous.

23. *Privilege of debtor to pay: Assignment of debt without notice.* A debtor may always voluntarily discharge a debt under the same circumstances under which the law would compel him to make payment. Hence, if a client draw an order in his own favor, on his attorney, and procure the latter to accept it, to be paid out of money to be collected by the attorney for the client, and at the same time inform the attorney that this was done for the purpose of assigning the order to one of his creditors; the attorney, on collecting the money, may pay it to his client without a production of the acceptance, if he receive no other notice that the order has been assigned. The absence of the paper when the attorney made payment, would be a circumstance to put the attorney on inquiry; but his duty in that respect would be discharged by an inquiry of his client, since the transaction disclosed to him no other person to whom he could apply; *Shields v. Taylor*, 3 C. 13.

24. *Plea of note acquired by defendant.* A note against the plaintiff in favor of a third party, may be pleaded as a set-off, if the defendant acquired it before the suit commenced. The onus of showing this is on the defendant; *Carprow v. Carnavan*, 4 H. 370.

See APPROPRIATION OF PAYMENTS. SET-OFF.

Penitentiary.

Sentence to. A sentence to the penitentiary suspends the right of the prisoner to sue for the term of the sentence; *Beck v. Beck*, 7 G. 72.

Personal Estate.

See SEAVES. SALES. REGISTRATION. WILL. FRAUDS. STATUTE OF. LIMITATION OF ESTATES.

1. *Meaning of term.* It is a matter of doubt whether the terms "personal estate of any kind whatever," taken alone, would embrace promissory notes, and it seems they would not; *McIntyre v. Ingraham*, 6 G. 25. See PROPERTY.

2. *Possession of personalty evidence of ownership.* The possession of personal property is *prima facie* evidence of title in the possessor; and such title is presumed to be *bona fide* until the contrary is shown; *Roach v. Anderson*, 6 C. 234. And it is the policy of the law to treat the possessor as owner, when there is no record that he claims under a loan; *Falconer v. Holland*, 5 S. & M. 689.

3. *Possession of agent as notice.* The possession of a slave by an agent, is not notice to a purchaser from the principal, of an unre-

corded mortgage on the slave made by the agent. His possession will be regarded as the possession of the principal; *Harmon v. Short*, 8 S. & M. 433.

4. *Registration of title to personalty.* The Act of 1822 (H. & H. 344, § 4), respecting the registration of titles to personal estate, does not apply to title deeds made prior to the passage of the act; *Palmer v. Cross*, 1 S. & M. 48; S. P., *Taylor v. Stone*, 13 S. & M. 652; *Prewett v. Dobbs*, *Id.* 431.

Nor do our registration laws apply to deeds in trust or mortgages executed in another State, on property then situated there, but afterwards removed here; *Presly v. Rodgers*, 2 C. 520; *Barker v. Stacy*, 3 C. 471.

5. *Same.* The said 4th section only applies to deeds of personal property in this State, when the conveyances are made here, and there is a subsequent removal of the property from one county to another in this State; *Palmer v. Cross*, 1 S. & M. 48.

6. *Same.* Without some statutory provision requiring it, deeds to personalty need not be recorded in this State; *Id.*

7. *Possession of personalty for three years.* The statute of frauds, making possession for three years vest the title to personalty in the possessor, so far as creditors and purchasers are concerned, does not apply unless the possession has continued for three years in this State; *Id.*; S. P., *Moseby v. Williams*, 5 H. 520. And the possession need not be adverse; *Palmer v. Cross*, *supra*.

8. *Action for injury to.* In an action on the case for injuries to personal property, it must be shown that the plaintiff had at the time of the injury, a legal right or interest in the matter or thing affected by the injury. The absolute or general owner, having the right of immediate possession, may in general maintain an action for an injury thereto, though at the time of the injury the chattel was in possession of a servant, carrier or other bailee. But if the goods have been let to hire, the action cannot be maintained by the general owner, unless an injury to his reversionary interest be established. Hence, the owner of a slave who has hired him out for a year, cannot maintain an action against the sheriff, for wrongfully levying on him and taking him out of possession of the hirer, if the slave was returned to the owner uninjured, at the expiration of the year; *Lacoste v. Pipkin*, 13 S. & M. 539.

9. *Evidence of title.* If the purchaser of a chattel deliver possession to another, upon his claim of title, and there be no other evidence of ownership, this will be sufficient to show ownership and title in the person, to whom the delivery was made; *Frizzell v. White*, 5 C. 198.

10. *Sale without delivery.* A sale of a specific, designated chattel, at the time in the possession of a third person, and the payment of the purchase money, vests in the purchaser a good title, though the actual possession be not changed; *Cassell v. Backrack*, 42 M. 56.

11. *Destruction after conversion.* A party

who wrongfully converts personal property to his own use, is liable to the true owner for the value thereof, though the property, subsequent to the conversion, was destroyed by the public enemy, or otherwise; *Mason v. O'Brien*, 42 M. 420.

12. *Term for years in land.* A term for years in land is personal estate, and on the death of the tenant for years during the term, it goes to the administrator and not to the heirs; and upon an insufficiency of personalty to pay debts resulting from a *devastavit*, a sale of the term will be decreed, before the creditor has exhausted his remedies against the administrator; *Webster v. Parker*, 42 M. 465; *S. P., Montgomery v. Dillingham*, 3 S. & M. 647.

13. *Lien on personalty.* Money advanced by one party to another, to enable him to erect a steam mill and apparatus, creates a debt, but is no lien on the mill and apparatus; *Weathersby v. Sleeper*, 42 M. 732.

Physician.

1. *As an expert.* A physician may be examined as an expert, though he is not a graduate, and has no license to practice from any medical board; *N. O. J. & G. N. R. R. Co. v. Allbriton*, 9 G. 242.

2. *As to proof of a physician's account,* see EVIDENCE, 358.

3. *As to barring by limitations of physician's account,* see LIMITATION OF ACTIONS, 60.

Plank Road.

1. *Right to take toll.* There is an implied undertaking on the part of an incorporated plank road company with a person travelling on their road, that the road bed is reasonably fit for use; and such undertaking on the part of the company, constitutes the consideration for the obligation of the traveller to pay toll; and hence, if the company fail in the performance of their undertaking, there is no binding obligation on the traveller to pay toll, and he cannot be compelled to do so; *Sims v. Fazoo & Big Black Plank Road Co.*, 9 G. 23.

Planter's Bank and Bonds.

1. *Planters' Bank: Act allowing it to surrender charter.* In 1843, the Legislature passed a general act, prescribing the mode of proceedings against banks, for a forfeiture of their charters; and in the same year proceedings were commenced against the Planters' Bank. In 1844, the Legislature passed another act, relating alone to the Planters' Bank, and one other bank, authorizing them, upon certain conditions, to surrender their charters, and upon their refusal to do so, directing the attorney general to proceed against them in chancery to wind them up. The law also provided that if the banks should surrender their charters, they should no longer be amenable to the provisions of the Act of 1843. The Planters' Bank did not

surrender its charter, and the attorney general never instituted any proceedings against it in chancery: *Held*, that the bank was still liable to the proceedings which had already been commenced under the Act of 1843, and that there was not such necessary repugnancy in the two acts, as to the Planters' Bank, as to make the latter a repeal of the former; *Planters' B'k v. The State*, 6 S. & M. 628.

2. *Treasurer's right to pay coupons.* The State treasurer has no right to pay coupons of interest on the Planters' Bank bonds, except upon a warrant issued therefor by the auditor of public accounts; *Wilson v. Griffith*, 2 C. 468.

3. *Sinking fund pledged to pay interest on Planters' Bank bonds.* The Act of 4th of March, 1848, directs the sinking fund to be appropriated to the payment of the coupons of interest of the Planters' Bank bonds, according to their priority in falling due. There were bonds bearing interest, which had no coupons attached: *Held*, that however just it may be to pay the interest as it may mature, by an appropriation of the sinking fund *pro rata*, yet as the Legislature has specially appropriated it to "coupons" of interest, no other interest could be paid out of it: *Held*, further, that the auditor should not issue his warrant for any coupons falling due in September, until it appeared that all the coupons falling due in the previous March had been paid, or that there was money enough left of the sinking fund to pay them; *Swann v. Wilson*, 2 C. 471.

Pleadings.

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I. General Principles.

1. *Prima facie* case only need be stated. The pleader is bound only to plead a *prima facie* case; he is not bound to traverse the matter which may be set up in avoidance of that pleading; *Kershaw v. Merchants' Bank of New York*, 7 H. 386.

2. *Not bound to set out facts presumed from those pleaded.* Nor is he bound to aver the existence of a state of facts which the law presumes from the facts pleaded. Hence, a plea setting up a satisfaction of a judgment, averring a levy on sufficient personalty to satisfy it, need not aver a sale, nor negative a legal motion of the levy; *Id.*

3. *Irrelevant and redundant matter stricken out.* Irrelevant and redundant matter in pleading should be stricken out on motion; but if not stricken out, it does not invalidate the matter which is well pleaded. Hence, if a declaration be sufficient in all other respects, but contains matter which is irrelevant and redundant, a demurrer to it should not be sustained; the proper mode of objection would be a motion to strike out; *Hurt v. Southern R. R. Co.*, 40 M. 391.

4. *Less particularity and certainty, where facts pleaded lie in knowledge of the adversary.* Less particularity in pleading is required, where the facts lie more in the knowledge of the opposite party than of the party pleading; and hence, where the defendant executed a writing to plaintiff's intestate, acknowledging the receipt "of claims on various individuals," amounting to a sum "between four and five hundred dollars," and which he promised to collect and pay to the decedent; in a suit thereon to recover damages, upon the ground that the defendant had negligently failed to take steps to collect them, whereby some of the claims had become worthless, and some had become barred by the statute of limitations, it is unnecessary for the plaintiff to describe the claims in his

declaration with more particularity than they are set out in the receipt sued on; *Moore v. Gholson*, 5 G. 372.

5. *Omission to state in declaration the form of the action.* The omission of the plaintiff to state in his declaration the form of the action, is a fault in pleading tending to embarrass greatly the cause; but whether the defect is fatal on general demurrer; *Quære? Blackwell v. Reid*, 41 M. 102.

5a. *Object of pleading.* The object of pleading is to state in a concise form and by positive averment, the facts constituting a cause of action on the one side, and the defence on the other; and this altercation is to be continued till the parties arrive at a distinct issue of law or fact that shall fairly dispose of the merits of the controversy. And our statutes relating to pleading and amendments have greatly enlarged the powers of the courts to facilitate this object; *Weathersby v. Sinclair*, 43 M. 189.

5b. *Same: Effect of Revised Code of 1857.* Under the provisions of the code, litigants are not held to strict technical rules of pleading. All that is required is to state in ordinary and concise language the facts constituting a substantial cause of action or defence; *Lamkin v. Nye*, 43 M. 241.

5c. *Same: Case in judgment: Mechanic's lien.* A mechanic and material man, who has commenced a personal action to recover for building a house, and furnishing materials therefor, may, after plea filed, change his form of action, and substitute in lieu of his declaration in *assumpsit*, a proceeding *in rem*, to enforce his lien; *Weathersby v. Sinclair*, 43 M. 189.

As to false pleas, see *post*, 154, 155.

II. Construction of Pleadings.

6. *Construed ut res magis valeat quam pereat.* It is a rule in the construction of pleadings, that where an expression used by the pleader is capable of different meanings, that one will be adopted which will support the pleading, and not that which will defeat it; *Pender v. Dicken*, 5 G. 252.

7. *Construction as to form of action.* The character of an action, as to whether it is in *tort* or *ex contractu*, must be determined by the nature of the grievance, rather than the form of the declaration; *Hirn v. McCaughan*, 3 G. 19; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660. Hence, where the ground of complaint against a common carrier, is his failure to comply with an engagement made with the parties by previous advertisement, to stop at a particular place, and transport passengers thence to another point, it will be considered as an action founded in *tort*, although the declaration allege a promise to the plaintiff arising from the advertisement; and moreover, in cases of that kind, courts are inclined to consider the action as found in *tort*, unless a special contract be very clearly stated; *Hirn v. McCaughan*, *supra*. And so also in suits against common carriers for a breach of

duty in failing to put passengers off at the proper station, the courts are inclined to consider the action as found in *tort*, unless a special contract very clearly appear to be the gravamen of the complaint; *N. O. J. & G. N. R. R. Co. v. Hurst*, *supra*.

8. *Effect of averring an act to be done according to law.* An averment in a declaration that the defendant subscribed for certain shares in the capital stock of plaintiff's company, "according to the statute incorporating the company," will be held on general demurrer, to mean that the defendant had done everything required by the charter in order to become a subscriber; *Fiser v. Miss. & Tenn. R. R. Co.*, 3 G. 359.

9. *Construction of averment in reference to sale of goods.* The declaration averred that the defendant promised to accept and pay for a gin of a specified description, to be delivered on a future day, "if it should perform well" when put in operation, "according to the directions accompanying the same;" and that the plaintiff had delivered the gin of the description required, "and that it would have performed well," but defendant refused to accept it: *Held*, on demurrer, that it sufficiently appeared that the instructions accompanied the gin when it was delivered; *Crawford v. Avery*, 6 G. 205.

10. *Construction of the term "transfer."* The term "transfer," when applied to negotiable paper, does not indicate the particular mode of passing the interest in it, nor that the legal title is assigned; and hence, a declaration averring that a promissory note sued on has been transferred by the nominal plaintiff to the usee, does not show that the legal title is in the latter, and is consequently good; *Montague v. King*, 8 G. 441.

III. The Declaration.

1. The Filing of the Bill of Particulars and Exhibits.

11. *When filed.* To enable the plaintiff to take judgment by default in the Circuit Court at the return term, it is necessary that the declaration should be filed when the suit was commenced; *Merritt v. White*, 8 G. 438.

12. *The bill of particulars.* In an action by an accommodation acceptor against the drawer, the bill must be so described in the account sued upon, as to identify it; *Curry v. Kurtz*, 4 G. 24.

See BILL OF PARTICULARS, for all the decisions on this subject.

13. *Filing of instrument sued on.* The instrument on which an action is founded, is by statute, when filed (or a copy of it) with the declaration, a part of the record, but it is no part of the declaration, and cannot be referred to in aid of the declaration; whatever is material in it must be set out by proper averments, according to its legal effects; *Marshall v. Hamilton*, 41 M. 229; *Blackwell v. Reid*, *Id.* 102. But this does not constitute them a part of the record in a strictly legal sense, though copied in it; and hence, the

High Court cannot look to such copy as evidence, in order to see whether the result was right; *Gale v. Lancaster*, 44 M. 413.

14. *Filing of any other instrument.* But any other instrument than the one sued on, filed with the pleadings, is no part of the record, and cannot be noticed as such for any purpose. The practice of filing written proofs as exhibits in an action at law, is unwarranted; *Marshall v. Hamilton*, 41 M. 229; *S. P.*, *Lee v. Dozier*, 40 M. 477.

2. Setting out a Writing according to its Legal Effects.

15. *Setting out the legal effect, sufficient.* Only the legal effect of a writing declared on, need be set out; *Mullen v. Jelks*, W. 205. It is unnecessary in declaring on a note or bill single, to do more than to describe it according to its legal effect; and should that part of the paper which describes the consideration, the use for which it was intended, or the liability of others (than the defendant) be set out, it will be surplusage; *Berthe v. Briggs*, 1 H. 195. The instrument must be set out according to its legal effect; *Blackwell v. Reid* 41 M. 102; *S. P.*, *Marshall v. Hamilton*, *ante*, 14; and it is an improper mode of pleading at law, to set out the instrument sued on in *hæc verba*; it should be described according to its legal effect; *Lee v. Dozier*, 40 M. 477; and *ante*, 14.

17. *Certain omissions justifiable: Addition to signature.* A mere addition to the signature of the writing sued on, denoting the character in which a party signs it, or the purpose of the contract, as the words "in liquidation," appended to a partnership signature, may be safely omitted in the declaration *Fairchild v. Grand Gulf Bk.*, 5 H. 597.

18. *Same: Other instances in respect to supersedeas bond.* If a declaration on a *supersedeas* bond, set out the bond in *hæc verba*, and the bond admits the existence of the writ, the declaration will not be bad on demurrer, for want of an averment, that the writ issued; the bond admits the writ, and if there be any defects in it, they are matters of defence on issue joined; if indeed the execution of the bond does not waive all objections to previous proceedings. Nor is it a good objection to such a declaration that it does not set forth with sufficient averments, the judgment and execution in consequence of which the writ of *supersedeas* issued; if the bond recite the judgment, this is a waiver of the objections; *Harper v. Montgomery*, 11 S. & M. 611. See *post*, 19.

3. Certainty in Setting out Plaintiff's Right.

19. *Plaintiff's right must be set out clearly: Case in judgment.* To an action on a *supersedeas* bond, the defendant pleaded general performance, and the plaintiff replied and assigned as a breach, "that the defendant did not prosecute his said *supersedeas* with effect, nor has he well and truly paid," &c., but did not aver that any *supersedeas* had ever issued, and there was a demurrer to the repli-

cation for that omission: *Held*, that in assigning the breach of a bond, the plaintiff must state all that is necessary to give him a cause of action with particularity, as to how the breach occurred; and that the issuance of the *supersedeas* was material, and should have been averred; *Wharton v. Porter*, 10 S. & M. 305. See *ante*, 18.

20. *Same: Case in judgment.* The declaration in an action by the assignee of a turnpike company, to recover tolls from passengers over the road, averred, that the defendants were indebted to plaintiff for tolls due for the passage of their stage-coaches over the turnpike road of plaintiff, the right to which had been duly granted by the Legislature to G., and by him assigned to plaintiff: *Held*, on demurrer to be sufficient; *Dulaney v. Starke*, 7 S. & M. 375.

20a. *Setting out breach of bond with alternative condition.* If the condition of a bond be for the performance of one of two alternative covenants, in assigning a breach thereof, the performance of each and all the covenants should be negatived; *Shaefer v. Minor*, 1 H. 218.

As to breach of guardian's bond, see *post*, 152, 153.

21. *Where general pleading allowed in assigning breach of a bond.* In assigning a breach of a bond, when the subject comprehends a multiplicity of matters, general pleading is allowed. Hence, an assignment will be good which avers that the defendant collected several sums of money amounting to \$——, by virtue of several executions in his hands," is not bad for a failure to show the specific sum received on each execution; *Matthews v. Bailey*, 3 C. 33.

22. *Certainty as to extrinsic matters.* In declaring on a contract, which is not sufficiently explicit in itself, and where its validity depends upon extrinsic matters, either expressly referred to by, or necessarily arising out of, the contract, the extrinsic matters must be supplied by proper averments in the declaration; *Rileys Adm'r v. Vanhouten*, 4 H. 428.

22a. *Declaration against a femme covert.* The plaintiff in an action against a *femme covert* must set out in his pleading, the special circumstances which authorize her to make a contract. It must appear of record in some form or other that all the necessary facts existed, in order to make the contract binding on the wife; *Dunbar v. Meyer*, 43 M. 679.

4. Clerical Error.

23. *Case in judgment.* If the declaration aver that the note sued on, is due at a time prior to its date, it is a mere clerical error and cured by verdict; *Shrock v. Bowden*, 4 H. 426. See **CLERICAL ERROR**.

5. Statement of the Consideration.

24. *When necessary.* In declaring on a writing, which is neither a deed, bill, or note, a consideration must be stated, and the omission to do so not cured by verdict; *Minn v. Michie*, W. 244. And wherever the con-

tract declared on, or set up as a defence, does not import a consideration, the declaration or plea should set out the consideration; *Willis v. Ives*, 1 S. & M. 307.

As to setting out consideration of guardian's bond, see *post*, 152.

6. Setting out the Damages.

25. *Damages for breach of supersedeas bond.* The declaration on a *supersedeas* bond averred, that the writ was not prosecuted with effect, but was discharged, and that the defendant in the execution superseded by the writ, has not paid the judgment, interest and damages, whereby the bond became forfeited: *Held*, that this was a sufficient averment of damages; *Harper v. Montgomery*, 11 S. & M. 611. See *post*, 153.

26. *Plaintiff not limited in debt to his demand for damages.* In an action for debt, the plaintiff is not limited to the specific demand for damages made in the declaration, and he may recover the amount he is legally entitled to under the proof not to exceed the demand in the declaration; *Hudson v. Pindexter*, 42 M. 304.

7. Proof of Unnecessary Averments.

27. *Rule on this subject.* The decisions in relation to the necessity of proving unnecessary averments in the declaration, are not uniform; but except where the averment is descriptive of the subject matter to which it relates, it seems it will be unnecessary to prove it in all cases, where, if the converse of it were pleaded and proven, it would be an answer or defence. Hence, if a declaration against the guarantor of a promissory note, aver demand and notice, it may be treated as surplusage; *Thrasher v. Ely*, 2 S. & M. 139; *S. P.*, *Hundley v. Buckner*, 6 S. & M. 70.

8. Common Counts.

28. *Indebitatus assumpsit: Where it lies.* *Indebitatus assumpsit* will lie on a class of special contracts which have been fully executed, and when a specific sum is due; *Fowler v. Austin*, 1 H. 156. And it may be maintained by an overseer for his services, notwithstanding there was a special contract as to the price—there being no conditions as to times and periods of payment, nor as to the nature and peculiarity of the work; *Hill v. Robeson*, 2 S. & M. 541. See *post*, 31.

29. *Time immaterial in this action.* In this action the time laid in the declaration for the promise is wholly immaterial; and hence, in an action against an administrator, if the promise be averred to have been made by the intestate, it is immaterial that the date laid is after his death; *Id.*

30. *Money had and received.* An action for money had and received will lie when defendant has come to the possession of plaintiff's property by permission of law, and has sold it. Courts are disposed to extend the remedy of *indebitatus assumpsit* to advance the ends of justice; *Glass v. Lobdell*, W. 105.

31. *Waiver of special contract.* Plaintiff

may waive declaring on a special contract, which has been performed, and give it in evidence under the common counts; yet he cannot prove materials furnished under a count for work and labor done; *Richardson v. O'Neal*, W. 469. See *ante*, 28.

32. *Where special contract is proven.* Although a special contract is proven, the plaintiff may recover under the common counts; *Arnett v. Evans*, W. 471 (but this is overruled). Where a plaintiff declares on a special agreement, he must prove it as laid, and if there be a special agreement, he cannot recover on the common counts; *Fowler v. Austin*, 1 H. 156; *S. P. Morrison v. Ives*, 4 S. & M. 652. Yet if there be a count on a special agreement and also the common counts, and the plaintiff wholly fails in his right to recover on the special contract, he may recover on the common counts, provided the case be such, that if there had been no special contract, he might have recovered on the common counts; *Gibson v. Powell*, 5 S. & M. 712.

33. Where the plaintiff declares on a special agreement, and also files the common counts, if at the trial he proves a special agreement, but materially different from that laid in the declaration, he cannot recover on any of the counts. He cannot recover on the special count, because of the variance; nor on the common counts, because a special contract has been proven; *Drake v. Surget*, 7 G. 458.

9. Joinder of Counts.

34. *Each count must show liability on all the defendants.* Where a declaration against two or more defendants has two or more counts, each count must show a liability on the part of all the defendants; *McKee v. Kent*, 2 C. 131; *Miller v. Northern B'k*, 5 G. 412.

35. *Same: Joinder of joint count and separate count.* The dismissal, as to one of a suit brought against two defendants, upon a joint demand against both, does not alter the complaint or change the character of the action; and hence, even after such dismissal it will be improper to allow the plaintiff to amend his complaint, by inserting a new count upon a separate demand against one of the defendants; *Miller v. Northern B'k*, 5 G. 412.

36. *Same: Case in judgment.* Partnership contracts are by statute joint and several; and hence, one member of a firm may be sued, and a recovery had against him upon a partnership contract, as upon his individual contract. But where a suit is brought upon a partnership contract, as upon a joint contract, a recovery cannot be had against any member of the firm, unless the contract be proven to be joint, as alleged; *Ib.*

37. *Counts for fraud, and for false warranty united.* Counts for fraudulent representations of soundness, and for a breach of warranty of soundness, may be united; *Patterson v. Kirkland*, 5 G. 423.

38. *Counts on parol and sealed agreements.* A count in debt on a promissory note may be

united with a count on a sealed instrument; *Mardis v. Terrell*, W. 327.

38a. *Counts on debt and trespass cannot be joined.* A count on debt for the statutory penalty for cutting trees, and a count on trespass for damages, cannot be joined; *Elder v. Hiltzheim*, 6 G. 231.

10. Partners as Plaintiffs and Defendants.

39. *Partners cannot sue in partnership name.* Partners cannot sue or be sued in the partnership name; their individual names must be set out; except where by statute (Rev. Code of 1857, p. 492, art. 89) it is allowed the plaintiff, when he is ignorant of the name of a party defendant, to sue him by any name; and when his true name has been discovered, the declaration and writ may be amended accordingly. Where the plaintiffs, who are partners, sue in the partnership name (as J. K., & Co.), it is not a case of non-joinder under the statute (Rev. Code of 1857, p. 485, art. 43), but the declaration is bad on demurrer; *Blackwell v. Reid*, 41 M. 102.

40. *Declaration against partners.* The statute declaring the contracts of partners joint and several, materially changes the rules of pleading in reference thereto. Under that statute, any one or more of the partners may be sued on a partnership contract, and in the declaration, it is not necessary even to allege the existence of the partnership; *Nutt v. Hunt*, 4 S. & M. 702. See *ante*, 36.

11. Declarations on Statutes.

41. *What it should show.* A declaration upon a statute giving an action, which did not exist at common law, should show by averment, that the case is not in the statute; but it is sufficient, if this be done, to a common intent. Thus, where a statute made actionable words which "are in common acceptance considered as insults, and lead to a breach of the peace," it was held, that an averment in a declaration, that the defendant spoke the words "contrary to the statute, and with a view to insult the plaintiff, and lead him to commit a breach of the peace," was sufficient to bring the case within the statute; *Scott v. Peebles*, 2 S. & M. 546.

See ACTION, 29, *et seq.*

12. Declaration in Replevin.

See REPLEVIN.

42. *Divisible as to recovery and damages.* A declaration in replevin is divisible as between the recovery and the damages; and if it be good as to one, and bad as to the other, a demurrer to the whole declaration will be overruled; *Newell v. Newell*, 5 G. 385.

43. *Declaration must follow affidavit.* If the affidavit in replevin be for a wrongful detention, the declaration cannot be based both on a wrongful taking and detention; the affidavit and declaration must correspond; *Ib.*

13. Assumpsit.

44. *When it is proper, and when not: Instances.* Assumpsit is not the proper form of action to recover for work and labor, which

the defendant induced the plaintiff to do, by falsely representing that another would be liable to pay for it; but after verdict, the defect will be cured by *jeofails*; *Cartwright v. Carpenter*, 7 H. 328. Nor will it lie against an attorney for receiving depreciated bank notes, instead of lawful money for his client—case is the proper remedy; but after verdict *assumpsit* is good; *Kellogg v. Budlong*, 7 H. 340.

45. *Assumpsit is not an action on the case.* An action of *assumpsit* is not an action "on the case," which last, according to recent authorities, comprehends only actions *ex delicto*; *Fletcher v. Benbrook*, 5 S. & M. 619.

45a. *Trespass waived.* The proper form of action for an injury done by a railroad company to cattle depasturing on their track, would be trespass, but the plaintiff may waive trespass, and sue in *assumpsit* for the value of the cattle; yet the waiver does not give him the benefit of the statute which allows him to take judgment by default final on open accounts where there is no plea, it appearing, from the declaration, that the cattle were killed and not bought by defendant; *M. C. R. R. Co. v. Fort*, 44 M. 423.

14. Actions against Makers and Endorsers, &c., of Bills and Notes.

See BILLS OF EXCHANGE, 164a. ACTION, 15, *et seq.*

46. *Declaration where some are not sued.* Where some of the drawers or endorsers of a bill or note are not sued, it is unnecessary for the plaintiff to aver that such are dead or non-resident. If a plea in abatement be filed, setting up the non-joinder, it must aver their residence, and it must be sworn to. But if it appear affirmatively in the declaration that they are alive and resident in the State, objection may be taken by demurrer; *Lillard v. Planters' Bank*, 3 H. 78.

See ABATEMENT, 4. ACTION, 15, 19.

15. Miscellaneous.

47. *Averment as to a foreign statute.* In a declaration on the record of a judgment rendered in a sister State, which judgment was rendered against several partners on process served on one alone, according to the statutes of that State, it is not necessary to aver the existence of such law. The averment that the judgment was duly rendered is sufficient; and, if objection be made by defendant on that ground, it will be time enough to produce the statute; *Stephens v. Roby*, 5 C. 744.

48. *Averment as to precedent offer to perform.* In an action to recover damages from the defendant for his refusal to permit plaintiff to carry out his contract, the plaintiff need not allege in his declaration an offer to perform his part of the agreement; it is sufficient to allege his willingness to do so, and defendant's refusal to allow him to do it; *Hunt v. Crane*, 4 G. 669.

49. *Where action of debt lies.* The action for debt lies for a sum certain, or a pecuniary

demand, which may be easily reduced to a certainty, and this rule applies as well to actions upon statutes as upon other demands. It has been settled that an action of debt will not lie on a note payable in bank notes, because, in the fluctuations and changes to which they are liable, it is often no easy matter to ascertain their value. Hence, in an action upon the statute making the master liable for goods stolen by his slave, debt is not proper if bank notes were stolen; *Dowell v. Boyd*, 3 S. & M. 592.

See ACTION, 23.

49a. *Debt for cutting trees.* Debt, and not trespass *quare clausum fregit*, is the proper form of action to recover the statutory penalty for cutting plaintiff's trees; *Elder v. Hülzheim*, 6 G. 231. But if the declaration claim the statutory price, it is no objection to the recovery of the statutory price at the trial, that the declaration is in trespass and not in debt. The objection should have been made by demurrer; *Miss. Cent. R. R. Co. v. Whitehead*, 41 M. 225.

49b. *Profert in declaration.* See EXECUTOR AND ADMINISTRATOR, 303a.

IV. Departure in Pleading.

50. *Departure not allowed.* The plaintiff must not depart from, but must sustain and fortify the case made in the declaration. When, therefore, the declaration alleged that the defendant had subscribed for certain shares of stock in the plaintiff's company, and at the time of subscription had paid the *per centum* thereon, as required by the charter, and the defendant denied by his plea that he had paid the *per centum* at the time of subscription, as alleged, a replication by the plaintiff, that after the subscription, but before any calls were made on the capital stock, the defendant had paid the *per centum* required, will be a departure from the declaration and bad on demurrer; *Fiser v. Miss. & Tenn. R. R. Co.*, 3 G. 359.

51. *Same: Another instance of departure.* Plaintiffs (who were husband and wife) sued defendant for money paid by the wife to defendant for her use, and the defendant pleaded payment, and filed as a set-off, money due by the wife for the rent of a hotel. She replied, denying liability on account of her coverture. The defendant rejoined by denying that the sum claimed in the plaintiff's declaration was paid to his use, and averring it was paid on a parol contract for the sale of the hotel by the defendant to the wife; and that said contract being invalid, he had applied the money to the payment of his claim for the use and occupation of it by her. He also filed a second rejoinder, in which he stated that the money claimed in the declaration was paid on a parol contract for the sale of the hotel, and that several items specified in the plaintiff's bill of particulars, were not paid to him on said hotel, but were paid to him as a partner in the firm of S. & Co., of which firm she had purchased goods to carry on said hotel: *Held*, 1st. That the replication was bad; it should

PLEADINGS, V., VI.

have been a simple traverse of the plea; and on that the wife could have had the benefit of her coverture. 2d. The rejoinder was bad as being a departure from the plea; *Vansant v. Shelton*, 40 M. 332.

52. *Same: Instances held no departure.* To an action on a sheriff's bond, the defendant pleaded performance generally, setting out in his plea the condition of the bond. The plaintiff replied, stating that he was assignee of certain fees due to a former sheriff, which the defendant had collected and refused to pay over. To this the defendant rejoined, stating that the said former sheriff had assigned the said fees to S. D., and that defendant had become liable to pay them to the assignee before the assignment to the plaintiff: *Held*, that this was no departure from the defence set up in the plea; *Mathews v. Hamblin*, 6 C. 611.

52a. *Same: Instances of departure.* The plaintiff in his replication assigned as a breach of an injunction bond, the non-payment of a judgment different from the one mentioned in the injunction bond, and in favor of a different plaintiff: *Held*, to be a departure; *Gildart v. Howell*, 1 H. 198.

V. Duplicity in Pleading.

53. *Duplicity defined.* Duplicity in pleading consists in alleging for one single purpose or object, two or more distinct grounds of defence, or causes of action when one of them would be as effectual in law as both or all; but mere surplusage, or that which is alleged by way of inducement, or for the purpose of giving importance to another fact, will not render the pleading double; *State v. Com'l B'k of Manchester*, 4 G. 474; *Hunter v. Wilkinson*, 44 M. 721. A pleading should present but a single ground of defence, or cause of action; *Welch v. Jamison*, 1 H. 160. Matter however multifarious, if it constitute but one connected narration of a single defence, will not make the pleading double; *Hunter v. Wilkinson*, 44 M. 721.

54. *Rule further explained and illustrated.* And it does not make a plea double that it contains various circumstances, if they are all stated by way of inducement to the main fact and tend to one common point; *Ellis v. Martin*, 2 S. & M. 187; *Ransom v. Cothran*, 6 S. & M. 167. Thus, a plea averring that the note sued on was given for the price of a lot purchased by defendant upon a certain condition, named in the plea; that the plaintiff falsely and fraudulently represented that the condition had been complied with, and that defendant, confiding therein, had given the note; that the representation was false and the condition had not been complied with, and the consideration of the note had failed, is not bad for duplicity; *Ellis v. Martin*, *supra*. And so where an attorney being sued for neglect of duty, in failing to collect a claim in his hands, pleaded that he had brought suit against one of the debtors at the first term after getting the note, and had recovered judgment, and that

the debtor thus sued had sufficient property bound by the judgment to pay the debt, that the defendant would have obtained satisfaction of the judgment, but that the plaintiff, by his own act, surrendered up and vacated the judgment; it was held that the plea was not double; *Ransom v. Cothran*, *supra*.

55. *Same: Another illustration.* An plea of duress, which unnecessarily set in detail numerous circumstances, which, ever, constitute but one connected proposition, and tend to raise but one issue, is not that account bad (citing and confirming *Ransom v. Cothran* and *Ellis v. Martin*, *supra*); *Bingham v. Sessions*, 6 S. & M. 13.

56. *Same: Another instance.* A "that the note sued on was obtained by the plaintiff by misrepresentation and fraud in this that it was given for the purchase money of a slave sold by plaintiff to defendant, which slave the plaintiff falsely fraudulently represented and warranted to be sound in body and mind, and which representation and warranty were, at the time they were made, and at the making of note, false and fraudulent in this, that said negro was then wholly unsound in mind. It is sufficiently full and not liable to the objection of duplicity; *Barker v. Jus* 41 M. 240.

57. *Traverse pleading may be as broad as the pleading it answers.* The defendant pleaded accord and satisfaction, averring that he had conveyed to the plaintiff a tract of land which the plaintiff had accepted in satisfaction of the debt. The plaintiff replied denying both the conveyance of the land to the defendant and its acceptance by plaintiff in satisfaction of the debt: *Held*, on demurrer to the replication, that it was double in denying both the conveyance and the acceptance; that probably the denial of one alone would have been sufficient, but that the denial in the replication being broader than the plea, was good; *Derby v. Coleman*, 10 S. & M. 83.

58. *How duplicity objected to.* A plea cannot be stricken out for duplicity. The objection must be made by demurrer; *Ex parte Brown & Johnston*, 5 G. 688.

59. *The demurrer must be special.* Under the statute (H. C. p. 875, § 64) which enacts that no defect in a pleading shall be so ground for demurrer unless specially alleged in demurrer, or the cause thereof, if it be "so essential to the action or defence as to require judgment according to law, and the very result of the cause could not otherwise be given," the defect of duplicity in a plea will not be noticed on general demurrer; *Mobley v. Ke* 13 S. & M. 677.

VI. Demurrer.

See PRACTICE, 57 to 73.

1. Extent of.

61. *Extends back to first defect in the pleading.* At whatever state of the pleading a demurrer is interposed, it reaches back to

effects through the whole record, and attaches ultimately to the first substantial defect in the pleading, on whichever side it may have occurred; *Tucker v. Hart*, 1 C. 548; *Miles v. Myers*, W. 379; *Wren v. Spann*, 1 H. 115.

See PRACTICE, 60.

2. When Demurrer must be Special.

62. *When the demurrer must be special: Rule and instance.* The statute (H. C. 875, sec. 64) requires defects in pleading to be specially pointed out by a demurrer, unless so wholly defective that judgment according to law and the very right of the case could not be given. Under this statute, a plea to an action on a note given for the purchase of land sold by an administrator, setting up total failure of consideration on account of want of title in the intestate and in the administrator, is not so fatally defective as to be adjudged bad on general demurrer, notwithstanding there are no facts set out in the plea to enable the court to judge whether there was such failure of consideration or not; *Ray v. Woolfolk*, 1 S. & M. 523.

63. *Same: Other instances.* And so it is a mere formal defect, and not reached by general demurrer, that a declaration in the name of the president of the board of police as successor in office, to the payee of the note sued on, avers a delivery of the note by the maker to the plaintiff instead of to the payee, and does not aver in the breach of non-payment that the note had not been paid to the payee; *Haynes v. Covington*, 9 S. M. 470. And so the failure to state in the declaration the sum claimed, and the date of the promise can be objected to only by special demurrer; *Delahuff v. Reid*, W. 74. And the objection on account of duplicity must be made by special demurrer; *Mobley v. Keyes*, ante, 59; see, also, *post*, 66.

3. When General Demurrer will do.

64. *When general demurrer will do.* It is unnecessary to assign special cause in a demurrer to a pleading which is so defective that judgment according to law and the right of the cause cannot be rendered on it; *Hawkins' Adm'r, &c., v. Miss. & Tenn. R. R. Co.*, 6 G. 688.

4. When a Demurrer is Necessary.

65. *When a demurrer is necessary.* A demurrer is necessary to test the legal sufficiency of a pleading, in all cases, except when it is irregularly filed, or is manifestly frivolous, or a nullity; *Marshall v. Hamilton*, 41 M. 229.

For demurrer to answer of garnishee, see PRACTICE, 59.

66. *Same: Instances.* Thus, where the replication is in these words, "Issue as to the second plea," it must be demurred to; *Pickett v. Ford*, 4 H. 246. And so the omission in a plea of the technical words, "comes and defends the wrong and injury," does not make it a nullity; the plaintiff should demur specially; *Templeton v. Planters' Bank*, 5 H. 169. And the objection, that the decla-

ration for the statutory penalty for cutting trees, is in trespass instead of debt, must be made by demurrer; *Miss. Cent. R. R. Co. v. Whitehead*, 41 M. 225, and ante, 49. And the objection of duplicity must be made by demurrer; *State v. Brown & Johnston*, 5 G. 688, and ante, 58.

And so, if assumpsit be brought on a record, the objection to the form of the action must be made by demurrer; *Bone v. McGinley*, 7 H. 671. See *post*, 101.

That demurrer to notice filed with the general issue, is improper and unnecessary, see *post*, 123. PRACTICE, 58.

5. Variance objected to by Demurrer.

67. *Where variance objected to by demurrer.* A variance between the declaration and the instrument sued on, cannot be objected to by demurrer, except only where oyer is demandable of the instrument, *Robertson v. Banks*, 1 S. & M. 666; *S. P., Turnbull v. Witherspoon*, W. 351.

6. Effect of Demurring to a Null Plea.

68. *Effect of demurring to a null plea.* The plaintiff after demurring or replying to a plea, cannot treat it as a nullity, by taking judgment, as for want of a plea. The plaintiff waives the privilege of treating the plea as a nullity, by demurring to it; *Walker v. Walker*, 6 H. 500; *Hatch v. Roberts*, 41 M. 92; *Mayfield v. Barnard*, 43 M. 270. Thus, a plea of set-off may be treated as a nullity; but if the plaintiff demur to it, he cannot proceed to judgment, without a disposition of the demurrer; *Anderson v. Burke*, 6 S. & M. 475; and if he do, it will be error, and not cured by jeofuils; *Anderson v. Burke, supra*; *Marlow v. Hamer*, 6 H. 189.

69. *Same: As to error in not disposing of a demurrer.* But, if the plea demurred to be a nullity for having been filed after the issue term and without leave of the court, it is a nullity, and if there be four trials and two verdicts afterwards, without objection, that the demurrer has not been disposed of, the error will be immaterial, and no cause for reversal; *Field v. Weir*, 6 C. 56.

See PRACTICE, 63 to 68.

7. Joinder in Demurrer.

70. *Same.* A joinder in demurrer is unnecessary, under art. 113, p. 495, of the Rev. Code of 1857; *Hawkins v. Miss. & Tenn. R. R. Co.* 6 G. 689.

8. Frivolous Demurrer.

71. *Same.* If a demurrer to the declaration be on its face manifestly frivolous and for delay, it may be rejected by the court, and if no affidavit of merits be filed, the court may enter judgment *nil dicit*, for want of a plea; *Warbington v. Norris*, 3 H. 227. And the court should not render judgment for the defendant, because there is a frivolous plea unanswered; *Shropshire v. Probate Judge*, 4 H. 142.

9. Withdrawal of Demurrer.

72. *Same.* Where a demurrer to a plea is filed, the plaintiff should have leave to withdraw it and reply; but this is a matter within the discretion of the court below, with which the High Court cannot interfere; *Vicksburg Waterworks B'k v. Washington*, 1 S. & M. 536.

10. Demurrer good in part and bad in part.

73. *Demurrer, when part only of the matter demurred to is bad.* If a general demurrer be filed to both counts of the declaration, one of which is good and the other bad, the demurrer should be overruled as to the former, and sustained as to the latter; *Dowell v. Boyd*, 3 S. & M. 592. *Sed contra* in *Scott v. Peoples*, 2 S. & M. 546, where it is held, if the declaration contain one good count and one or more bad counts, but all properly joined, a demurrer to the whole must be overruled. And this last decision is sustained by *Judge of Probate v. Thompson*, 2 H. 808, where it is held that if the demurrer be to a declaration generally, assigning several breaches of the condition of a bond, and there be one good breach assigned, the demurrer must be overruled, though there be several bad breaches assigned. And also by *Newell v. Newell*, 5 G. 385, where it was held that a declaration in replevin was divisible, as between that part seeking a recovery of the property, and the part seeking a recovery of damages; and if it be good as to one, though bad as to the other, a demurrer to the whole declaration must be overruled; S. P., *Guion v. Doherty*, 43 M. 538.

74. *When demurrer may be filed to a part of a count.* A demurrer may be filed to a part of a count, if it be divisible from the other, as where a count is against a maker and endorser of a note, under a statute requiring all to be sued together, the demurrer may be to so much of it as charges the endorser; and if it be confessed to that extent, and the suit be dismissed as to the endorser, judgment may be entered by default against the maker, without amendment, there being no defect as to him; *Kirk v. Seawell*, 2 S. & M. 571. See PRACTICE, 45.

11. Judgment on Demurrer.

See PRACTICE, 39 to 56.

75. *Same: When final.* On sustaining a second demurrer to the same plea, the judgment should be *quod recuperet*, for under the judgment of *respond-at ouster*, entered on sustaining the first demurrer, the defendant must plead to the merits at his peril, and the court will then regard his plea as containing his entire defence, and if that be bad, judgment will go against him; *Davis v. Singleton*, 2 H. 673.

This seems to be the only rule under art. 110, p. 495, of the Rev. Code of 1857, allowing, possibly, a further leave to amend in the discretion of the court, under art. 180, p. 508.

76. *Judgment respondeat ouster.* If a demurrer to a plea be sustained, the judgment should

be *respondeat ouster*, although there be other pleas on file on which issue is joined; *Drane v. Board of Police*, 42 M. 264 (citing *Lee v. Dozier*, 40 M. 477); S. P., *Douglass v. Hendricks*, W. 230. But, as an administrator is not bound to plead specially, but may make all defences under the general issue, if a demurrer to his special plea be sustained, the court is not bound to award *respondeat ouster*, if the general issue be also filed; *Hawkins v. Miss. & Tenn. R. R. Co.*, 6 G. 688; S. P., in PRACTICE, 44. As to the rule where the demurrer is overruled, see PRACTICE, 47. See *post*, 149, 166.

77. *Effect of replying under respondeat ouster.* By the common law, if the plaintiff's demurrer to a plea was overruled, and he then replied, this was a waiver of the demurrer, and the overruling of it could not be assigned as error in the Appellate Court; but this consequence will not follow, if upon overruling the demurrer, the court, of its own motion, without application therefor from the plaintiff enter judgment of *respondeat ouster*; *Willis v. Ives*, 1 S. & M. 207; S. P., *Gwinn v. McCarroll*, 1b. 351; *Ellis v. Martin*, 2 S. & M. 187.

78. *Judgment, where plaintiff refuses to reply over.* Where the defendant's demurrer to the replication of the plaintiff to any one of his several pleas is sustained, and the plaintiff refuses to reply over, judgment final should be entered on the demurrer for the defendant; *Washington v. McCaughan*, 5 G. 304.

79. *Sustaining demurrer to the declaration.* If a special demurrer be sustained to a declaration, it is in the discretion of the court to allow the plaintiff to amend, and go to trial *instanter*; *Warbington v. Norris*, 3 H. 227.

80. *Demurrer to declaration overruled or confessed: Affidavit of merits.* On overruling a demurrer to the declaration, the affidavit of merits required by the statute, as the condition of the defendant's right to plead, need not state "that the defendant has a meritorious defence," if it sets out specially the grounds of a good legal defence. This affidavit is not required where the demurrer is confessed; *Shaw v. Brown*, 42 M. 309.

See further, as to the proper judgments on demurrers, PRACTICE, 39 to 56.

VII. Striking out Pleadings.

81. *Irrelevant and redundant matter stricken out.* As to this, see *ante*, 3.

82. *When motion to strike out pleas proper.* A motion to strike out pleas cannot be sustained except only where they are irregularly filed, or manifestly frivolous or null; *Marshall v. Hamilton*, 41 M. 229. And a plea, however defective in form, if it be appropriate to the form of action, cannot be stricken out on motion; *Shaw v. Brown*, 42 M. 309. A plea cannot be stricken out for duplicity; *State v. Brown & Johnston*, 5 G. 684.

82a. *What plea may be stricken out*

Where the defendants plea presents an immaterial issue, or contains matters only which no skill in pleading could make a good defence, the court has authority, both by the common law and under the statute of 1840 (H. C. p. 854), to strike it out in a summary way, without a demurrer. And in all cases, where the plea is such, that if issue were joined on it, and found for defendant, the court would enter judgment *non obstante veredicto*, the court may strike it out; *Gurrett v. Beaumont*, 2 C. 377.

Null pleas and replications may be stricken out. A second replication, not verified, is a nullity; *Hunter v. Wilkinson*, 44 M. 721.

See PRACTICE, 76 to 79, and *post*, 95.

VIII. Pleas.

As to duplicity in pleas, see *ante* 53 to 60.
As to departure in pleading, see *ante*, 50 to 52a.

1. General Principles.

A. CERTAINTY IN PLEAS.

83. *Less certainty in pleas in bar than in declarations.* A plea in bar does not require the same certainty in description as a declaration; *Williams v. Harris*, 2 H. 627.

84. *Certainty when agreement is executed.* An executed agreement may be set out with less certainty than an executory one; *Ib.*

85. *Pleading false warranty.* In pleading to an action for the purchase money, the defence of a false warranty as to soundness, it need not be averred that the plaintiff's warranty was the consideration of defendant's promise, nor that the warranty was made before the promise. It is sufficient if the plea allege that the promise was made for the price of the chattel which the plaintiff sold and warranted sound, &c.; *Ib.*

See *ante*, 56, for instance of a plea of false warranty.

86. *One pleading made certain by another.* If an action be founded on a note, and in the pleas and replications the word "note" is used, without words of identification, it will be understood that the note sued on is referred to; *Grover v. Gaunt*, 6 S. & M. 317.

87. *Plea of deviation in location of railroad track.* Where a stockholder in a railroad company resists the collection of his subscription for stock, on the ground of a deviation in the route prescribed by the charter, he ought to set out in his plea the deviation clearly and distinctly, so that its materiality may be determined. An averment in the plea, "that the road was not constructed in accordance with the requirements of the charter," is not certain enough to set out the deviation; *Champion v. Memphis & C. R. R. Co.*, 6 G. 692.

87a. *Plea setting up void decree and void sale.* A plea in bar to an action on a promissory note, that it was given for land sold under an order of the Probate Court, which was void, and that said notes were void, is bad—for a failure to set out the grounds on which it is insisted that the decree is bad; *Hanks v. Neal*, 44 M. 212.

B. THE WRITING OF PLEAS.

88. *Writing not required.* There is no statute in this State requiring pleas to be drawn up in writing by the pleader, and it is a matter of discretion in the court to require it, or to allow the issue to be made up on the record. Hence, if the record recite "that the defendant appeared, and by his attorney comes and defends the force and injury, &c., and pleads the general issue," the plea will be good; *Gwinn v. Williams*, 5 C. 324.

C. EACH PLEA MUST STAND BY ITSELF.

89. *Each plea must stand per se.* Every plea must be complete and perfect in itself, and must contain matter to bar (or abate) the action; it cannot be helped by matter contained in another plea, unless such matter be expressly referred to in it; *Lee v. Dozier*, 40 M. 477.

D. FULL AND HALF DEFENCE; PARTIAL AND WHOLE DEFENCE.

90. *Defence either whole or half.* Defence, either whole or half, must be made before plea entered. All pleas which admit the jurisdiction of the court, require full defence; *Babcock v. Scott*, 1 H. 100.

91. *Pleas in bar must answer the whole action.* Every plea in bar must disclose a good defence to the whole action; and, it is improper to plead in bar to an action to recover damages for a breach of a contract, matter which amounts only to a mitigation of the damages, but is not a justification of the breach; *Armfield v. Nash*, 2 G. 361; S. P., *Fox v. Smith*, 10 G. 350.

92. *Partial defence may be pleaded as such.* A partial defence to the action should be pleaded as such; if a plea purport to answer the whole action, whilst in fact it is an answer to a part only, it will be bad; *Brown v. Smith*, 5 H. 387. A plea must answer so much of the action as it professes to do; *Holcomb v. Mason*, 6 G. 698. But a defect in this respect does not make the plea a nullity; it can be taken advantage of by demurrer only; but the plea is good after verdict; *Tucker v. Zollicoffer*, 12 S. & M. 591; S. P., *Fox v. Hilliard*, 6 G. 160.

See SET-OFF, 25.

2. Argumentative, Evasive, and Frivolous Pleas.

93. *Argumentative pleas: Case in judgment.* A plea to an action on a judgment, which avers "that if there be a record of any such supposed judgment, the defendants were not made parties to the suit in which it was rendered, and therefore the court had no jurisdiction to render judgment against them," &c., is bad, because it is but an argumentative denial of the record; *Cannon v. Cooper*, 10 G. 784.

94. *Evasive plea: Case in judgment.* To an action on a bond, in which the defendant obliged himself not to settle or continue as a practitioner of medicine within a named district, the defendant pleaded that he had set-

tled outside of said district, and had not been a practitioner of medicine within the district: *Held*, that the plea is evasive and bad. It should be a simple denial of the breach assigned. And a replication to such a plea, which merely repeats the breach assigned in the declaration, is also bad. Also, the rejoinder is bad, which merely asserts the substance of the plea; *Thompson v. Means*, 11 S. & M. 604. See *post*, 126.

95. *Frivolous pleas*. A special plea, amounting only to the general issue, may be rejected by the court, as frivolous; *Moore v. Mickell*, W. 231. A frivolous plea need not be noticed or replied to by the plaintiff; *Shropshire v. Probate Judge*, 4 H. 142. See *ante*, 81, 82.

3. Special Pleas only amounting to the General Issue.

96. *Such a plea is bad*. A special plea, which amounts only to the general issue, is bad; *Alexander v. Eastland*, 8 G. 554; *Wallace v. Seales*, 7 G. 53. Such a plea is frivolous. See *ante*, 95.

97. *Same: Instances*. A plea to an action on a note, that the plaintiff is not the lawful holder and owner of the note, is bad, amounting to the general issue; *Bingham v. Sessions*, 6 S. & M. 13 (citing *Netterville v. Stevens*, 2 H. 642). And so, a plea alleging that the plaintiff has no interest in the note sued on, is bad, as it amounts only to the general issue, under which plea the title of the plaintiff is properly in issue; *Anderson v. Patrick*, 7 H. 347; S. P., *Green v. McCurroll*, 2 C. 427.

98. *Same: Another instance*. So, a special plea to an action of trespass, which justifies the entry under a license from another, who is alleged to have been in the actual adverse possession of the premises, at the time the trespass was committed, is bad, 1st. Because it denies the plaintiff's possession, and therefore only amounts to the general issue; and 2d. It does not aver title in the person from whom the license is claimed; *Alexander v. Eastland*, 8 G. 554.

99. *Same: Pleas held not to be general issue*. To a declaration against a covenantor for breach of the covenant of quiet enjoyment, and alleging that plaintiff was evicted by a mob, moved to do the act by the defendant, the latter pleaded that the mob was composed of persons unknown to him, who, without his knowledge, privity, or consent, and against his will, did the act: *Held*, that the plea was good, and being a denial of the declaration, should have concluded to the contrary; *Surget v. Arighi*, 11 S. & M. 57.

4. Null Pleas.

See PRACTICE, 74, 75.

100. *Null pleas may be disregarded*. A plea which is a nullity, may be so treated, and judgment may be entered over it, as for want of a plea. *Aliter*, where the plea is merely informal; *Templeton v. Planters' B'k*, 5 H. 169.

A plea which is appropriate to the form of

action, though defective in substance, cannot be treated as a nullity; *Smith v. Com'l B'k of Rodney*, 6 S. & M. 83; *Johnson v. Beard*, 7 id. 214. See PRACTICE, 74. *Ante* 65, 66. *Post*, 106, 109.

101. *Same: Examples*. The omission of the words, "comes and defends the wrong and injury, when," &c., does not render a plea a nullity; *Templeton v. Planters' B'k*, 5 H. 169. And a plea which purports to answer the whole declaration, but is, in reality, an answer to a part only, cannot be treated as a nullity; *Fox v. Hilliard*, 6 G. 160.

A plea of set-off is a nullity. See *post*, 137. But pleas "in short, by consent, are not nullities, but the court reluctantly conceded to them any validity; *McEwen's Case*, 3 S. & M. 120. A plea which denies the character in which the plaintiff sues, and not supported by oath, when the face of the record does not evidence the truth of the plea, is a nullity, and may be stricken out; *Prewett v. Bennett*, 2 S. & M. 101. And a plea by one sued as a stockholder in a railroad company, denying he is such, is a nullity if not sworn to; *Thigpen v. Miss. Cent. R. R. Co.*, 3 G. 347. That a false plea is a nullity, see *post*, 154, 155.

See EJECTMENT, 20a. *Ante*, 66.

102. *Effect of demurring to a null plea*. The plaintiff after demurring to a plea, cannot treat it as a nullity, by taking judgment as for want of a plea, without disposing of the demurrer; *Walker v. Walker*, 6 H. 500; *Marlow v. Hamer*, 1d. 189; *Anderson v. Burke*, 6 S. & M. 475; *Mayfield v. Barnard*, 43 M. 270.

See PRACTICE, 74, 75.

5. The Special Traverse.

103. *What is a special traverse*. A replication which confesses a contract, was made as stated in the plea, but denies that it is truly stated therein, and sets out the contract, as the pleader understands it to be, is not a confession and avoidance, but a special traverse of the contract as set out in the plea, and may be pleaded with an *absque hoc*; *Grover v. Gaunt*, 6 S. & M. 317.

104. *Same: Case in judgment*. To an action on a note, it was pleaded that it was given for the hire of a slave for the year 1842, under a contract that he should remain with the plaintiff all that time; but that he was taken away by the plaintiff on 3d May, 1842. The replication was, that it was the contract, that if plaintiff should want the slave before the year had expired, he could take her away, allowing the defendant \$12 per month, for that portion of the year the slave did not serve the defendant, and that plaintiff took her away on the 2d June, 1842, *without this*, that the plaintiff agreed, that the defendant should have the slave for the whole year, as averred by defendant: *Held*, that the replication was good in form and substance; *Ib.*

6. Plea Darien Continuance.

105. *When pleadable*. If new matter,

which is a good defence to the action, has happened since the last continuance, it may be pleaded *puis d'arien continuance*. A plea of accord and satisfaction, may be so pleaded to an action of trespass; *Heirn v. Carron*, 11 S. & M. 361. But this plea is applicable only when the matter of it has come into existence since the last continuance, not where, being in existence before the suit was commenced, it has come to the defendant's knowledge since the last continuance; *Lee v. Dozier*, 40 M. 477. It is not applicable to matter happening during the term at which it is pleaded; *Pool v. Hill*, 44 M. 306.

See DETINUR, 13.

105a. *Form and effect of the plea: Practice.* Pleas of *puis d'arien continuance* are a good deal within the discretion of the court. The court must be satisfied in some form, that the plea is in good faith and not frivolous. And the practice in the United States, has been to require an affidavit; but the affidavit may be waived if the court perceive verity in the plea. The plea waives all former pleas, even when abatement is pleaded *puis d'arien continuance*; and the judgment, whether upon verdict or demurrer, if against the plea, is final *quod recuperet*, and not *respondet ouster*. An objection that the plea was not put in in proper time; or that it was not accompanied by proper affidavit; or that it was accompanied by another plea, must be taken by motion to strike out, and not by demurrer; *Pool v. Hill*, 44 M. 306.

7. Filing of Pleas.

106. *Time of filing.* Where a plea is filed at a term subsequent to the issue or trial term, and the record does not show that it was filed by leave of the court, the plea will be so radically defective, that it may be disregarded by the plaintiff, as if it had not been filed; nor will it make any difference, that the plea recites that it was filed "by leave of the court." The record must show permission affirmatively; *Wright v. Alexander*, 11 S. & M. 411 (citing *Price v. Sinclair*, 5 S. & M. 254, and distinguishing this case from that, because in that case the plea was filed at the issue term. Citing also, *O'Conley v. Natchez*, 1 S. & M. 31, which holds, that pleas filed at a "subsequent term" (but it is not stated to what term it is subsequent) without leave of court, may be disregarded); S. P., *Pool v. Hill*, 44 M. 306.

And so, a plea filed without leave of court, after another has been filed, and out of the order of time, in which such a plea is allowed by law to be filed (as a plea to the jurisdiction, after a plea of payment), may be disregarded by the court; *Peters v. Finney*, 12 S. & M. 449.

106a. *Same.* Pleas must be filed on or before the third day of the return term, or within such further time as the court may by rule or otherwise allow, and issue of fact shall be made and joined, ready for trial at the succeeding term. Pleas improperly filed as to time, may be stricken out on motion; *Pool v. Hill*, 44 M. 306.

107. *Presumption as to time of filing.* A plea in the record at the proper place, will be presumed in the High Court, if no time of filing otherwise appear, to have been filed at the proper time, notwithstanding the court below rendered judgment by default, as for want of a plea; *Tomlinson v. Hoyt*, 1 S. & M. 515.

IX. Statute allowing Several Pleas to be Filed.

108. *The pleas must be legal.* The statute allowing double pleas, means legal pleas; *Moore v. Mickell*, W. 231.

109. *It does not apply to replications.* The statute only applies to pleas, it does not extend to any subsequent pleading; *Wren v. Span*, 1 H. 115. Under the Act of 1857, Rev. Code, 494, art. 105, several replications, rejoinders, &c., may be pleaded by leave of court, upon the party's making affidavit that the matter so pleaded is true; but the court has no discretion to waive the affidavit, or mitigate the terms; and if a second replication be filed, without an affidavit, it is a nullity, and may be stricken out on motion; *Hunter v. Wilkinson*, 44 M. 74.

110. *Inconsistent pleas.* A plea admitting a part of the debt to be due, and making defence as to the balance, is like a plea of tender, and cannot be pleaded in connection with other pleas, denying the whole ground of the action; for on that plea the plaintiff would be entitled in law to a judgment *nil dicit*, for the amount admitted to be due, which he cannot take by reason of the other pleas denying his whole action; *Williams v. Harris*, 2 H. 627. But in *Rowland v. Dalton*, 7 G. 702, it was held, that inconsistent pleas may be pleaded together; and hence, that in an action against a defendant as a partner, he may plead the general issue which admits the partnership; and may also deny the partnership under oath, as the statute directs.

111. *Does not change common law order of pleading.* The statute (H. & H. 597), which provides that the defendant may plead as many pleas in bar of an action as he may choose, although some may be to the party, or the character of the party, does not change the common law order of time in which pleas of different kinds are to be pleaded; and hence, under the statute, the defendant cannot plead a personal plea to the jurisdiction of the court, after he has pleaded to the action. The last named plea, is a waiver of any objection to the jurisdiction of the court over him; *Peters v. Finney*, 12 S. & M. 449.

112. *Joinder of pleas in abatement and in bar.* A plea in abatement and a plea in bar, cannot be put in at the same time; the latter is a waiver of the former; *Pearce v. Young*, W. 259. But this is overruled; and pleas in bar and in abatement may be filed together, and it is only when a plea in bar is filed after a plea in abatement, that it operates as a waiver of the first plea. See ABATEMENT, 9.

113. *Two pleas in abatement may be pleaded.* See ABATEMENT, 9.

114. *Admissions in one plea, no evidence against another plea.* Under the statute allowing several and inconsistent pleas, each plea is distinct; and an admission in one plea, is no evidence to overturn a denial contained in another; *Doss v. Jones*, 5 H. 158. Hence, in ejectment, a plea setting up a claim for valuable improvements, is no evidence to prove possession of the land in the defendant, if the general issue be also pleaded; *Morris v. Henderson*, 8 G. 492.

X. Statute requiring certain Pleas to be Sworn to.

115. *As to this*, see NON EST FACTUM. Post, 131a, 181. *BILLS OF EXCHANGE*, 173. *et seq.*

XI. Pleas in Short by Consent.

116. *Validity of.* Where the plea and replications are "in short by consent," it will be error to take judgment by default, as if there were no pleas; but the court reluctantly concede any validity whatever to this mode of pleading; *McEwen's Case*, 3 S. & M. 120. A replication in these words, "Issue to second plea," is void; but it must be demurred to. It is good after verdict, without demurrer or objection; *Pickett v. Ford*, 4 H. 246.

117. *Such pleas waive replication.* If by consent, a plea is put in "In short by consent," it will be considered that a replication in short is also in; *Cole v. Harman*, 8 S. & M. 562.

XII. Withdrawal of Pleas.

118. *After withdrawal no part of record.* Where pleas of justification in slander are withdrawn, they are no part of the proceedings, and are not therefore legal evidence before the jury; *Gilmore v. Borders*, 2 H. 824.

119. *Effect of withdrawal of plea.* The withdrawal of a pleading, in effect, accomplishes the same end as the sustaining of a demurrer to it; and if after a demurrer is overruled, the pleading be withdrawn, the demurrant cannot assign for error the overruling of his demurrer; *Rocco's Case*, 8 G. 357.

120. *What is a withdrawal of a plea.* The phrase, "withdraw a plea," means in legal contemplation, to withdraw or waive the defence set up in the plea, and not to abstract the plea itself from the file; that remains on file and constitutes after the withdrawal a part of the record (*sed vide ante*, 118). The plea itself cannot be taken from the file without leave of the court, and that leave should appear from the record. Hence, a recital in the judgment, that the defendant appeared and withdrew his plea, is no evidence of his appearance, if there be no plea in the record; *Barker v. Shepard*, 42 M. 277.

XIII. Miscellaneous Pleas setting up certain Defences.

1. Accord and Satisfaction.

121. *Same.* A plea of accord and satisfaction may be pleaded *purs darien continuance*, to an action of trespass; *Heirn v. Carron*, 11 S. & M. 361.

121a. *Must aver satisfaction: Tender.* Accord executed is satisfaction; but accord executory is only substituting one cause of action for another. Hence, a plea to an action of *assumpsit*, that the plaintiff had agreed to accept depreciated currency in satisfaction of the claim sued on, without averring actual payment, will be bad on demurrer. Nor is the plea with an averment that the defendant had a particular currency in readiness, and made presentation for payment, sufficient. If the thing tendered be capable of production in court, as specie, bank notes, &c., it must accompany the plea; *Guion v. Dougherty*, 43 M. 538. See ACCORD AND SATISFACTION.

2. Assignment of the Money sued for.

122. *Same.* A plea that the plaintiff hath assigned the money due on the note, which is the foundation of the action, and "hath not now any right or title in or to the money due on the same, having parted with it by assignment" is bad. The averment in relation to the assignment does not show that the plaintiff does not hold the legal title to the note; and the averment denying his right and title is to be construed not as a distinct averment, denying his right and title. &c.; but as an inference from the alleged assignment; *Scott v. Metcalf*, 13 S. & M. 563.

See ASSIGNMENT, 17a.

3. Attachment, Traverse of.

123. *Same.* A plea traversing the grounds upon which an attachment is sued out, should contain a simple denial of the causes for the attachment, as stated in the affidavit. Such a plea is not demurrable, because of objections to the notice of special matter appended to it; *Ross v. Fowler*, 42 M. 293.

See PRACTICE, 58,

4. Failure of Consideration.

124. *Same.* A plea to an action on a note, that it was executed without any consideration good or valuable in law, is good; and to such a plea, the replication may be general, averring that it was executed "on good and sufficient consideration;" or it may be special, setting out the consideration; *Matlock v. Livingston*, 9 S. & M. 489; cited and confirmed in *Taylor v. McNairy*, 42 M. 276.

5. Forbearance of Suit.

125. *Same.* A plea of forbearance given to the principal, should state that the time of payment was extended without the surety's consent; *Green v. Brandon*, W. 372. A plea of forbearance, which avers, "that for a valuable consideration, paid by the principal to the creditor, the latter gave indulgence to

the former, for twelve months, without the consent of the surety," is good; *Dent v. Coleman*, 10 S. & M. 83.

6. General Performance.

126. *Same*. A plea of general performance to a declaration on a penal bond, with a condition, in which specific breaches of the condition are set out, is bad on demurrer; *Emanuel v. Laughlin*, 3 S. & M. 342. And where the plaintiff declares on a bond with a negative condition, assigning the breach of that condition, the defendant cannot plead general performance; for in that case, the plaintiff could only reply by repeating his declaration. Hence, to an action on a bond, in which the defendant bound himself not to practice medicine within a certain district, assigning as a breach, that the defendant had so practiced, the plea of general performance will be bad; *Thompson v. Means*, 11 S. & M. 604. See *ante*, 94. As to *onus probandi*, where general performance is pleaded, see *post*, 174, 175.

7. Nil Debet.

127. *Same*. To a declaration on a penal bond, with a condition which is not set out, *nil debet* is not a legal plea; *Burfield v. Kearney*, W. 504; *Boggett v. Beard*, 43 M. 120. Where in debt on a specialty, the deed is only inducement to the action, and matter of fact is the foundation, *nil debet* may be pleaded. But where the deed is the foundation of the action, though extrinsic facts are mixed with it, *nil debet* is not a good plea; and hence, it is a good plea to an action on a sheriff's bond, to recover money collected by him, on execution as in that case, the bond is only inducement to the action; *Matthews v. Redwine*, 1 C. 233.

8. Nul tiel Record.

See NUL TIEL RECORD.

128. *Same*. A party cannot show payment of a judgment under a plea of *nul tiel record*; he must plead payment, as in other cases; *Stephens v. Roby*, 5 C. 744.

129. *Same: Verification*. In a plea of *nul tiel record*, a verification is unnecessary, because it is a negative; and if a verification be inserted, it will be surplusage, and will not vitiate the plea; *Wright v. Weisinger*, 5 S. & M. 210. But it should conclude with a verification by the record, and an omission so to conclude will be bad on demurrer; *Cannon v. Cooper*, 10 G. 784. There should be a replication to a plea of *nul tiel record*; *Bone v. Gilly*, 7 H. 671.

130. *Same: Should not be argumentative*. A plea to an action on a judgment which avers, "that if there be a record of any such supposed judgment, the defendants were not made parties to the suit in which it was rendered, and therefore the court had no jurisdiction to render the judgment against them," &c., is bad, because it is but an argumentative denial of the record; *Cannon v. Cooper*, *supra*.

130a. *When matter of abatement only*. If

to an action on an administrator's bond by a judgment creditor, for a *devastavit* in not paying his judgment, the defendant plead there is no such judgment, this is not properly a plea of *nul tiel record*. It does not go to the merits, but only presents matter in abatement, and should the court find the plea against the defendant, judgment by default only, with writ of inquiry, can be rendered (citing *Sims v. Nash*, 1 H. 271); *Cogan v. Duncan*, 1 C. 274.

131. *Same: How tried; waiver of trial*. The plea of *nul tiel record* should regularly be tried by the court, before the cause is submitted to a jury; but after two new trials, and three concurring verdicts against the plaintiff in error, if it do not appear that he insisted on a trial of the plea of *nul tiel record*, it will be too late for him to insist that the judgment should be set aside, and a new trial granted, on the ground that it does not affirmatively appear by the record that that issue was determined. In such a case it will be considered as waived; *Field v. Weir*, 6 C. 56.

9. Nul tiel Corporation.

131a. *Same*. *Nul tiel* corporation sworn to is a good plea in this State, since the Act of 1836, which dispenses with proof of the character in which plaintiff sues, unless it be denied under oath; *Vicksburg Waterworks & Banking Co. v. Washington*, 1 S. & M. 536.

10. Non Assumpsit.

132. *Same*. A plea of *non assumpsit* will be good, if it substantially deny the promise or undertaking declared on; *Tomlinson v. Hoyt*, 1 S. & M. 515.

11. Payment.

See PAYMENT, 20, 21.

133. *Same: Bill of particulars*. The plea of payment is good to let in proof of actual payment in money, either total or partial, without a bill of particulars being filed; *Prim v. Kiltridge*, W. 390; *Price v. Sinclair*, 5 S. & M. 254. The plea is a good one, without a bill of particulars, and it will be error to go to trial without a replication to the plea; *Webster v. Tiernan*, 4 H. 352. But if the plea concludes thus, "And the defendant herewith files his bill of particulars, and will insist upon them as a set-off," and there be no bill of particulars filed, the plaintiff may treat the plea as a nullity, as no evidence could be given under it; but if the plea had been simply one of payment without notice of set-off, the rule would be different (see case above cited); *Miller v. Brooks*, 4 S. & M. 175.

134. *Same*. The bill of particulars filed with a plea of payment, though essential, is no part of the plea; and the plaintiff, in his replication, cannot put in issue, any item, in the bill of particulars. The plaintiff can take advantage of all legal objections to these items, by taking issue on the plea; *Vanzant v. Shelton*, 40 M. 335.

135. *What the plea of payment admits*. The plea of payment admits the execution of

the instrument sued on; *Hines v. Rogers*, W. 486.

See PRACTICE, 117.

136. *Proof of a partial payment under.* Under a plea of payment in full, partial payment may be proven; *Cage v. Iler*, 5 S. & M. 410; *Price v. Sinclair*, Id. 254.

12. Set-off.

137. *Same.* A plea of set-off is a nullity in this State; *Houston v. Smith*, 2 S. & M. 597; *Henry v. Hoover*, 6 id. 417; *Anderson v. Burke*, Id. 475. The plea is unknown to our laws, and the defence may be made either under the general issue, or payment with notice by bill of particulars; *Alliston v. Lindsey*, 12 S. & M. 656.

138. *Same: Bill of particulars.* But where a set-off is claimed under the plea of payment, the defendant will not be allowed to introduce evidence to establish it, unless he file with his plea, an account, stating the nature of the payment or set-off, or unless the same be so plainly and particularly described in his plea, as to give notice to the plaintiff of its character; *Phipps v. Shegogg*, 1 G. 241; S. P., *Curry v. Kurtz*, 4 G. 24.

139. *Same: Cross action.* The defendant cannot deny in toto, the plaintiff's right of action, and at the same time, set up in his answer, a substantive and independent cause of action, inconsistent with the plaintiff's claim, and involving the issue of its justice and legality, and which amounts of itself, to an assertion that the plaintiff's demand is ill-founded *ab initio*, and hence, where the plaintiff brought an action to recover damages, as for a total loss of the chattel, occasioned by a breach of the defendant's warranty of soundness, the latter cannot deny the breach of the warranty, and at the same time demand judgment against the plaintiff for the purchase money; *Shewalter v. Ford*, 5 G. 417.

XIV. Replications.

140. *Effect of failure to reply: Case in judgment.* To an action of *assumpsit*, the pleas were *non assumpsit*, and part failure of consideration—the latter not being replied to. There was a trial, and verdict for plaintiff: *Held.* that the defendant was entitled to take judgment on his second plea, which was not replied to; and his failure to do so, was a waiver of the plea; *Roberts v. Haley*, 2 H. 886. It is error to proceed to trial and judgment where there is an affirmative plea unanswered; *Webster v. Tiernan*, 4 H. 352; *Bozman v. Brown*, 6 H. 349. And such failure to reply amounts to a discontinuance of the action, which may be taken advantage of before verdict; it is such error, however, as will cause a reversal of the judgment; *Hogue v. Lewellen*, 42 M. 302.

141. *Replication to plea of nul tiel record.* See ante, 129.

142. *Replication to plea of payment, with bill of particulars.* See ante, 129, 130.

143. *Departure in replication.* See ante, 51, 52, 52a.

144. *Special traverse in replication.* See ante, 51, 103, 104.

145. *Special replication to plea of general performance.* See ante, 19, 94.

145a. *As to right to plead several replications.* see ante, 190.

146. *Replication to plea setting up want of title.* A special plea, alleging that the plaintiff has no interest in the note sued on, is bad, as amounting only to the general issue; but a replication to such a plea which alleges generally, that the plaintiff had an interest in the note at the commencement of the action, is a good answer to it; and means that the plaintiff has such an interest in it, as to enable him to maintain an action at law on it; *Anderson v. Patrick*, 7 H. 347. See also, ante, 124 for a general replication to plea of failure of consideration.

146a. *Replication must answer the whole plea.* A replication should answer the whole plea; and hence, if the plea be to the whole declaration, a replication which sets out with "*precludi non*" as to the 2d and 3d counts, is defective; *Wren v. Span*, 1 H. 115.

XV. Pleadings by and against Executors, Administrators and Guardians.

147. *Declaration by creditors for devastavit.* In an action by a creditor on an administration bond, it is unnecessary in assigning breaches of the bond, to state the kind and quality of the goods, &c., which came to the administrator's hands; it is sufficient to aver that goods, &c., sufficient to pay the debt came to the administrator's hands, and that he has wasted and converted them to his own use; and if the value of the goods, as stated, be more than the debt, that will be a good averment of sufficiency of assets; *Hoggatt v. Montgomery*, 6 H. 93.

148. *Same: Averment as to failure to pay penalty of the bond.* The failure to pay the penalty of an administrator's bond, is sufficiently averred in a declaration by a judgment creditor for a *devastavit*, when the declaration alleges, "that by his failure to pay the judgment, an action hath accrued to the plaintiff to have and recover of and from the defendant" (stating a sum which is the penalty of the bond); and it seems that an averment, that the defendant has failed to pay the creditor's judgment, is sufficient, as the bond is but an indcement to the action; *Randolph v. Singleton*, 12 S. & M. 439.

149. *Executor not bound to plead specially.* An executor or administrator is not bound to plead an affirmative plea (as the statute of limitations) specially, but if he undertake to do so, he must plead it correctly; *Wren v. Spann*, 1 H. 118; and having the right to make all defences under the general issue, it will not be error for the court on sustaining a demurrer to a special plea filed by an administrator in connection with the general issue, to omit to award *respondeat ouster*; *Hawkins v. Miss. C. R. R. Co.*, 6 G. 688; S. P., *Effinger v. Richards*, 6 G. 540. See post, 166.

See EXECUTOR AND ADMINISTRATOR, 314, 314a.

150. *Plea of non presentation of claim.* A plea by an administrator, setting up non presentation of the claim sued on, within the time prescribed by law, should aver that the publication of notice was commenced within the time prescribed by law, from the date of the grant of his letters, and was continued for the legal period; *Wren v. Spann*, 1 H. 118. And it should deny that he had any knowledge or notice of the existence of the claim within the time limited for its presentation to him; *Branch Bk of Ala. v. Rhew*, 8 G. 110.

151. *Plene administravit.* *Plene administravit* is a good plea to an action by a creditor against an administrator for a *devastavit*; but it is only applicable to cases where all the assets have been consumed in paying preferred debts, and those which were a lien on the property in decedent's lifetime; *Randolph v. Singleton*, 12 S. & M. 439.

152. *Declaration on guardian's bond.* As a general rule, it is not necessary, in declaring on a specialty, to set out any inducement or statement of the consideration upon which the contract is founded; but the declaration usually proceeds at once to the statement of the specialty. Hence, in declaring on a guardian's bond, it is not necessary to aver that the principal obligor had been appointed guardian by the proper court; *Lum v. Springer*, 2 C. 479.

153. *Same.* And in such a declaration, where the relator is still a minor, if the declaration aver that the suit is brought "at the relation of the next friend and guardian of the minor;" and after setting out breaches prejudicial to the minor, concludes "by means whereof the said ward hath sustained damages," &c., by reason of which the said writing obligatory became forfeited, whereby an action hath accrued, &c., it will be sufficient to show that the suit is brought for the benefit of the minor, at the relation of his next friend and guardian; *Id.*

XVI. False Pleas.

154. *False plea bad.* The object of pleading is to ascertain the *truth* of the material facts in controversy between the parties; and if it judicially appear of record, that the matter pleaded is false, or if it be immaterial, the other party may have judgment, as if that plea had not been filed; *Thigpen v. Miss. Cent. R. R. Co.*, 3 G. 347; *S. P., Walker v. Mobile & Ohio R. R. Co.*, 5 G. 245.

155. *Same; Instances.* Where a person subscribes for stock in a railroad corporation, according to its charter, he thereby is admitted a member of the corporation, and becomes entitled to the franchises granted by the charter, which is a valuable consideration for the subscription. A plea, therefore, to an action by the corporation, to recover the amount so subscribed, that the subscription was made without valuable consideration, is bad, because it appears from the defendant's own showing, that the plea is false; *Thigpen v. Miss. Cent.*

R. R. Co., supra. And so, if it appear from the record, that the act of an assumed agent of the plaintiffs has been ratified by them, the plea of the defendant, denying the authority of the agent to act for the plaintiff, would thereby appear to be false, and therefore bad. And an action by the corporation to recover subscription for stock procured by such assumed agent, is a ratification of the act, and makes the foregoing plea of defendant appear to be false on the record; *Walker v. Mobile R. R. Co.*, 5 G. 245.

XVII. Protestando: Profert and Oyer.

156. *What plea confesses: Protestando.* Every pleading is taken to confess such traversable matter, alleged in the pleading on the other side, to which it is an answer, as it does not traverse, notwithstanding a *protestando*, the only effect of which is to leave the party making it at liberty to traverse, in another suit, the traversable matter in his adversary's pleading, which he has not chosen to deny in the existing suit; *Thigpen v. Miss. Cent. R. R.*, 3 G. 347.

157. *Profert and oyer of a record.* It is true that *oyer* of a record or recognizance, which are a part of the proceedings of a court, will not be granted, because a party will not make profert of them in his declaration; but, in an action on a bond, which is the foundation of the plaintiff's right, profert is necessary and *oyer* demandable, notwithstanding the bond is an official bond, and required to be recorded; in such case, however, the plaintiff, in answer to the demand, may produce only a certified copy; *Matthews v. Bailey*, 3 C. 33.

XVIII. The General Issue, and what may be Proven under it.

158. *Fraud: Total and partial failure of consideration.* Fraud in the contract and total failure, or want of consideration, may be given in evidence under the general issue. *Quære*, as to partial failure of consideration; *Brewer v. Harris*, 2 S. & M. 84; *S. P., Ferguson v. Oliver*, 8 S. & M. 332. Where it appeared that a note was given for the boot in an exchange of horses, and there was a warranty of soundness of the horse received by the maker, and a breach of it, and in consequence thereof, the horse was worth less by the amount of the note than he would have been worth if he were sound; it was held that this defence could be made under the general issue to an action on the note. Fraud is provable under the general issue, though it is more regular to plead it specially, or give notice of it with the plea; *Simmons v. Cutreer*, 12 S. & M. 584. See *post*, 165.

159. *Set-off.* A set-off may be given in evidence under the general issue, if a bill of particulars be filed with it, but the more appropriate plea is payment, the plea of set-off being unknown to our laws; *Alliston v. Lindsey*, 12 S. & M. 656.

160. *General rule as to proof under gen-*

eral issue. Any defence may be made under the general issue, which shows that the original contract is not binding, or, by its terms, is no longer binding; and hence, an agreement made by an administrator, at a sale made by him, that if the property was lost by the purchaser, by reason of being taken under an execution against the intestate, the purchaser should not be bound to pay the purchase money, may be set up under the general issue, as a defence to an action for the purchase money; *Buckels v. Cunningham*, 6 S. & M. 358.

161. *Want of interest and title in plaintiff.* The defence that the plaintiff has no interest or title in the claim sued on, may be made under the general issue; *Sims v. Ross*, 8 S. & M. 557; *Lake v. Hastings*, 2 C. 490. And a special plea, setting out want of title or interest in plaintiff, is bad, as amounting only to the general issue; *Bingham v. Sessions*, 6 S. & M. 13. See *ante*, 122.

162. *Failure to complete work sued for.* In an action by a mechanic to recover for work and labor done and performed for the defendant, his failure to complete the work, according to contract, may be given in evidence under the general issue; *Conner v. Swain*, 3 C. 245.

163. *Payment.* Actual payment in money may be shown under the general issue, without a bill of particulars filed; *Miller v. Brooks*, 4 S. & M. 175.

164. *General issue in replevin and ejectment.* Affirmative matter, as the award of arbitrators, may be given in evidence under the general issue in replevin; *Newell v. Newell*, 5 G. 385; and so in ejectment—as the statute of limitations; *Tegarden v. Carpenter*, 7 G. 404.

165. *Impeaching consideration of bond.* The consideration of a bond can be impeached at law, only by a special plea; *Candiff v. Thigpen*, 1 G. 180. But if the bond appear to be voluntary, on the face of the declaration, the objection may be made by demurrer; *State v. Bartlett*, 1 G. 624.

166. *Right to plead specially.* Where the law allows the defendant to plead his defence specially, he shall not be deprived of the right to do so, because he may be able to make proof of the same defence, under another and general plea, which he has already pleaded; and hence, it will be error to sustain a demurrer to a special amended plea, merely because the defendant could set up the same defence under the general issue, which had originally been pleaded; *Tegarden v. Carpenter*, 7 G. 404.

But where the special plea is bad, it is a good excuse on sustaining a demurrer thereto, for the omission to award *respondat ouster*, that the defence attempted to be set up in it, could be made under the general issue, which is on file; *Hawkins v. Miss. Cent. R. R. Co.*, 6 G. 688; *ante*, 149.

167. *Notice of the special matter under Rev. Code of 1857, p. 493, art. 97.* By this statute, no affirmative matter in avoidance of the contract sued on, can be given in evidence

under the general issue, unless notice of the matter be given with the plea. Hence, it cannot now be shown under that plea, without the notice filed, that the contract sued on was void, because made on Sunday; *Herndon v. Henderson*, 41 M. 584.

168. *The kind of notice required: Case in judgment.* The notice of justification accompanying a plea of not guilty, to an action of slander, need not in form amount to a special plea of justification; but it must fully notify the plaintiff in substance, of the specific charge relied on, so that he may be prepared to prove his innocence; and hence, a notice "that the defendant will prove the truth of the words complained of," is insufficient; *Powers v. Presgrove*, 9 G. 227.

XIX. The Pleading Act of 1850.

169. *General denial under.* The general denial under the Pleading Act of 1850, is the same in effect, as the general issue at common law; *McIntyre v. Kline*, 1 G. 361. And it is pleadable as the general issue at common law; *Grinstead v. Fonte*, 3 G. 120.

170. *Allegations not denied are admitted.* Under this act, the allegations of the complainant not denied by the answer, are admitted as true; *Adams v. Guice*, 1 G. 397. That act provided, that "every material allegation of new matter in the answer, not specifically controverted by the reply, is to be taken as true;" but this rule only applies to such new matter as would be proper for a plea of confession and avoidance, and not to a mere specific denial of a fact averred in the complaint, and necessary to be proven to enable the plaintiff to recover; *Houston v. Crutcher*, 2 G. 51.

171. *Pleadings in ejectment.* Under the Pleading Act of 1850, tenants in common could unite, as joint plaintiffs in an action of ejectment; *Corbin v. Cannon*, 2 G. 570. At common law, the defence of the statute of limitations to an action of ejectment, could not be specially pleaded, but the rule is different under the Pleading Act of 1850; *Tegarden v. Carpenter*, 7 G. 404. See *ante*, 164.

172. *Duplicity in replication.* A replication under this act, is not bad for duplicity; *Joslin v. Caughlin*, 3 G. 104.

173. *Averment of amount of damages.* Under this act, an averment of the amount of damages claimed by the plaintiff is unnecessary, and if made will be surplusage; and hence, it is not error, that the judgment exceeds the damages claimed; *French v. Davis*, 9 G. 218.

XX. Miscellaneous.

174. *Onus probandi, on plea of general performance.* If, to an action on a penal bond for damages for a breach of its conditions, the issue be on the plea of general performance, the onus to show a breach of the condition is on the plaintiff. *Aliter*, where the defendant pleads special performance; *Hollday v. Cooper*, 1 S. & M. 633.

175. *Same: Case in judgment.* In an action of covenant on a penal bond, conditioned for the payment of money, and also for the payment by obligor, of a note given by the obligee to a third person—the amount of the note not being specified in the bond—the declaration, however, averred it to be for \$5,000, and assigned as a breach of the condition, that the defendant had not paid that note. The defendant alleged in his plea, performance, in this: “that he had paid the note in the plaintiff’s declaration mentioned, according to the effect of the covenant.” No proof was introduced by either party, except the reading of the bond sued on, and a verdict was rendered for plaintiff for \$5,000: *Held*, that the plea though not correct in form, was good after verdict, and that it put in issue only the performance of the covenant as stated; and that the burden of proof was on the defendant pleading the performance, and the verdict must stand; *Winn v. Skipwith*, 14 S. & M. 14. See *ante*, 126.

176. *Proof of replication.* An averment in a replication requires no stronger proof, than if made in the declaration; *Moore v. Mickell*, W. 231.

177. *Lost pleadings.* The pleadings in a cause must evolve an issue of law or fact, before a judgment can be rendered; the evidence of the existence of such pleadings, is their appearance among the files. The statement of the clerk, that they have been filed, and are lost or mislaid, is not sufficient evidence of their existence to authorize a judgment; *Armstrong v. Barton*, 42 M. 506; *S. P., Steele v. Palmer*, 41 M. 88.

See PRACTICE, 61.

178. *Plea of sheriff’s sureties attacking bond.* A plea by the sureties of a sheriff to a motion made against them, setting up the invalidity of the sheriff’s official bond, upon the ground that it is payable to the governor and his successors in office, instead of to the State, should expressly negative the execution by them of any official bond payable to the State. A simple averment that a certain instrument executed by them on a certain day is void as an official bond, because it is payable to the governor, and not to the State, will not do; *Paddleford v. Moore*, 3 G. 622.

179. *Sheriff’s plea setting up dispute as to the fund sued for.* Where a sheriff seeks to justify his refusal to pay to the plaintiff money collected by him on an execution, upon the ground that there is a controversy respecting the title to it, he must set forth in his plea the facts upon which he relies, so that the court may judge of their sufficiency, and also determine whether the plaintiff is entitled to the money; *Trotter v. Parker*, 9 G. 473.

180. *As to plea by stockholders setting up deviation in route of railroad*, see *ante*, 87.

181. *Nul tiel corporation sworn to.* A plea of the general issue, accompanied by an affidavit, which denies that the plaintiff is a corporation, is sufficient to throw the burden on plaintiff of proving its character. The plea in such a case is the same as if not sworn to.

It is not changed by the affidavit, though certain effects grow out of the affidavit; *Vicksburg Waterworks, &c., v. Washington*, 1 S. & M. 536.

See BILLS OF EXCHANGE, 173, *et seq.* NON EST FACTUM.

182. *Defective writ cured by plea.* A defective writ is cured by a plea to the merits; *Halhcock v. Owen*, 44 M. 799.

183. *Plea in bar a waiver of abatable matter.* If the defendant fail to take proper advantage of the disability of the plaintiff, such as coverture, &c., but demurs or pleads in bar, he thereby waives the disability, and cannot take advantage of it on error; *Simmons v. Thomas*, 43 M. 31.

See ABATEMENT, 10.

Possession.

See VENDOR AND VENDEE. NOTICE. EJECTMENT.

1. *Good against a fraudulent title.* Possession is good against a title obtained by fraud; *Niles v. Anderson*, 5 H. 365.

2. *Is notice.* Possession is notice of the title of the occupant, and equivalent to registration; *Dixon v. Doe*, 1 S. & M. 70.

See NOTICE, 2, 3.

Posthumous Child.

See PARENT AND CHILD, 3.

Power of Attorney.

See PRINCIPAL AND AGENT.

1. *Registration of.* A power of attorney to sell land is a contract in relation to land, and may be proven, certified, and acknowledged, and registered, in the same manner as deeds for the conveyance of land; *Hughes v. Wilkinson*, 8 G. 482.

Powers.

1. *Power in life tenant of unrestricted disposition.* A bequest to one for life, with directions that the property “shall be delivered to the legatee after the testator’s death, as soon as possible, that he may have full control and be empowered to dispose of the same as he may think proper,” vests in the legatee an estate for life only, but with the unrestricted power of disposing of the fee; *Andrews v. Brumfield*, 3 G. 107.

2. *Power of unrestricted disposition.* A power of unrestricted disposition appended to a life interest in property, is a part of the “estate” of the tenant for life; *Id.*

3. *When executed: Rule on the subject.* Whether or not a testator has executed a power of appointment vested in him, is a question of intention, to be arrived at by the same rules of construction which apply in other cases in the interpretation of wills; and if he use general words, such as “all my estate,” or “all the balance of my property,” which in themselves are sufficient to cover the execution of the power; it will be sufficient although no reference be expressly made

in the will to the power, or the subject matter upon which it may be exercised; and especially is this so when it appears that these general words would be inoperative, unless construed to be an execution of the power; *Ib.*

4. *Construction of power to appoint a new trustee.* The power granted to the creditor in a deed in trust, to appoint a new trustee to sell the property, should express plainly the cases in which a new trustee is to be appointed, and it should embrace *every event* that can render such appointment necessary. The power to appoint a new trustee can be exercised only in the *particular event* in which the power is plainly and distinctly given. When the power of appointment is given upon the neglect or refusal of the trustee to act, it cannot be exercised where the trustee is dead; *Guion v. Pickett*, 42 M. 77.

5. *Power to sell does not enlarge life estate.* The power to sell, attached to an express life estate, will not have the effect to enlarge it into a fee; *Dean v. Nunnally*, 7 G. 358; *S. P.*, *Rail v. Dotson*, 14 S. & M. 176.

6. *Same.* Where it is apparent from the terms of a marriage settlement, that the issue of the marriage are to take the whole of the remainder after the death of the parents, a power reserved to the settlor to apportion the remainder by will among them, will not enlarge an express life estate, limited to him, into a fee; and in such a case, if the power be not executed, the children will take equally; *Gorin v. Gordon*, 9 G. 105.

7. *Equity aids defective execution.* A court of equity will aid a defective execution of a power: Hence, where an agent makes a sale of land by writing, not under seal, and in his own name instead of in the principal's, a court of chancery will recognize the vendee's title and protect it; *McCaleb v. Pradatt*, 3 C. 257.

8. *Naked power strictly construed.* The principle is of very general application, that at law, every naked power must be strictly pursued, and all prescribed formalities duly observed; *Learned v. Matthews*, 40 M. 210.

Practice.

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For practice in High Court, see HIGH COURT. For practice in Chancery, see CHANCERY, sub-division Practice. For practice in Probate Court, see PROBATE COURT. See also AMENDMENT. ABATEMENT. COSTS. DEMURRER TO EVIDENCE. EVIDENCE. DETINUE. JUDGMENT. TRIAL OF THE RIGHT OF PROPERTY. REVIVOR. SCIRE FACIAS. VERDICT.

I. Amendment.

See AMENDMENT.

1. *Amendment of averment as to damages.* It is error in an action of *assumpsit* to render judgment for a greater sum than the damages are laid at in the declaration; but the court should allow the plaintiff to amend, so as to make the damages sufficient; *Gerens v. Wright*, 8 S. & M. 360.

2. *Amendment after reversal in High Court.* Where a demurrer to a plea is overruled in the court below, but sustained in the High Court, and judgment of *respondeat ouster* awarded, it is competent for the court below, under the judgment, to allow an amendment of the plea; *Haynes v. Covington*, 9 S. & M. 470.

3. *Duty of court under Act of 1840.* Under the Act of 1840 (Session Laws, p. 133), regulating the practice in the Circuit Court, which provides, "that if it be discovered at any time that the pleadings are defective, it shall be the duty of the court, and he is hereby required, to cause the same to be amended and perfected, so that the merits of the controversy shall be fairly put to the jury," it is no longer a matter of discretion in the court to allow amendments, but such allowance is a matter of obligation and right; and where the court conceives that the pleadings are defective, it is his duty to see that they are perfected, and that a trial is had on the merits; and after sustaining a demurrer to a replication, the court should not grant judgment for the defendant, but should cause a proper replication to be filed; *Dent v. Coleman*, 10 S. & M. 83. See AMENDMENT, 22.

3a. *Amendment after plea in abatement.* If plaintiff obtain leave to amend his declaration, after plea in abatement is filed, it is a confession of the plea, and disposes of it. *Webster v. Tiernan*, 4 H. 352; *Duncan v. McNeill*, 2 G. 704.

3b. *Effect as to plea filed out of time.* It

will not make a plea good, which is null, because filed too late, if it applied only to the original declaration, that after it was filed, amended counts to the declaration were also filed; *Field v. Weir*, 6 C. 56.

3c. *Pleas. How affected by amendment of declaration.* The pleas to the original declaration are not superseded by the filing of an amendment to the declaration, unless the amendment made the pleas improper and inapplicable; *Ib.*

II. Charging the Jury.

4. See INSTRUCTIONS.

III. Continuance.

See CONTINUANCE.

5. *Judgment final by default as to one, and continuance as to another.* A judgment final by default against a part of the defendants, and a continuance as to the others, is error; but the continuance is evidence that the plaintiff did not intend to take final judgment. At all events, such a judgment and continuance do not entitle the defendants against whom no judgment was entered, to have a discontinuance as to them entered at a subsequent term; *Prewett v. Caruthers*, 7 H. 304.

6. *Same: Where action is against makers and endorsers.* Where makers and endorsers of a note are sued in the same action, judgment by default may be taken against the maker at one term, and the cause continued as to the endorsers to another term; *Moore v. Ayres*, 5 S. & M. 310.

7. *Same: Case in judgment.* In an action commenced against the makers and endorsers of a note, judgment final was entered against two of the defendants, and the cause continued as to plaintiff in error, who was an endorser. At the next term the cause was dismissed, as to the defendants, against whom judgment had been entered, and a trial was had and judgment rendered against the plaintiff in error. No exceptions were taken in the court below to either judgment; *Held*, that the judgment against the plaintiff in error would not be set aside; *Hunt v. Nugent*, 10 S. & M. 541.

IV. Discontinuance.

See DISCONTINUANCE, and *ante*, 5, 6.

8. *Action against several, and no service on a part.* Where several are sued, and there is no service of process on a part of the defendants, it will be error to proceed to judgment against those served, without an entry of a discontinuance as to the others; *Davis v. Tiernan*, 2 H. 786; *Hughes v. Evans*, 4 S. & M. 437; *S. P., Dennison v. Lewis*, 6 H. 517.

9. *For failure to enter judgment where one count is undefended.* At common law, if the defendant failed to answer one of several counts in the declaration, the plaintiff would be entitled to judgment on it, and if he failed to take judgment, he would thereby discontinue his whole action; but this is cured after

verdict by the statute of jeofails; *Tucker v. Zollioffer*, 12 S. & M. 591. See DISCONTINUANCE, 9, 10.

10. *Failure to revive for two terms.* The failure to revive a suit for two terms after the death of a party, does not *per se* operate as a discontinuance without an entry of a judgment to that effect, and if revivor be had after that time, and a trial on the merits without objection, the irregularity will be waived; *McKey v. Torry*, 6 C. 78.

11. *For failure to enter judgment against one defendant.* Where an action is brought against A. individually, and also as executor of B. upon a note made by A. and B., if judgment by default be entered against "the said defendant" merely, it will be considered as against A. individually, and as a discontinuance as to him as executor; *Davis v. Mahorner*, 41 M. 552.

12. *Judgment against one of two executors.* If the summons be not served on one of two joint executors sued in an action at law, it will not be error to enter judgment against the one served with process without a formal dismissal as to the other; in such case the judgment is equivalent to a discontinuance of the suit as to the executor not served with process; *Hunt v. Anderson*, 4 G. 559. See DISCONTINUANCE, 12.

13. *Discontinuance as to survivor of defendants.* Where one of several makers of a bond dies pending a suit against all the obligors, the plaintiff may proceed against the administrators of the decedent conjointly with the others, and when revivor has been had against the administrator the plaintiff may discontinue as to the others and proceed to judgment against the administrator; *Woodhouse v. Lee*, 6 S. & M. 161; *Henderson v. Talbert*, 5 S. & M. 109.

V. Dismissal.

14. *Right of plaintiff to dismiss suit.* Generally a party, who institutes a suit, or prosecutes an appeal, has the right to dismiss the proceeding; but if he does so, the costs must be taxed against him; *Miss. Cent. R. Co. v. Beatty*, 6 G. 668.

14a. *Dismissal at instance of defendant.* The defendant may cause the action to be dismissed by showing that it is prosecuted without plaintiff's consent; *Dove v. Martin*, 1 C. 588.

15. *Dismissal of appeal in Circuit Court.* Where the owner of land appeals to the Circuit Court, from the inquest of a jury assessing damages accruing from the location of a railroad thereon, and at his instance the Circuit Court dismisses the suit, although such action be based on grounds which assume the absolute invalidity of the proceedings before the jury of inquest, the action of the court will be in effect a dismissal of the appeal merely, and not an annulment of the proceedings of the jury of inquest, which if not absolutely void, but only voidable, will be left in full force; and hence, upon such an order it will be error to tax the costs against the

railroad company; *Miss. Cent. R. R. Co. v. Beatty*, 6 G. 668.

VI. Evidence.

16. *Objections to.* See EVIDENCE, 298 to 303.

17. *Objection to witness.* See EVIDENCE, 233, 234.

18. *Examination of witness.* See EVIDENCE, 270, 284.

19. *Order of introducing evidence.* See EVIDENCE, 290, 294.

19a. *Affidavits.* See AFFIDAVITS.

VII. Imparance Term.

See CIRCUIT COURT.

20. *What is.* The return or imparance term is the first term after the summons has been legally served; *Story v. Ware*, 6 G. 399; and if there be more than one defendant, then the first term after the last one is served; and that defendant cannot be forced to trial, till the next term afterwards; *Maury v. Com'l Bk of Natchez*, 5 S. & M. 41; *S. P., Thornton v. Fitzhugh*, 10 S. & M. 438.

21. *Right to plead at.* The defendant's right to plead at the imparance term is not lost or waived by a motion to quash the summons, or the return on it; *Story v. Ware*, *supra*.

22. *The right to take judgment by default at the imparance term.* See *post*, 26, 27.

22a. *When appearance term has failed.* If the term to which *mesne* process is returnable fail, so that no court be held at that term, such term will, nevertheless, constitute the appearance term of the case, and it will stand for trial at the next term, in the same way as though the appearance term had been regularly held; *Thornton v. Fitzhugh*, 10 S. & M. 438.

VIII. Judgment by Default.

See JUDGMENTS, 55, *et seq.*

1. When there is a Plea on File.

23. *Cannot then be entered.* Judgment by default cannot be entered when there is a plea on file and undisposed of; *Selser v. Wilkinson*, W. 108; *Arrington v. M. & O. R. R. Co.*, 1 G. 470; *Taylor v. McNairy*, 42 M. 276.

24. *Same: Where the plea is in short by consent.* And so it is error to enter judgment by default where the parties have agreed that it shall be considered that a plea is filed—as “*nil tuel* record in short by consent,” and “*replication and issue in short by consent.*” But the court reluctantly conceded that this mode of pleading had any validity whatever; *McEwen's Case*, 3 S. & M. 120.

2. The Production of the Note required.

25. *Same.* The court below ought not to permit a judgment by default to be entered on a note without its being produced and filed, but as the note is no part of the record, the High Court cannot know whether this

is done or not, without a bill of exceptions; *Vickery v. Reester*, 4 H. 293.

But by art. 90, p. 492, of Rev. Code of 1857, the instrument or a copy, and the account sued on is required to be filed and is made a part of the record.

3. Judgment by Default at Return Term.

26. *The same necessary.* Judgment by default cannot be taken at the return term, unless the summons has been served personally, but if the judgment be reversed on that ground, on the case being remanded, judgment by default may be entered without a new writ; *Petit v. McCoombs*, 41 M. 628.

27. *When the declaration must be filed.* The plaintiff cannot take judgment by default at the return term of his writ, unless he has filed his declaration when the suit commenced; *Merritt v. White*, 8 G. 438; *Nelson v. Rogers*, 41 M. 635.

4. When Final; and when Writ of Inquiry necessary.

28. *When writ of inquiry necessary.* It is not necessary on a judgment by default in an action on an award for a sum certain; *Chace v. East*, W. 439. Nor in judgment by default against the endorser of a note; *Owen v. Snyder*, W. 326. It is necessary on judgment by default on a judgment on a foreign contract, to enable the court to ascertain the interest; *Fretwell v. Dinmore*, W. 484; and it is necessary, where a part of the claim sued for is an open account; *Sandford v. Campbell*, 7 S. & M. 107; but this is not the rule under the Rev. Code of 1857, art. 253, p. 521.

And in an action of debt on a penal bond with conditions, when the declaration alleges special breaches the judgment by default must not be final, but with a writ of inquiry, and a jury must be empanelled to assess the damages; *Russel v. McDougal*, 3 S. & M. 234; *York v. Crawford*, 42 M. 508.

See EXECUTOR AND ADMINISTRATOR, 116.

But under the Rev. Code of 1857, if the action be in assumpsit with bill of particulars filed, for the value of cattle killed by defendant—the tort being waived—the judgment by default should be with writ of inquiry, since the statute only allows judgment final where the action is *ex contractu*; *M. C. R. R. Co. v. Fort*, 44 M. 423. See PLEADING, 45a.

29. *Writ of inquiry awarded for failure to assess value of property.* If the jury in an action of detinue fail to assess the value of the property, the court may award a writ of inquiry to ascertain the same; *Carraway v. McNeice*, W. 538.

30. *When the writ awarded.* A writ of inquiry will be awarded only after a judgment by default is taken; *Nobles v. Christmas*, 2 H. 885.

31. *Bill of particulars must be filed.* A judgment by default on a count for money paid out for defendant, when no bill of particulars is filed, cannot be made final until after writ of inquiry executed; and on executing

the writ, no proof can be introduced to support the count, *unless, perhaps*, proof of actual payment of money to the defendant, and that is doubtful; *Barker v. Justice*, 41 M. 240.

32. *When the judgment is final.* The court has full power over judgments by default during the term at which they are rendered, and may set them aside in its discretion, except after writ of inquiry executed and judgment entered thereon, and then they can be set aside only for good cause shown therefor, under oath; *Ib.*

33. *Setting aside judgment by default.* A judgment by default will be set aside at the term at which it is entered, when there will be no delay on the trial upon affidavit of merits and the payment of costs, though no excuse be made for not pleading; *Fore v. Folsom*, 4 H. 282.

See JUDGMENT, 65, 66.

5. On what day Judgment by Default may be taken.

34. *Should not be taken till the fourth day of term.* A judgment by default, under the art. 150, p. 503, of the Rev. Code of 1857, is premature before the fourth day of the term; the defendant has until that day to plead; and such a judgment will be reversed on writ of error; *Davis v. Patty*, 42 M. 509; but in *Winston v. Miller*, 12 S. & M. 550, it was held that it was no objection to a judgment that it was rendered before time allowed for pleading had expired; an application should be made on the court below to set it aside.

6. Judgment by Default on Special Count, without Discontinuance as to Common Counts.

35. *Such judgment not error.* A judgment by default on a special count, without discontinuance as to the common counts, is not error; *Soria v. Planters' Bank*, 3 H. 46.

36. *Same: Case in judgment.* Suit was brought on a promissory note for a sum certain; but with the privilege reserved to the maker to pay it at a specified time and place in specific articles, and there was also the common money counts added, but with no bill of particulars, and to these counts was pleaded *non assumpsit*; but there was no plea to the counts on the note: *Held*, that judgment by default final might be taken on that count, without a discontinuance as to the common counts; *Rankin v. Sanders*, 6 H. 52.

7. Judgment by default as to one Defendant and a Verdict as to another.

37. *Such judgment is good.* In an action on a joint and several contract, judgment may be entered against one defendant on verdict, and against another by default, at the same term; *Peyton v. Scott*, 2 H. 870; *Lynch v. Commissioner of Sinking Fund*, 4 H. 377; but it is error to take judgment final against one, at one term, and a verdict and judgment against the other for a different sum, at a subsequent term; *Falconer v. Frazier*, 7 S. & M. 235; *S. P.*, *Prewett v. Caruthers*, 7 H. 304; *ante* 3.

38. *Same: In actions against makers and endorsers.* But where makers and endorsers of a note are sued in the same action, a judgment by default may be taken against the maker at one term, and the cause continued as to an endorser 'o the next; *Moore v. Ayres*, 5 S. & M. 310; *S. P.*, *Hunt v. Nugent*, *ante* 7.

IX. Judgment on Demurrer.

1. Where Demurrer is Sustained to the Declaration.

39. *Plaintiff must make affidavit of merits for leave to amend.* It is not the practice to allow the plaintiff to amend after a demurrer has been sustained to his declaration, except on affidavit of merits. The practice is to allow the defendant to answer over, where a demurrer has been sustained to his plea; but the practice has never been extended to demurrer to the replication; *Ross v. Sims*, 5 C. 359.

2. Where Overruled to Declaration.

40. *Leave to plead on affidavit of merits.* When a demurrer to a declaration is overruled, leave to plead is given only on affidavit of merits; *Robertson v. Banks*, 1 S. & M. 666; *Drane v. Board of Police*, 42 M. 264. But where before the defendant's demurrer to the declaration is disposed of, the plaintiff files an amended declaration upon the same cause of action, and the defendant plead thereto, the subsequent overruling of the demurrer to the original declaration does not entitle the plaintiff to a judgment final on it, upon the defendant's refusal to file an affidavit of merits in his defence. In such case, the amended declaration supersedes the original, and the disposition of the demurrer to it, is mere matter of form, and the cause being at issue on the amended declaration, there is no necessity for further pleading; *Wood v. Gibbs*, 6 G. 559. That affidavit of merits is not required, when demurrer to declaration is confessed. See PLEADING, 80.

41. *Same.* A plea in abatement was filed for a variance between the writ and the declaration, and the plaintiff demurred to the plea, and then amended his declaration so as to cure the defect. The demurrer was then overruled, and the court entered judgment final for the plaintiff, upon the idea that the plea in abatement was a nullity: *Held*, that the judgment was erroneous—the plea could not be treated as a nullity after demurrer filed to it, and that the judgment on overruling the demurrer should have been *respondeat ouster*; *Walker v. Walker*, 6 H. 500.

42. *Affidavit of merits.* If an appropriate plea be tendered after overruling a demurrer to a declaration, accompanied by an affidavit that it is true, this is a sufficient affidavit of merits; *Johnston v. Beard*, 7 S. & M. 214.

3. Demurrer Sustained to Plea.

43. *Respondeat ouster.* On sustaining a demurrer to a plea, the judgment should be *respondeat ouster*; *Douglass v. Hendricks*,

W. 230; *Southard v. Bowles* Ib. 325; *Beatty v. Harkey*, 2 S. & M. 563; *Heyford v. Miss. Union Bk.* 7 S. & M. 434; *McMillan v. Causey*, 43 M. 227.

44. *Where there are several pleas.* Whether upon sustaining a demurrer to one or more pleas, if there still remain one good issuable plea, the judgment should be *respondat oster*; *Quere?* *Besangon v. Shirley*, 9 S. & M. 457. It should be *respondat oster*, and if this judgment be omitted, and a trial had on the other pleas, it will be error though not objected to; *Lee v. Dozier*, 40 M. 477; but if there be another plea on file (as the general issue with notice), under which the facts stated in the plea demurred to might be proven, this will cure the error in omitting to award *respondat oster*; *McMillan v. Causey*, 43 M. 227; S. P. in PLEADING, 76.

45. *Sustaining second demurrer.* When a demurrer has been sustained to defendant's plea, and on *respondat oster* awarded, he again pleads a bad plea, the plaintiff on the sustaining of his demurrer to that plea is entitled to judgment *quod recuperet*; *Harrison v. Balfour*, 5 S. & M. 301; *Kirke v. Seawell*, 2 S. & M. 571. But if the defendant confess the demurrer to the first plea, and then a demurrer is sustained to the second plea, he is still entitled to plead again. The confession of a demurrer, and the sustaining of it, are not the same within the meaning of this rule; *Brown v. Smith*, 5 H. 387.

46. *Construction of judgment on demurrer.* If a general judgment be rendered, sustaining a demurrer, which was filed to a plea, it will be construed to mean that the demurrer was applied to the plea, and sustained to it; *Besangon v. Shirley*, 9 S. & M. 457.

4. Demurrer overruled to Plea.

47. *Judgment is final.* Where a demurrer to a plea in bar is overruled, the judgment is final for the defendant; and if there be a demurrer to a special plea in bar, which is undisposed of, and there be verdict on the general issue for the plaintiff, the judgment should, nevertheless, be for the defendant, because his special plea is a good bar to the action; *Bailey v. Gaskins*, 6 H. 519. But this is overruled; the judgment should be *respondat oster*; *Lang v. Fatheree*, 7 S. & M. 404. But the judgment would be final, unless the plaintiff ask leave to plead; *Shields v. Taylor*, 13 S. & M. 127; *Hardin v. Pelan*, 41 M. 112.

48. *Effect of respondat oster.* By the common law, if upon plaintiff's demurrer being overruled and he replied, this was a waiver of the demurrer, and he could not afterwards assign the overruling the demurrer, as error; but the consequence does not follow when the replication is filed under judgment of *respondat oster*, rendered by the court of its own motion without application from the demurrant; *Willis v. Ives*, 1 S. & M. 307; S. P., *Ellis v. Martin*, 2 S. & M. 187; *Gwinn v. McCarrroll*, 1 S. & M. 351.

49. *Overruling demurrer.* If a demurrer be overruled to a special plea in bar, it will

be error to give judgment for the plaintiff, without disposing of the plea of *non assumpsit*, which is also filed; *Rodgers v. Hunter*, 8 S. & M. 640. NOTE.—This seems to be a misapplication of the rule, that where a demurrer is *sustained* to a plea, and the defendant declines to plead over, judgment *nisi dicit* cannot be rendered *against* him, if he has also filed a good plea, which is undisposed of.

50. *Demurrer overruled:* A plea to one of several counts. Where there are several counts, and a demurrer is overruled to a plea to one of them, and the plaintiff decline to reply to that plea, it will be error to give judgment for defendant on the whole declaration, as the plaintiff might succeed on the other counts; *Dent v. Coleman*, 10 S. & M. 83.

5. Demurrer to Replications.

51. *Practice on sustaining demurrer to replication.* The practice which allows *respondat oster* on sustaining a demurrer to a plea, has never been extended to replications *Ross v. Sims*, 5 C. 359. See *ante*, 39.

52. *When plaintiff refuses to reply.* A successful demurrer by defendants to the replication to one of several pleas in bar, entitles the defendant to a judgment final, if the plaintiff refuses to reply; *Armfield v. Nash*, 2 G. 361; *Washington v. McCaughan*, 5 G. 374. Under the Act of 1840, the court is bound to allow plaintiff to amend, if a demurrer be sustained to his replication; *Wharton v. Porter*, 10 S. & M. 305.

6. Demurrer to Pleadings when part are Bad and part Good.

53. *Judgment in such case.* If a general demurrer be filed to a declaration containing two counts—one good and one bad, the judgment should be overruling it as to the good, and sustaining it as to the bad; *Dowell v. Boyd*, 3 S. & M. 592 (decided November, 1844). But the rule now is to overrule the demurrer entirely, and so it was decided in *Scott v. Peebles*, 2 S. & M. 546 (decided in January, 1844; and in *Field v. Weir*, 6 C. 56, decided October, 1854); S. P., *Judge of Probate v. Thompson* 2 H. 808; *Newell v. Newell*, 5 G. 385. See on this point PLEADINGS, 73, 74.

7. Plea and Demurrer to same matter.

54. *Not allowable: Judgment on.* It is not allowable to plead and demur to a whole declaration; and if it be done, it seems that plaintiff may disregard both plea and demurrer and take judgment by default. At all events, he may take issue on either as he may elect; and if he elect to join in the demurrer, and the court overrule it, the plaintiff is entitled to judgment, as if no plea had been filed. In such a case at law, the plea is not a waiver of the demurrer; *Gwinn v. Mandeville*, 9 S. & M. 320.

8. When Judgment on Demurrer is final.

55. *Same.* Judgments on demurrer under the statute (H. & H. 619, S. 9), are not final till the end of the term at which they are rendered; and hence, although it is too late

to apply after final judgment to amend the pleadings, yet a demurrant, whose demurrer has been overruled and judgment final in form rendered against him, may apply at any time during the term, to set the judgment aside, and for leave to plead; and the court, under the Act of 1840, is bound to grant the application. It would be otherwise if the judgment on the demurrer were final in fact as well as in form; *Shields v. Taylor*, 13 S. & M. 127, citing *Wharton v. Porter*, 10 S. & M. 305, which decides, that under the Act of 1840, the court is bound to allow amendments, if desired.

9. Judgment of Leave to Amend.

56. *Effect of.* If, on sustaining a demurrer, leave be given to amend, this is equivalent to a judgment *respondant ouster*, if not more comprehensive, and therefore not error; *Beaangon v. Shirley*, 9 S. & M. 457.

X. Demurrers.

See PLEADING, 61 to 80.

1. Generally.

57. *Waiver of defects.* The filing of a demurrer to a declaration by leave of court, after pleas and replications had been filed, is a waiver on the part of the defendant of irregularities occurring previous to the filing of the demurrer; *Miller v. Pickens*, 4 C. 182.

58. *Demurrer to notice filed with plea.* It is not an approved practice to test the validity of a defence set out in a notice accompanying a plea, to demur to the notice. Where the notice accompanies a special plea, the proper practice is to move to strike it out, and where it accompanies the general issue, the proper practice is to object on the trial to the admission of the evidence to establish the facts stated in the notice. But if the notice be of facts which are not a proper defence, and it be adjudged bad on demurrer, the error will be immaterial; *Wren v. Hoffman*, 41 M. 616.

See PLEADINGS, E. 123.

59. *Demurrer to answer of garnishee.* A demurrer is unnecessary to test the sufficiency of the answer of a garnishee; a motion for judgment on the answer is the proper practice; *Beer v. Hooper*, 3 G. 246.

60. *Extent of demurrer.* When a demurrer is filed, it reaches back to the first substantial defect in the pleadings antecedent to that to which it is filed, but it does not reach formal defects in those pleadings, as they are waived by the other side pleading to them; *Haynes v. Covington*, 9 S. & M. 470. And so the defendant cannot complain of the action of the court in overruling his demurrer to a replication, if his plea be bad, as the demurrer should have been extended to it; *Green v. McCarroll*, 2 C. 427; *S. P. Tucker v. Hart*, 1 C. 348; *Miles v. Myers*, W. 379; *Wren v. Span*, 1 H. 115; digested in PLEADINGS, 61.

61. *The record must show the demurrer.* A judgment without an issue of fact or law, is

a nullity. Hence, when the record shows that a demurrer was overruled, it must also contain the demurrer, in order to show the issue made by it; *Lee v. Dozier*, 40 M. 477; *S. P. State v. Palmer*, 41 M. 88; *Armstrong v. Barton*, 42 M. 506; digested in PLEADINGS, 177.

62. *Same: Case in judgment.* Where there is a demurrer to evidence, the party demurring states the evidence in full, and avers its insufficiency, and the other party joins in the demurrer by averring its sufficiency; and this is essential. Hence, where the record states "that the defendant, closing the evidence in support of his plea, and the court sustained the demurrer, and gave judgment on the issue for the plaintiff, the defendant saying nothing further, it is considered," &c., the judgment is erroneous and will be reversed; *Lee v. Dozier*, 40 M. 477.

2. Disposition of Demurrer.

64. *Confession of demurrer.* If the defendant amend his plea so as to meet the objections of a demurrer filed to it, this will be a confession of the demurrer, and no further disposition need be made of it; *Shirley v. Fearn*, 4 G. 653. The confession of a demurrer is a sufficient disposition of it; *Field v. Hawley*, 12 S. & M. 320.

64. *Going to trial without disposition of demurrer is a waiver of it.* When pleas were filed on which issues were taken, and there was another plea, to which a demurrer was sustained, and on judgment of *respondent ouster*, the defendant pleaded a similar plea to which a like demurrer was filed, of which last demurrer the record showed no disposition, but the parties went to trial on the issues made up: *Held*, that under the circumstances, this court would presume that the parties waived the last demurrer; *Smith v. Elder*, 7 S. & M. 507; confirmed in S. C. 14 S. & M. 100.

65. *Same: Without issue on plea.* Two pleas were filed, and issue taken on one, and a demurrer filed and sustained to the other; and under judgment of *respondent ouster*, the defendant pleaded a similar plea in substance to the one adjudged bad. To the amended plea, a demurrer was filed, and without any disposition being made of it, a trial was had, and a judgment rendered for plaintiff, which on a writ of error was reversed, the demurrer to the original plea overruled, and the demurrer to the amended plea held to be waived. On return of the case to the Circuit Court, the demurrer to the amended plea, which was up to that time undisposed, was sustained, and a trial was had, without any answer to the plea to which the High Court had overruled the demurrer, and adjudged to be a good bar to the action; and on the trial, judgment was rendered for the plaintiff: *Held*, that the proceedings in the second trial were erroneous, and the judgment must be reversed; *Smith v. Elder*, 14 S. & M. 100.

66. *What is a showing of a disposition of a demurrer.* Where a demurrer was filed to a plea, and the record did not state in so

many words that the demurrer was sustained, but it appeared on the record, that the defendant, under a judgment of *respondent oster*, pleaded again: *Held*, that it sufficiently appeared that the demurrer was sustained; *Smith v. Elder*, 7 S. & M. 507.

67. *The demurrer must be disposed of.* It is error, for which the verdict will be set aside, to submit a cause to a jury, upon issue joined on one or more pleas, without disposing of a demurrer to one of the pleas; and *Proskey v. West*, 8 S. & M. 711, so far as it conflicts with this, is overruled, and the following cited to sustain it (*Walker v. Walker*, 6 H. 500; *Marlow v. Hamer*, *ib.* 189; *Rowley v. Cummings*, 1 S. & M. 340; *Harper v. Bondurant*, 7 S. & M. 397; *Isbel v. Vance*, 13 S. & M. 371. In *Proskey v. West*, *supra*, the decision was the reverse of this: *Marlow v. Hamer*, *supra*, held, that it was error to go to trial, without disposing of a demurrer to a null plea, and to the same effect, is *Mayfield v. Barnard*, 43 M. 270; *Rowley v. Cummings*, and *Harper v. Bondurant*, both decided it to be error to go to trial, without disposing of a demurrer to a plea.

68. *Same.* It is error to go to trial on the issues of fact, without first disposing of the issues in law made by demurrers, which had been filed (citing *Isbel v. Vance*, *ante*, 67). The court distinguished this case from *Merkell v. Harrison*, Opinion Book, 308, and never reported; where it was held, that if a party file a demurrer to a declaration, and then a plea, the demurrer will be considered as waived; *Anderson v. Robertson*, 2 C. 389; S. P., *Field v. Weir*, 6 C. 56. But if the plea demurred to is a nullity from having been filed without leave, after the time for pleading has elapsed, the rule is different; *Field v. Weir*, *supra*. *Sed vide ante*, 67, and PLEADING, 69, and *post*, 73.

3. Withdrawal of Demurrer.

69. *Withdrawal of demurrer to declaration.* Where the demurrer to a declaration is withdrawn before judgment on it, the defendant may plead to the merits, without filing an affidavit of merits; *Ogden v. Glidewell*, 5 H. 179. See *ante*, 40, 41, 42.

70. *Withdrawal of demurrer to plea.* Where a demurrer to a plea is filed, the plaintiff should have leave to withdraw it, and file a replication; but this is a matter in the discretion of the court, and if refused, the High Court will not interfere; *Vicksburg Waterworks & B'g Co. v. Washington*, 1 S. & M. 536.

4. Waiver of Demurrer.

71. *As to effect of filing plea and demurrer to declaration.* see *ante*, 54.

72. *As to effect of going to trial without disposing of demurrer, or a waiver,* see *ante*, 64, 65, 68.

73. *When demurrer considered as waived. Case in judgment.* A plea was filed and a demurrer interposed to it; there was another plea of the same character and in similar terms on file to the whole declaration; there

were four trials without objection, that the demurrer was not disposed of: *Held*, that the demurrer was waived under the circumstances; *Field v. Weir*, 6 C. 56. See *ante* 69.

XI. Null Pleas.

See PLEADING, 100 to 102.

74. *What is a null plea, and the mode of disposing of it.* Where a plea is not adapted to the nature of the action—as *non est factum* to an action of trespass *vi et armis*—it may be treated as a nullity; but when it is appropriate to the form of action, as a general rule, a demurrer is necessary to reach defects in it, however great they may be, if in fact the plea go to the substance of the action; special pleas, which amount to the general issue, cannot be stricken out as nullities. *Smith v. Com'l Bank of Rodney*, 6 S. & M. 82; S. P., *Alexander v. Pringle*, 5 C. 558.

As to effect of demurring to null pleas, see *ante*, 67, and PLEADING 68, 69.

75. *Trial on a null plea.* Where a plea, as a plea of set-off, is a nullity, and is pleaded, and issue taken thereon, and a trial and verdict for plaintiff is had, it will be treated as that kind of mispleading which is cured by the statute of jeofails. The defendant cannot complain because it is his plea, and the plaintiff cannot, because he took issue on it; *Henry v. Hoover*, 6 S. & M. 417.

XII. Striking out Pleadings.

See PLEADINGS, 81, 82, 95, 105a.

76. *When striking out proper.* Where a plea is appropriate to the form of the action, though defective in substance, it cannot be "ruled" out or stricken out, but the plaintiff must demur. And this rule applies, where upon overruling a demurrer to the declaration, the defendant makes affidavit of merits and tenders a plea. In such a case the plea should be received, if appropriate to the form of the action; *Johnston v. Beard*, 7 S. & M. 214. See *ante*, 74, 95, 105a.

77. *Extent of motion to strike out.* When a motion is made to strike out a replication to a plea, the court should adjudge whether the plea itself be good, just as if a demurrer had been filed; *Matthews v. Lee*, 3 C. 417.

78. *Striking out notice filed with plea.* See *ante*, 54.

79. *Judgment on.* When a plea is stricken out as frivolous, it is in the discretion of the court to enter judgment final, or *respondent oster*; *State v. Brown & Johnston*, 5 G. 688.

XIII. Final Judgment.

See JUDGMENT.

80. *As to form of judgment,* see JUDGMENT, 44, 54.

81. *Mistake in names of parties to.* The insertion of the names of the parties in the final judgment is unnecessary, if there be enough to connect the entry with the other parts of the record. Hence, if the clerk make a mistake in the name of a party in entering the final judgment, it will not vitiate the

judgment; *Grimball v. Miss. & Ala. R. R. Co.*, 3 S. & M. 38.

82. *When plea confesses part of the action.* When the plea sets out only a partial defence to the action, it is a confession of that which is undefended, and judgment by default may be taken as to the part confessed, and a trial had as to the other. And this rule applies where the plea of usury alone is set up, which is a confession of the justice of the principal; *McLaurin v. Parker*, 2 C. 509.

84. *Judgment on penal bond.* The practice is, in a suit on a penal bond, to enter judgment for the penalty of the bond, to be discharged by the payment of the damages assessed by the jury; *Rubon v. Stephan*, 3 C. 253.

85. *When judgment on verdict barred.* The plaintiff is entitled to have judgment entered on a verdict in his favor, at any time before it is barred by the statute of limitations; *Perrison v. Barlow*, 6 G. 174.

86. *Judgment construed by the verdict.* When a verdict is in favor of a part of the defendants and against the others, the judgment thereon, if entered against "the defendants" generally, will not be erroneous; for the judgment will be construed with reference to the verdict upon which it is founded, and it will be held to be against those defendants only against whom the verdict was given; *Lamar v. Williams*, 10 G. 342.

XIV. Trial and Verdict.

87. *Severance in defence and trial.* When an order in the Circuit Court, permitting one of several defendants to an action of assumpsit on a promissory note, to sever from the others in his defence and trial, is made without objection, it cannot be assigned as error, but the court say they are not satisfied with the correctness of the practice. Such an order, however, does not relieve the other defendants from liability for the costs of the separate trial; *Com'l & R. R. Bk of Vicksburg v. Lum*, 7 H. 414.

88. *Trial: When several are sued, and a part not served with process.* See ante. 8.

89. *Direction to jury in actions of tort, to try as to one defendant, so he may be a witness.* On the trial of an action of trespass against several defendants, if there be no evidence at all tending to inculpate one of them, it is competent for the court to direct the jury to retire and acquit him, so that he may be examined as a witness in the cause. But if there be evidence tending to show that defendant is guilty, such a direction cannot be given; nor, in a doubtful case, can the jury be permitted to retire to determine whether a particular defendant has been proven guilty of the trespass with a view of allowing him to testify. But if at the instance of the defendant, this course be taken in a doubtful case, and the jury return a verdict of guilty against that defendant, without assessing any damages, this verdict will not be permitted to have any effect to defeat the plaintiff's right to recover against the other defendant as well as against that defendant, whatever damages

he may be entitled to, without prejudice from that verdict. For though the proceedings were irregular, yet having taken place at the instance of the defendants, they cannot complain of it, and it will not be permitted to have any effect beyond what was intended by the parties, viz.: to ascertain whether that defendant was a competent witness; *Bell v. Morrison*, 5 C. 68.

90. *Same: Effect of such verdict.* Such a verdict will not have the effect to render the defendant so convicted a competent witness; for he is still a party to the suit, and liable to such damages as may be assessed on the trial; *Id.*

91. *Same: When court should direct a trial as to one.* The court should not direct a verdict to be entered in favor of one of several defendants sued in tort, so as to allow him to testify, except only in a case where there is no evidence to show, or from which the conclusion might be drawn, that he is liable; *Wilson v. Clarke*, 5 C. 270.

92. *Trial of plea of nul tiel record.* See PLEADING, 131.

93. *Trial as to one defendant without entry of default as to another.* It is irregular where there are several defendants, one of whom has made default, to go to trial as to the others without taking judgment by default against the one who has not pleaded, or entering a discontinuance as to him; *Barker v. Justice*, 41 M. 240.

94. *Trial: Where there is a pleading unanswered.* It is not error to submit to the jury an issue made by the general issue, without a similiter being added by the plaintiff; but the rule is the reverse, where a special plea is filed with a verification, and a trial is had without a replication to it; *Smith v. Warren*, 2 H. 895; *Martin v. Tarver*, 43 M. 517; *Price v. Sinclair*, 5 S. & M. 258; *Fields v. Hawley*, 12 S. & M. 320; *Rushing v. Keys*, 4 S. & M. 191; *Webster v. Tiernan*, 4 H. 352; *S. P., Rhodes v. McDonald*, 2 C. 418; *Beall v. Campbell*, 1 H. 24; *Wilkinson v. Patterson*, 6 H. 193; *Harrison v. Agricultural Bk*, 2 S. & M. 307; *Adams v. Massey*, 1 S. & M. 660; the last three being cases of verdicts on the declaration without plea, or judgment by default. But in *Garret v. Felt & Reed*, 3 G. 137, it was held, that a judgment for plaintiff on a verdict without plea by the defendant, will not be set aside at defendant's instance; it being the same in substance as if a judgment by default had been rendered, and not prejudicial to him; and the case was approved and confirmed in *Hewett v. Cobb*, 40 M. 61; and it was held, that if plaintiff submit his cause to a jury, upon the plea of one defendant and without taking judgment by default against another defendant, who has not pleaded, and the jury find for both defendants, the plaintiff will have no ground to complain; *Anderson v. Walker*, 2 G. 642.

But it is now the settled practice, that the failure of the plaintiff to reply to an affirmative plea, and a trial had without such issue is error, and not cured by the statute of jeo-

fails; there must be an issue for the jury to try, except where a writ of inquiry is submitted to them; *Hogue v. Leuellen*, 42 M. 302; and this is the rule of the present Supreme Court; *Martin v. Tarver*, 43 M. 517. Yet in *Nason v. Given*, 43 M. 346, the court after noticing the diversity in the former decisions, expressly confirmed; *Garrett v. Felt*, and *Hewett v. Cobb*, *supra*.

95. *Trial without assigning breach of penal bond*. It is error for the jury to assess damages in an action on a penal bond, with conditions, without any breach being assigned; *Riley v. Ruffin*, W. 425.

96. *As to oath of jury*, see JURY, 28, 29, 30.

97. *Trial of a cause before the day it is set for*. Under the statute (H. & H. p. 619, § 27) it will be error for the court to call a case and try it on a day prior to the one for which it is set by the clerk; *Fall v. Com'rs of Sinking Fund*, 3 S. & M. 127.

But this rule does not apply to actions of replevin, so as to prevent the court from resetting such a case, after the term has commenced, because, under the statute, they have a priority over all other business; *Tift v. Virden*, 7 S. & M. 91.

Under the Rev. Code of 1857, art. 20, p. 481, the court may reset a cause for trial on a subsequent day of the term.

98. *Verdict for one and against another in actions ex contractu*. In actions *ex contractu*, a verdict and judgment against one joint defendant and in favor of another, is irregular; *Jones v. McGahey*, 1 H. 128.

Though partnership contracts are joint and several, and each partner therefore liable to be sued on them, as if it were his individual contract, yet, if two or more partners be sued in a joint action on a partnership contract, the verdict cannot be against one, and in favor of the other, on the ground that the latter was never liable. The contract must be proven as alleged; nor does it make any difference in such a case that the plaintiff has dismissed as to one, he must, on the trial, show that he, with the other, made the contract; *Miller v. Northern Bank*, 5 G. 412.

In *Fairchild v. Grand Gulf Bank*, 5 H. 597, which was a case under the statute, requiring the makers and endorsers of endorsed notes, bills and notes, to be sued in the same action, and providing, that the verdict and judgment brought might be for a part and against a part, as the evidence required, it was held, that where three were sued as partners and two pleaded to the action, thereby admitting they were partners, and one denied the partnership under oath, the verdict might be against the two and in favor of the one denying the partnership.

99. *Verdict by eleven jurors*. The jury must consist of twelve men, no other number is known to the law; and if the record show the verdict was by eleven, it will be error; *Dixon v. Richards*, 2 H. 771.

100. *As to formation of jury*, see JURY, 17, 27.

101. *As to power of jury to return a sealed verdict*, see JURY, 43.

102. *Correction of verdict by jury*, see JURY, 44. PRACTICE, 7.

103. *Where one defendant not served, and verdict against another*. See *ante*, 8.

104. *Verdict exceeding the damages laid*. It is error in an action of assumpsit to render judgment for a greater amount than the sum at which the damages are laid in the declaration, but the court should allow the plaintiff to amend so as to make the averment of damages sufficient; *Geren v. Wright*, 8 S. & M. 366.

104a. *Verdict where one count is bad*. By the common law, where there are several counts in the declaration, and one or more be bad, and one be good, a judgment entered generally on the declaration will be bad; but this rule is changed by the statute (H. & H. 591), which provides, that where there are several counts and one be bad, and entire damages are given, the verdict shall be good; *Scott v. Peebles*, 2 S. & M. 546.

104b. *Where jury fails to assess value of property*. Where property levied on by attachment is replevied, if the jury find for the plaintiff, but omit to assess the balance of the property so replevied, as required by law, the court may immediately empanel another jury to supply the omission; and the exercise of this power is necessarily inherent in the court in furtherance of justice; *Merrill v. Melchior*, 1 G. 516.

And so, where in replevin, there is a failure in the verdict to assess the separate value of each article sued for, a new jury may be called to make the assessment; *Drane v. Hiltzheim*, 13 S. & M. 336; *Walker v. Com'rs of Sinking Fund*, 1 S. & M. 372.

105. *Verdict exceeding penalty of bond*. If the verdict exceed the penalty of the bond sued on, the court may enter judgment for the proper amount; *Cohea v. State*, 5 G. 179. See VERDICT.

XV. Nonsuit.

106. See NONSUIT.

XVI. Remittitur.

107. See REMITTITUR.

XVII. Revivor.

108. See REVIVOR. SCIRE FACIAS.

XVIII. Retraxit.

109. See RETRAXIT.

XIX. Scire Facias.

110. See REVIVOR. SCIRE FACIAS.

XX. Security for Costs.

See COSTS.

111. *Rule for security must be made absolute*. If, on motion of the officers of court for security for costs, a rule be entered that the plaintiff give security for costs within sixty

days, a non-compliance with the rule and a failure to give the security, will not vitiate a final judgment rendered for the plaintiff. The defendant's failure to apply to the court to make the rule absolute and to dismiss the cause, was a waiver of the rule *nisi*; *Grimball v. Miss. & Ala. R. R. Co.* 3 S. & M. 38; S. P., *Miss. & Ala. R. R. Co. v. Ballard*, 5 S. & M. 606; *Bullard v. Dorsey*, 7 S. & M. 9; and *post*, 112.

In such a case, if nothing appears in the record but the affidavit and rule *nisi*, it is not shown by the record that the security was not given; *Bullard v. Dorsey. supra*.

112. *Party making the motion may waive it.* The clerk made a motion for security for costs, and a rule *nisi* was taken, requiring the security to be given in sixty days. At the next term, the plaintiff offered to show that he was perfectly solvent, and the clerk asked to withdraw the rule, stating that the motion was made under a misapprehension; the plaintiff then offered to give the security, but the court below refused and dismissed the case. The High Court said: "The party at whose instance the rule is granted, may lose his right to have it made absolute, by want of due action upon, or by waiver of the right." And that upon application of the party at whose instance the rule was granted, it should be dismissed, and it is error to dismiss the case, because the rule in such case had not been complied with (citing *Grimball v. Miss. & Ala. R. R. Co.*, *ante*, 111); *Miss. & Ala. R. R. Co. v. Ballard*, 5 S. & M. 606.

113. *When rule nisi must be granted.* But if a motion be regularly made for security for costs upon proper affidavit filed, it cannot be overruled. The court must make a rule that the security be given. The statute allows sixty days in which to give the security, and the cause cannot be dismissed without allowing the plaintiff the benefit of the rule *nisi* for sixty days. But the statute is imperative that the security shall be given, and the motion to that effect, if properly made, must be sustained, or the judgment will be reversed; *Besangon v. Shirley*, 9 S. & M. 457.

114. *When the security may be given.* But the security need not be given within the sixty days as required by the rule *nisi*; if given at the succeeding term by permission of the court, it will be in time, and such permission ought to be given; *Kyle v. Stinson*, 13 S. & M. 301.

115. *How judgment entered against the surety.* A judgment cannot be entered against the surety for costs upon a verdict against the plaintiff merely. The judgment on the verdict should be against the plaintiff only, and then if he fail to pay, a motion for a judgment shall be made against the surety. But in reversing a judgment against both plaintiff and his surety for costs, the High Court will enter the proper judgment against the plaintiff; *Muldrow v. Davis*, 12 S. & M. 635. But the motion is not the proper remedy, except where the plaintiff is a non-resident; *Overstreet v. Davis*, 2 C. 393.

The Rev. Code of 1867, p. 488, art. 56, pro-

vides, "if the costs shall not be paid when due, judgment shall be rendered by the court against said surety, as well as the plaintiff or complainant, and execution may issue as in other cases."

116. *As to power of the clerk to take security for costs*, see Costs, 10.

XXI. Miscellaneous.

117. *Plea of payment to a penal bond: What it admits.* A plea of payment to an action for unliquidated damages on a penal bond, is an admission of the cause of action, but it seems it does not dispense with proof of the amount of damages sustained; *Rubon v. Stephan*, 3 C. 253.

See PLEADINGS, 135.

118. *Effect of admitting as evidence an affidavit for continuance.* Where, on an application for a continuance, the adverse party, in order to procure a trial, admits that the affidavit for the continuance is evidence, or that it should be received as the evidence of the absent witness, the admission does not preclude the introduction of evidence to contradict the affidavit; but the rule is otherwise, where the truth of the facts stated in the affidavit is admitted; *Brent v. Heard*, 40 M. 370.

119. *Withdrawing an account.* The plaintiff has a right, during the progress of the trial, to withdraw an account introduced by him, and if it be so withdrawn both the debits and credits in it are withdrawn; *King v. Cooper*, W. 359.

120. *Motion to dismiss, because nominal plaintiff is dead.* If it were error to allow the administrator of a nominal plaintiff, who was dead at the commencement of the suit to be substituted as plaintiff, instead of his intestate, it cannot be corrected by motion to dismiss the suit at the next term. The correction can only be made by writ of error; *Denton v. Stephens*, 3 G. 194.

121. *Mechanics' lien: Objections to.* If in a proceeding to enforce a mechanic's lien, there be items in the account not entitled to the lien, they should be objected to on the trial; *Richardson v. Warwick*, 7 H. 131.

122. *Variance: How objected to.* If there be a variance between the instrument sued on and the declaration, the defendant may, in cases where *oyer* is demandable, crave *oyer* and demur; but in all other cases, the variance can be objected to only when the instrument is offered in evidence; and the rule is the same though the instrument be copied in the declaration. Hence if the declaration be in the name of Mary H. Banks, as plaintiff, and the promissory note sued on, is payable to M. H. Banks, and there is no allegation that Mary H. and M. H. are the same person, the variance cannot be reached by demurrer; *Robertson v. Banks*, 1 S. & M. 666.

123. *Entry of death of one of several plaintiffs or defendants.* The statute (H. & H. 583) provides that in case of the death of a joint plaintiff or defendant, in all cases, where the cause of action survives to or

against the survivors, the action shall proceed in the name of the surviving plaintiffs and against the surviving defendants; and under this act, in case of the death of a plaintiff or defendant, as aforesaid, it is unnecessary to enter a formal abatement as to him, a simple suggestion of his death on the record, is sufficient; *Sprawles v. Barnes*, 1 S. & M., 629.

124. *Opening and conclusion: Replication to plea of statute of limitations.* When to a plea of the statute of limitations, the plaintiff replies that the defendant was out of the State when the cause of action accrued, and that suit was brought within the time limited, after his return, the affirmative of the issue is on the plaintiff, and he is entitled to the opening and conclusion; *Thornton v. West Feliciana R. R. Co.*, 7 C. 143

Prescription.

See ROADS AND HIGHWAYS.

Presumption.

See EVIDENCE.

1. *Presumption of the validity and correctness of judgments.* See JUDGMENT, 29 to 32. HIGH COURT, 49 to 63.

2. *Presumption as to validity of marriage.* See MARRIAGE AND DIVORCE, 11, 12

3. *Presumption of payment.* There is no presumption of the payment of a judgment before the lapse of a year and a day after its date; *Meyer v. Dorrance*, 3 G. 263.

4. *Continued possession by mortgagor.* The continued possession by the mortgagor of the mortgaged estate, after condition broken, is no presumption of payment. *Aliter*, if possession were once in mortgagee, and it be redelivered to mortgagor; *Carpenter v. Bridges*, 3 G. 265.

5. *Presumption of death in favor of validity of marriage.* The law presumes in favor of the validity of a second marriage, contracted by a party whose husband or wife, by a former marriage, had been absent, and had not been heard from for five years; when the second marriage was celebrated, that such absentee was then dead. And this presumption will be indulged in a prosecution for bigamy against the other party to such second marriage, who has married again, and who relies on the nullity of such second marriage as the ground of his or her defence; *Gibson's Case*, 9 G. 313.

Principal and Agent.

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I. Creation and Proof of Agency.

1. *Agency by implication and ratification.* An agency may be created by express authority, oral or written; and as to third parties, may be implied from the conduct of the principal, or it may be shown by the subsequent ratification of the principal of an act done in his name, and on his behalf, by a person without authority; *Taylor v. Conner*, 41 M. 722; *Humphreys v. Wilson*, 43 M. 328.

As to ratification, see post, 69, et seq.

2. *Statement of the agent as to extent of his powers.* The statement of an agent having certain defined powers by law, as an attorney at law, is not admissible to show an enlargement of these powers; *Garvin v. Lowry*, 7 S. & M. 24. See post, 18.

3. *Appointment of agent to sell land need not be in writing.* It is not necessary that an agent's authority to sell land should be in writing; *Curtis v. Blair*, 4 C. 309. But his power to convey under seal must be also under seal; *Humphreys v. Wilson*, 43 M. 328. See DEED, 79.

4. *Mutual agent of debtor and creditor, as to collaterals.* Where the debtor places collateral securities in the hands of an agent of the creditor appointed to collect the debt from him, and the creditor approve it, the latter will be responsible to the debtor for the proceeds of the securities realized by the agent; *Harris v. Halliday*, 4 H. 338. See post, 16.

4a. *Proof of authority to make deed.* Proof that the vendee went into possession soon after the making of the deed, which appears on its face to have been executed by an agent, and that he held possession for twenty years, and that the principal received the purchase money, is sufficient to show the agent's authority to make the deed; *Bias v. Cockrum*, 8 G. 509.

II. General and Special Agents, and their Powers.

1. General Agent.

5. *Distinction between general and special agent.* A special agent is one who is appointed for a particular purpose, and under a limited authority; a general agent is one whom the principal puts in his place, to transact his business, of a particular kind, or at a particular place. The acts of the former do not bind his principal, if they exceed his authority; the acts of the latter bind, if they are within the general scope of his authority, though contrary to his private instructions, if the party with whom he deals be ignorant of the restriction upon his authority; *Planters' Bk v. Cameron*, 3 S. & M. 609.

6. *Another definition of a general agent.* A general agent, in the most comprehensive sense of the term, has unlimited power in the

transaction of all kinds of business. A person, however, put in the place of another, to transact all business of a particular kind, is as to that business a general agent, and can bind his principal by all acts within the general scope of his employment; and also, by all acts which the express authority granted is calculated to induce innocent persons to believe the agent has authority to do; *Wilcox v. Routh*, 9 S. & M. 476.

7. *Example of general agent: And of act without scope of his authority: Signing principal's name as surety.* A principal gave his agent authority to transact the following business with the Planters' Bank: "To sell and transfer any stock standing in his name in the bank, and to receive dividends on the same; to deposit money in the bank and check it out; to lodge in the bank, bills and notes for collection, and to withdraw the same; to borrow money and to contract with the bank in the principal's name, whether on bills and notes drawn in his favor, or in favor of others, without limit as to the amount; to acknowledge notices of protest, and to do all acts necessary to transacting the principal's business with the bank; and finally, the principal empowered the bank to receive the agent's signature for him, on all bills and notes as drawer, maker, endorser or acceptor."

The agent signed the principal's name to a note to the bank as surety for a third person, and to enable such person to borrow money from the bank, and the suretyship was known to the bank: *Held*, that the agency was general, but the signing of the principal's name as surety was not within the scope of his authority and not binding; *Planters' Bk v. Cameron*, 3 S. & M. 609.

8. *Same: Example of representation of agent outside of his authority.* The principal is not bound by the representation of his agent made outside of the scope of his authority. Thus, where an agent to procure a subscription for the endowment of a seminary of learning, promised that the subscriptions should be refunded in case the institution goes down, or that the subscriptions due when that event occurs should not be collected, the subscriptions on their face being payable in five annual instalments, the promise is without the scope of the agent's authority, is not binding on the principal, and the subscriptions may be collected according to their written tenor and effect; *Cook v. Whitfield*, 41 M. 541. As to false representations made by an agent of a railroad company to induce subscriptions for stock in it; see *Thigpen v. Miss. Cent. R. R. Co.*, 3 G. 347; *Walker v. Mobile & Ohio R. R. Co.*, 5 G. 245; *Ellison v. Mobile & Ohio R. R. Co.*, 7 G. 572, digested under Railways, 2, 3. 7a.

9. *Examples decided to be within scope of authority: Receiving notice of protest for principal.* The principal, by letter of attorney, constituted an "agent, general and special," with full power to the agent, for the principal and in his name, or for the use and in the name of the agent, and for the use and in the name of any person whatsoever, to make,

endorse, draw, accept and negotiate all promissory notes, bills of exchange, drafts and other securities of any kind whatsoever, and to issue letters of credit, to transact all banking business, to make all manner of renewals and endorsements of the principal's name, on all promissory notes, bills of exchange, drafts, or other securities of any kind whatever, consequent, or in anywise dependent upon such renewals, whether the same be payable to the agent or the principal, or to any others. "And generally to do all lawful acts and things whatever, concerning, or in anywise appertaining to the premises, or which the principal might or could do, if he were personally present and acting therein"; and the letter of attorney concluded: "that it was to be taken in its fullest and most comprehensive sense": *Held*, that notice of protest was a matter "concerning and appertaining" to a note; and that the agent was authorized to receive for the principal, notice of the protest of a note which he had endorsed in the name of the principal; and if the note was payable in the bank, he had authority to receive such notice, under the clause in the letter of attorney, which authorized him to transact all banking business for the principal; *Wilcox v. Routh*, 9 S. & M. 476.

As to what is notice in such a case, see *post*, 90, 91. As to power of agent to receive notice of protest, see *BILLS OF EXCHANGE, &c.*, 51 to 57.

10. *Power to bind within scope of authority: Notice to agent.* An agent has power to bind the principal only within the scope and sphere of his agency; and hence, when a principal has several agents, with distinct and separate powers, notice to one agent in relation to a matter beyond the scope of his agency is not notice to the principal or the other agents (citing *Fortner v. Parham*, 2 S. & M. 151; *Commercial Bank of Natchez v. Wilkins*, 6 H. 217; *Wilcox v. Routh*, 9 S. & M. 476); *Goodloe v. Godley*, 13 S. & M. 233.

As to notice of protest to agents, see *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 51, 57, and *ante*, 9.

11. *Power of agent for collection to receive bank notes.* The payment to a sheriff on an execution in his hands of anything but legal tender, is no satisfaction; but an agent for collection may take bank notes which are at par, if the debtor has no notice that the agent's instructions are to take gold and silver alone; *Crane v. Bidwell*, 3 C. 507. See *post*, 16.

2. Private Restrictions on Agent's Powers.

12. *Private limitation on power of agent.* Where the principal seeks to impose a limitation on the powers which are within the scope of the agency, he must show that the person transacting business with the agent knew of the limitation; *Routh v. Agricultural Bank*, 12 S. & M. 161.

13. *Principal bound to extent of unknown authority of agent: Limitation on unknown authority.* A principal is bound by the acts of his agent to the full extent of the power

conferred on him, though the person contracting with the agent did not know the extent of the authority vested in the agent, or that the transaction was in fact within his powers. And this is the rule, though such third person was in possession of a power of attorney to the agent of less extended authority than another which he possessed, and of which that person was ignorant. In such case it is no objection to the validity of the act, that it is beyond the powers of the agent, so far as known to the person with whom he contracts, if it be within the power, as really conferred. Hence, where a principal gave a letter of attorney to an agent, authorizing him to make and endorse notes, bills, &c., for the principal's use, and payable in a certain bank, and deposited that letter with the bank, with a contract with the bank reciting and confirming it, and he afterwards gave another power of attorney to the agent, authorizing him to make and endorse notes and bills in the principal's name as surety for the agent; and so far as appeared, the last power of attorney was unknown to the bank, and the agent made a note to the bank, and signed the principal's name as surety thereto; it was held he was liable on the note, and this, too, notwithstanding a private limitation imposed on the agent's authority, as it existed in this last power of attorney, and which limitation was exceeded in making the contract with the bank; *Id.*

14. *Same: Limitation arising from law of a foreign State.* A general power of attorney executed in Louisiana by a citizen of that State to a citizen of this State, without any limitation being specified in it as to the place where, or the time in which the powers conferred were to be exercised, empowers the agent to act within this State; and if the principal seeks any advantage from any alleged difference between the law of Louisiana and the law of this State as to the construction and use of the power of attorney, he must not only produce the law of Louisiana and show that difference, but must also show that the person in this State transacting business with the said agent, knew of such law of Louisiana limiting the powers; and this is so, though it be shown that the person transacting business in this State with the agent did not know of the power of attorney made in Louisiana, but acted with a knowledge only of a letter of attorney, which did not authorize the act done; *Id.*

3. Special Agent.

15. *For definition of special agent, see ante, 1.*

16. *Instance of special agent: Construction of his powers: Agent to collect debt.* An agent appointed to collect a debt, is a special one, with limited powers; and in such cases, general expressions in the letter of attorney, such as instructions to do with the debt as if it were his own, are to be construed with reference to the special and limited powers conferred, and are not to be construed to

embrace the power to bind the principal by a collateral agreement to account for the surplus of collaterals the agent may receive as security for the debt, nor to bind the principal for the negligence of the agent in making collections; *Fox v. Fish*, 6 H. 328; see *ante*, 4: as to power of agent to collect, to receive bank notes, see *ante*, 11.

17. *Agency created by delivering blank note: Power of the agent.* If one sign a note in blank as to the amount, and deliver it to another, though with specific instructions as to the amount to be inserted in it, he thereby makes that other his agent with unlimited power to fill it up with any amount, so far as parties treating with the agent are concerned, who are ignorant of the instructions; *Johnson v. Blasdale*, 1 S. & M. 17.

As to blank notes and bills, see *BILLS OF EXCHANGE*, 104 to 109.

18. *Proof of special agency: Onus.* He who seeks to hold the principal liable for the contracts of an alleged agent, must show, not only the authority of the agent, but if the authority be a special and limited one, he must also show, that the contract was made by the agent, within the scope of the power granted. Hence, if the principal be sued on a note, made by an agent who was shown to have power to purchase goods for a store of the principal, it must be shown that the agent made the note, and that it was for the purchase of goods; *Carter v. Taylor*, 6 S. & M. 367.

And where the bond was in the name of A., as principal, and signed by B. for A., on *non est factum* pleaded by A., it must not only be shown that B. executed the bond, but that he had authority to do so; *Grubb v. Wiley*, 9 S. & M. 29.

19. *Duty of third persons to ascertain the nature and extent of the agency: Effect of exceeding powers.* It is the duty of a person dealing with an agent, to ascertain the extent of the agent's authority; and where there is no general agency, and no question as to the act of the agent being within his apparent powers, but outside of his private instructions, the party dealing with him, deals at his own risk, and he is presumed to know the extent and limit of the agent's authority; and if this be exceeded, the contract will be void *in toto* as to the principal, but is binding on the agent. And in such a case, if the agent pay the principal's money on the contract, upon a rescission thereof, the principal will be entitled to recover it back. And this principle is applicable to a case where the State deals with an agent, through an agent of its own; and if money so paid, be actually paid in the State treasury, the State will be liable to refund; *Brown, Governor, &c., v. Johnson*, 12 S. & M. 398.

20. *Same: Case in judgment.* A special and limited authority was given to an agent, to buy a particular tract of land, sold under a decree in chancery, for the benefit of the State. The agent did not buy that land, but bought another tract and borrowed one-third of the purchase money, in the principal's

name, and paid it on the purchase, and gave the principal's notes for the balance. The principal, as soon as he heard of the purchase, disaffirmed it, and resisted the confirmation of the sale by the Chancery Court, by filing a petition to annul it, and recover back the purchase money paid: *Held*, that the sale was void as to the principal, but binding on the agent, and that the purchase money paid should be refunded to the principal, though it had been paid into the State treasury; *Ib.*

21. *Exceeding power.* A special agent exceeding his powers, does not bind the principal, unless he afterwards ratify the act; *Landsdale v. Shackelford*, W. 149. Thus, where a client instructed his attorney to pay out of the proceeds of claims in his hands for collection, a certain sum, to effect a release of a certain mortgage, and the attorney so acted, that he accepted an order, payable out of collections to be so made, which acceptance was made to procure a release of the mortgage, but the release failed as to part, owing to the mortgagee's failure to take up, according to his agreement, one of the mortgage notes which had been assigned: it was held, on a bill of interpleader, filed by the attorney against the client and the holder of the acceptance, that even though the attorney may have made himself individually liable by the manner in which he had given the acceptance, yet the client, never having authorized an application of the funds, except on the condition of a release of the mortgage, was entitled to the money collected by the attorney; *Dick v. Mawry*, 9 S. & M. 448.

22. *Same: Where excess only is void.* If an agent in filling up a blank note, exceed the private restrictions on the amount to be inserted, the note will not be void *in toto*, but only for the excess, in the case where the party taking it knew of the restriction. The act of the agent is binding on the principal, so far as he had authority, but void only as to the excess; *Johnson v. Bladale*, 1 S. & M. 17.

23. *Same: Unauthorized absolute sale construed a mortgage.* An absolute sale made by an agent, who was only authorized to execute a mortgage, is not binding on the principal; and if disaffirmed by him, it will be construed in favor of the purchaser as a mortgage to secure a return of the purchase money, which was received by the agent, and actually applied to the benefit of the principal; *Coppage v. Barnett*, 5 G. 621.

III. The form of executing power of Agent, and its effect as to Responsibility of Principal and Agent.

24. *Instances in which contract was made in name of principal.* A promissory note as follows: "We, as trustees of the Methodist Church, promise" &c., and signed by the makers thus—"J. W. King, Jno. A. Pearson, Trustees"—does not impose an individual liability on the makers; *Leach v. Blow*, 8 S. & M. 221. A bill was drawn in these words: "Pay to my order \$2,000, value received, and

charge to account of your agency at Natchez. J. D. H., Agent." It was also endorsed in blank by "J. D. H., Agent," and negotiated. The agent was sued as drawer and endorser, and it was held that enough appeared on the face of the bill to put a prudent man on inquiry as to the extent of J. D. H.'s liability, and that he could therefore show that he drew as agent for the drawer, and was not to be personally liable on the bill; *Davis v. Henderson*, 3 C. 549.

See *BILLS OF EXCHANGE*, &c., 149.

25. *Another instance: Deed by agent.* A deed was made by W., as agent for the Union Bank, as follows: "I, W., attorney in fact for the Union Bank, have sold," &c., and the covenant of warranty was in the name of "W., agent for the Union Bank." *Held*, whether this was a good deed to convey title; *Quere?* But if it were not, it was a good contract to bind the principal, and would authorize the grantees to demand a good deed from the bank; *Edmondson v. Orr*, 12 S. & M. 541. For if the deed of the agent be in his name instead of the principal's a court of equity will aid the defective execution of the power, and compel a conveyance by the principal; *McCaleb v. Pradat*, 3 C. 257.

26. *Agent's deed conveys his own land.* A deed executed by an agent in the name of his principal which conveys land belonging to the agent, is a valid conveyance of the agent's title, for he and those claiming under him will in such case be estopped to deny the validity of the title of the principal; *Harney v. Morton*, 7 G. 411.

27. *Public officers contracting as agents.* The acts of public officers or agents in regard to the creation of a personal liability on them, stand on a very different footing from those of private agents. Ordinarily an agent contracting on behalf of the government or the public, is not presumed to bind himself personally, but this presumption may be rebutted by circumstances showing a contrary intention; *Copes v. Matthews*, 10 S. & M. 398.

28. *Same: Case in judgment.* M., as auditor of public accounts, signed a paper in his official capacity, in which he stated that W. was a clerk in his office, and had performed his duties faithfully, and that he should retain him; and also stating that W. wished to anticipate his salary; and the paper also contained a promise to issue to the assignee of the paper, warrants for W.'s monthly salary for the period of twelve months. The assignee sued M. on the instrument, and a demurrer to the declaration was held good, because it did not aver that W. had performed the services as clerk in the auditor's office; *Ib.*

29. *When agent personally liable.* The agent is personally responsible on his contract, if the party with whom he contracts elects to take him instead of the principal; and in that case the principal is not responsible; *Fox v. Fisk*, 6 H. 328. And so if the agent undertakes to give his own draft in payment of property bought for the principal, and fail to do so, he will, nevertheless, be liable

personally for the price; *Garland v. Stewart*, 2 G. 314.

30. *Draft of agent on principal does not exonerate the latter.* Where an agent makes a purchase in the name and on the credit of the principal, and then draws a draft on the principal for the price, this is not an extinguishment or merger of the debt; and if the draft be not accepted or paid by the principal, the latter may be sued on the original consideration; *Taylor v. Conner*, 41 M. 722.

IV. Liability of Principal for Torts of Agents.

31. *Not liable for malicious tort outside agent's authority.* The principal is not liable for the torts or negligences of the agent, in matters beyond his agency, unless he has expressly authorized them to be done, or has subsequently adopted them for his own use and benefit; and he is never liable for the unauthorized, wilful, or malicious act or trespass of his agent. Hence, where the hirer ordered his overseer to chastise a hired slave, and the overseer maliciously and wilfully beat the slave excessively, so that he died, it was held that the hirer was not liable; *McCoy v. McKown*, 4 C. 487.

32. *Liable when trespass committed with his knowledge and consent.* The master or principal is liable for a trespass committed by his overseer and slaves, with his knowledge and approbation, or subsequent sanction; *Exum v. Brister*, 6 G. 391.

33. *Same: Case in judgment.* Proof, that a large number of trees were cut on the plaintiff's land, and manufactured into cross-ties by the defendant's overseer and slaves, and under the superintendence of his agent; and that they were hauled away by the defendant's teams and delivered to a railroad company, with which the defendant had a contract to furnish cross-ties; and that the defendant resided in the same neighborhood in which the plaintiff's land was situated, is sufficient to warrant the jury in finding that the trespass was committed with his knowledge and approbation; *Exum v. Brister*, 6 G. 391. See post, 81.

But it is well settled, that the master is not liable for the trespass of his slaves, unless done in pursuance of his orders, or was the result of improper conduct on his part, or occurred by his failure to exercise his legal authority over them; *Newell v. Cowan*, 1 G. 492.

34. *Same: Rule as to liability of principal for torts of agent.* In all cases, where it appears that the employment of the principal afforded the agent the means and opportunity which he used, whilst so employed, in committing an injury to a third person, the principal is responsible, whether the injury results from the negligence, or the wilful and malicious conduct of the agent; *N. O. J. & G. N. R. R. Co. v. Allbritton*, 9 G. 242.

35. *Same: Liability for exemplary damages.* Upon grounds of public policy, the principal is held civilly liable for the acts, torts,

misfeasances and nonfeasances of his agent, committed in the scope of his employment, to the same extent in every respect as if done by himself; and the principal is liable to be punished by the infliction of exemplary damages for the tort of the agent, in all cases where he would have been so liable for his own conduct; *N. O. J. & G. N. R. R. Co. v. Bailey*, 40 M. 395.

36. *Same: Responsibility of railroad companies for acts of their agents.* Upon a principle of public policy and public necessity, the rules of law, which fix the liability of the principal for the torts of his agent, are applied with strictness to common carriers, and especially to those using forces for the propulsion of their carriages, which are calculated to endanger life or property; *N. O. J. & G. N. R. R. Co. v. Allbritton*, 9 G. 242.

37. *Same.* A railroad company impliedly warrants that its engineers, conductors and other employees engaged in running its trains, are possessed of due skill, and are competent and faithful; and the company is liable under all circumstances for any injury occasioned by the misconduct, rashness, or negligence of such persons; and where an injury is caused by gross negligence, or wanton and wilful misconduct of its employees, it is liable for exemplary damages; *N. O. J. & G. N. R. R. Co. v. Allbritton*, supra; *S. P., Vicksburg & Jackson R. R. Co. v. Patton*, 2 G. 156; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660. And the plaintiff may introduce in evidence in an action against a railroad company for damages done by the negligent and careless running of its engine and cars, proof to show that the general character of the engineer in charge of the train, when the injury was done, was that of a reckless and untrustworthy agent; *Id.*

38. *Liability of principal for frauds, &c., of agent and sub-agents.* The principal is liable to third persons in a civil suit for the frauds, misfeasances or neglect of duty of his agent, and of those whom the agent employs about his business, though without his knowledge or consent; *Mayer & Co. v. McLure*, 7 G. 389.

38a. *Liable criminally.* The owner of a drug store is liable criminally for the acts of his clerk in selling, contrary to law, vinous and spirituous liquors; *Riley's Case*, 43 M. 397. See PARTNERSHIP, 14.

V. Liability of Principal for Admissions of Agent.

39. *When admissions of agent binding on principal.* The admissions of an agent in reference to the subject matter of the agency, are admissible against the principal; *State v. Farish*, 1 C. 483. And the admissions of the agent, made with reference to contracts within the scope of his agency, which have been consummated, even are admissible against the principal; *Carter v. Taylor*, 6 S. & M. 367. But the admissions are binding on the principal only when made during the existence of the agency, and about a matter

within the scope of the agent's authority; *Skipwith v. Robinson*, 2 C. 688.

See EVIDENCE, 25.

VI. Liability of Agent to Principal.

60. *Illegal agency.* If the principal employ an agent to carry out an illegal enterprise, he cannot recover from the agent the fruits of it after its completion; *Wooten v. Müller*, 7 S. & M. 380.

61. *Agent having funds to invest.* Where a principal entrusts money with his agent to be invested, and subsequently instructs him not to invest, the agent from that time becomes a depository. And if the funds begin to depreciate while in the agent's hands, it is not his duty to return, or offer to return the money to the principal, without a request or demand from the principal, the latter having the same facilities as the agent for obtaining knowledge of the depreciation of the funds. And if, after such notice not to invest, he do invest the funds, he acts on his own responsibility, and is liable to the principal for any loss occasioned thereby; *Richardson v. Futrell*, 42 M. 525.

62. *Agent receiving money on deposit.* The agent received from his principal about \$7,000 in Confederate treasury notes, giving a receipt, stating that the money was to be invested in negroes, as his judgment should direct, "and to be accounted for by me." The principal afterward directed the agent not to invest the money. The agent kept the money until it became worthless, but did not keep it separate and apart from his own money. He was sued for the value of the money, and it was insisted that he was liable, because the mixing of the money with his own was a conversion of it to his own use, but the agent proved that he always had that amount of Confederate treasury notes on hand, and it was held that, as the deposit was special and not general, he was not bound to keep the identical notes he received, and that he was not responsible; *Id.*

63. *Purchase of property in agent's name.* Where a slave is purchased by an agent with the funds and expressly for the use of the principal, the principal may recover him at law, though the agent fraudulently took a bill of sale in his own name. And if the agent afterward deliver the slave to the principal, the legal title will thereby be fully vested in the latter. And the fact that the agent hired out the slave and received the proceeds with the knowledge of the principal, is not a circumstance to show title in him, unless he claimed the right to do so in his own right, and this was known to the principal; *Fairly v. Fairly*, 9 G. 280.

63a. *Liability for collecting depreciated currency.* An agent to collect has no power to receive depreciated currency, though he has instructions to "exercise his discretion as to the procedure to collect." Nor is the rule varied, if there be no other currency in circulation but the kind he takes. And if

he take such currency, he will be liable for the loss; *Mangum v. Ball*, 43 M. 288.

63b. *Agent presumed to be responsible for hire.* In the absence of any understanding between the principal and agent as to compensation, the law presumes that the agent is to be paid for his services, and holds him responsible accordingly; *Mangum v. Ball*, 43 M. 288.

VII. Sub-Agents.

1. Power of Agent to Appoint Sub-Agent.

64. *Power of trustee to appoint agent.* The office and duties of trustee being matters of confidence, cannot be delegated to an agent, unless an express authority be delegated, in the instrument creating the trust, to appoint such agent; *Skipwith v. Robinson*, 2 C. 688. See post 67.

65. *Power when sub-agent is necessary and usual.* A bank, receiving a note for collection, is agent for the owner, and bound to use reasonable skill and diligence. But when a protest is necessary, the bank may employ a notary to make it, and the notary, when so employed, is sub-agent for the owner of the note; *Agricultural Bk v. Commercial Bk*, 7 S. & M. 592. And such sub-agent is directly responsible to the owner for his negligence in making the protest; *Bowling v. Arthur*, 5 G. 41.

2. Liability of Agent in respect to Sub-Agent.

66. *Same.* The agent, in appointing a sub-agent, is responsible for ordinary diligence in making the selection, and if he use such diligence he is not responsible for the acts of the sub-agent. Thus, when a bank having a note for collection, employed a notary to protest it who was of intemperate habits, but was very competent when sober, and the notary thus employed made an insufficient demand of payment, but made it in the mode then universally practised by notaries in this State, it was held that the bank was not responsible, it not being shown that the notary was drunk at the time the note was delivered to him, nor that the irregularity in the demand was in consequence of intoxication. And it was further held, that in order to hold the bank liable for employing a notary who was intemperate, it must be shown that the notary was drunk at the time, or that his habits were so unusually intemperate as to disqualify him for the discharge of an official act; *Agricultural Bk v. Commercial Bk*, 7 S. & M. 592; *S. P.*, *Tienan v. Com'l Bk of Natchez*, 7 H. 648.

67. *Same.* The principle that an agent cannot delegate his authority, is founded upon the special trust and confidence reposed by the principal in the personal skill and integrity of the agent. The agent, therefore, has no authority to turn his principal over to another, of whom he knows nothing, but he remains responsible to his principal in all cases of sub-agency, when the appointment was unauthorized; *Mayer v. McLure*, 7 G. 369.

3. Liability of Principal for Acts of Sub-Agent, and consequent Rights.

68. *The principal liable.* The principal is liable to third persons, in a civil suit, for the frauds, or misfeasance, or neglect of duty in his agent, or in those whom his agent employs, though the principal did not authorize or assent to it. This liability runs through all stages of the service, and as third persons treat with a sub-agent as with one having authority, they have no right, as against the principal, to set up that the sub-agent is without authority to act for the benefit of the principal. And hence, when a person who has a note for collection, directed his clerk to present it to the debtor for payment, and upon such presentation by the clerk, the debtor recognized his liability, and promised payment; it was held, that the clerk was not a mere stranger to the transaction, but was authorized to receive payment, and the promise made to him was as effectual a bar to the defence of infancy, as if it had been made to the owner of the note; *Ib.*

VIII. Ratification of Acts of Agents.

1. Generally.

69. *Ratification equivalent to original authority to bind principal.* A subsequent recognition of an act done by an agent, or by one who assumes to be an agent, is usually as binding on the principal, if made with a full knowledge of the act done, as if there had been a previous authority. And the recognition need not be express, but may be shown by circumstances; *Baker v. Byrne*, 2 S. & M. 193. And this principle applies to ratifications by corporations; *Planters' Bk v. Sharp*, 4 S. & M. 75. And also to ratifications by principals, of acts done with corporations. Thus, if a subscriber for stock in a railroad company, afterwards ratify the payment of the *per centum* on his stock, required by the charter to be made when he subscribes; and which payment was made by a third person, without his knowledge or consent, it will be binding on him, and make his subscription valid; *Miss. & Tenn. R. R. Co. v. Harris*, 7 G. 17.

70. *Ratification, as it affects the rights of the principal.* The principal may ratify an unauthorized act done for his benefit, and thereby receive the fruits of it. Thus a promise made by a person after he arrived at majority, to pay a debt contracted during infancy, if made to a person acting for the creditor in endeavoring to collect the debt, but without authority, will be binding on the promisor, if the act of the assumed agent be afterwards ratified by the principal; *Mayer v. McLure*, 7 G. 389. And so, where a tender was made by an assumed agent of the plaintiff, to a purchaser of a judgment which had been sold for costs, with a view of redeeming the judgment for the plaintiff, it is unnecessary that the agent, acting in good faith in making the tender, should have had a previous authority, if his act was subsequently ratified by the plaintiff; and the

bringing of a suit to enforce the right of redemption, growing out of the tender, is a ratification of it; *Harman v. Barstow*, 1 G. 276; *S. P., Miss. & Tenn. R. R. Co. v. Harris*, *ante*, 69. And so a railroad company may, in a reasonable time, ratify the act of its pretended agent, on procuring a subscription for stock, and thereby make the subscriber so procured, liable for his subscription; *Walker v. Mobile & Ohio R. R. Co.*, 5 G. 245.

71. *Where a third party is not bound by subsequent ratification: Unauthorized demand.* Yet, where a demand is made by a person who has no authority to make it, and the person upon whom the demand is made, upon that ground refuses to comply with it, no subsequent ratification by the principal of the unauthorized demand, will have the effect to put the party in default. Thus, where a demand for, followed by a refusal to deliver property, is made by an agent, and is sought to be made the ground of a conversion of the property by the defendant, the principal must show that the agent had authority to make the demand; *Robertson v. Crane*, 5 C. 362.

72. *Same: Where unauthorized demand is good.* But, if the refusal to deliver do not turn upon the supposed want of authority, and if the party waives any inquiry into the authority of the agent, and puts his refusal upon another distinct ground, which cannot in point of law be sustained—or if he claim to detain the property on the ground that he is owner of it; or by arbitrary and urgent means; or under a frivolous or fraudulent pretext—without questioning the agent's authority, the demand is good, and evidence of conversion; *Ib.*

73. *Ratification must be of the whole, and not of a part.* The principal may adopt or reject, the act of a pretended agent *in toto*; but he cannot separate the act, and ratify what is beneficial to himself only, and repudiate the remainder; *Taylor v. Conner*, 41 M. 722.

2. Suit as a Ratification.

74. *Action to recover fruits of transaction is a ratification.* If a note be discounted by the cashier of a bank without authority, an action on the note afterwards is a ratification of the transaction, and makes the note valid; *Planters' Bank v. Sharp*, 4 S. & M. 75. So a suit to enforce a right growing out of and based on a tender made by an unauthorized agent of the plaintiff, is a ratification of the tender; *Harmon v. Barstow*, 1 C. 276. So a suit by the principal on a note taken by an unauthorized agent is an affirmation of the contract, and is a ratification, and estops the plaintiff, whilst thus attempting to enforce it, to deny the agent's authority; *Kountz v. Price*, 40 M. 341. And so a suit by a railroad company to enforce a subscription for stock procured by an unauthorized agent is a ratification, and makes the subscription good; *Walker v. Mobile & Ohio R. R. Co.*, 5 G. 245. And prosecuting an attachment, by the principal, is a ratification

of the agent's authority to make the bond. See ATTACHMENT, 25.

3. Ratification by Acquiescence.

75. *Knowledge of the transaction necessary to ratification* Knowledge or notice of the transaction is necessary to constitute a ratification by acquiescence; and, therefore, where it is attempted to hold the principal liable for the act of an unauthorized agent, on the ground that the principal acquiesced in it, it must be shown that the principal had knowledge of the transaction; *Garvin v. Lowry*, 7 S. & M. 24.

76. *Where disavowal necessary.* If the agent for collection receive without authority, currency which the principal disapproves, he should at once disavow the agent's acts, and notify the debtor thereof; *Crane v. Bedwell*, 3 C. 507. As to acquiescence in reception by sheriff of depreciated bank notes in satisfaction of an execution, see EXECUTION, 58, 59; see also, *post*, 79.

77. *Instance of such ratification.* A subscriber for stock in a railroad company, who had not paid the *per centum* on his subscription necessary to render it valid, upon being informed by an officer of the company that a third person had paid it for him, made no objection, and promised to pay the other instalments due on his stock: *Held*, this was a ratification of the payment; *Miss. & Tenn. R. R. Co. v. Harris*, 7 G. 17.

78. *Ratification of sealed instrument by acquiescence.* Acquiescence in the act of an attorney in sealing and delivering a bond, without authority, under seal, to do so, or a subsequent recognition of it, will render it as obligator on the principals as a previous valid authority; *Spear v. King*, 6 S. & M. 276.

79. *Instance held not to be a ratification.* A Confederate soldier, in 1861, deposited a promissory note with a bailee for safe keeping during his absence in the army. The maker wrote to him three times, asking permission to pay the note in cotton money, but the soldier made no reply. In 1863, the maker went to the bailee and paid the note in cotton money, assuring the bailee that it was all right, as he had written to the soldier about it. In 1864, the soldier was at home for a few days, and on being informed by the bailee of what he had done, said nothing. He did not return home again till June, 1865, and in October of that year he first met the maker, and informed him of his dissatisfaction: *Held*, that if his rights could be parted with by mere silence, he had, under the circumstances, dissented in the proper time; *Burns v. Kelley*, 41 M. 339. (See *ante*, 76; where the agent had authority to collect, but exceeded his authority; in this case he was a mere bailee, induced to take the money by the fraud of the debtor.)

4. Ratification by Receiving the Fruits of the Unauthorized Act.

80. *Receiving the fruits is a ratification.* If the principal receive the fruits of an unau-

thorized act of the agent, it is a ratification. Thus, if the agent, on receiving a part of the mortgage debt in money and a part in the renewed note of the mortgagor, unconditionally release the mortgaged debt, and then the principal receive from the agent the money and the note, and assign the latter, it will be a ratification of the release; *Burns v. Feizer*, 5 C. 188. And so if one fraudulently sell the land of another, the owner cannot recover the price received by the agent, unless he will confirm the title thus made; *Franks v. Wanzer*, 3 C. 121.

As to the reception of fruits of an act being evidence of previous authority, see *ante*, 4a and 33.

81. *Same: Applied to cases of fraud.* He who receives and enjoys a benefit procured by the fraud of another, is responsible for the fraud, and must make good the fraudulent act, though done without his authority. Thus, where a person sent by the vendee to the vendor to procure a deed, which the vendor refused to make, upon the ground that the purchase money had not been paid, and thereupon the agent assured the vendor that the vendee would certainly pay it, and he thus procured the vendor to make a deed, and afterwards the vendee being sued for the purchase money relied on the statute of limitations, it was held, that this new promise so made by the agent, though without authority, was binding on the vendee, as he had received a deed in consequence of it; *Bowers v. Johnson*, 10 S. & M. 169. See *ante*, 8.

See VENDOR AND VENDEE, 226.

IX. Miscellaneous.

82. *Power of agent to sue out attachment.* The bond and affidavit in a proceeding by attachment may be made by an agent, whether the attaching creditor be a non-resident or not; *Beer v. Hooper*, 3 G. 246.

83. *Power of master of vessel to bind owner for collections.* The course of the usual employment of a vessel, is evidence of authority given by the owners to the master to make for them and on their behalf, a contract in relation to such employment. The plaintiff may, therefore, show in a suit against the owner, for the recovery of money collected by the officers of the vessel on a draft placed by him in their hands at one port, to be conveyed to and collected at another, that it was their usage and custom to employ the vessel in that kind of business; *Steamer General Worth v. Hopkins*, 1 G. 703.

84. *Same.* It is not true as a general legal proposition, that the master of a vessel engaged in the transportation of freight and passengers, has the right, by virtue of his office as master, to make contracts which would bind the owners for the receipt and collection of bills of exchange and the carrying of specie. To enable him to do so, his authority must be express, or implied from the usage and custom of the boats in that particular business; *Id.*

85. *Power of president of a corporation.* The president of a private corporation can

make no contracts on behalf of the company, except in pursuance of authority conferred on him by the directors; *Bacon v. Miss. Ins. Co.*, 2 G. 116.

86. *Agent cannot act for his own benefit adverse to principal.* An agent employed to collect an execution, will not be permitted to deal on his own account and adverse to the interest of his principal, with persons holding claims and rights to the property of the defendant in the execution. Thus, where S. was employed to collect a judgment, and he had the execution levied on a lot, and then finding that the defendant had sold the lot before the judgment was rendered, he bought the interest of the vendee and then levied the execution on it, and purchased it at the sheriff's sale, it was held, that the purchase would enure to the benefit of the creditor; *Murphy v. Sloan*, 2 C. 658.

87. *Same.* And so a party possessed of information as to the value and location of public land, who has sold such information to another to enable the purchaser of the information to enter the land, cannot afterwards enter the land in his own name and thus deprive his vendee of the privilege of entering it. Such conduct is fraudulent, and constitutes the enterer a trustee for the person to whom he sold the information; *Winn v. Dillon*, 5 C. 494.

88. *As to purchase by an agent, where the principal is interested,* see FRAUDULENT ASSIGNMENT, 61, 62, 63.

89. *Effect of notice to agent in cases of sale of property.* See VENDOR AND VENDEE, 51b, 137, 138.

As to notice to agent of protest, see ante, 9. As to power of several different agents to receive notice, see ante, 10.

90. *What is notice to an agent of protest of a bill?* Where an agent is authorized to receive the notice of the protest of a bill which he had drawn for the principal, if the notice be left with the agent, it is not necessary that it be addressed on the envelope to him, if, from an inspection of the outside, he could know that the letter was a notice of protest; *Wilcox v. Routh*, 9 S. & M. 476. See ante, 9.

91. *Knowledge of agent notice to principal.* If the agent come to a knowledge of a fact whilst he is acting for the principal, this operates as a constructive notice to the principal himself; therefore, where an agent, having general powers to make, endorse, renew and negotiate all manner of notes, bills and drafts, and to transact all the principal's banking business, made his own note and endorsed it in the principal's name, and failed to pay it at maturity, it was held that the knowledge of the agent that his own note was unpaid, was sufficient notice to bind the principal as endorser; *Ib.*

92. *Revocation of agency.* The facts that an agent resided in New Orleans, and the principal in Mississippi, in 1862, and that New Orleans had fallen into the Federal power for three days, does not *per se* revoke an agency to sell bills and notes for Confederate money. The enemy relation had not,

in that short time, been established between the principal and agent. The fall of New Orleans might be a good ground for revoking the agency to sell for Confederate money, but did not itself work that effect; *Murrell v. Jones*, 40 M. 565.

93. *Indefinite agency revokable.* An agency to do particular services from time to time for a compensation, to be paid as the services are rendered, and without any agreement as to the time of its continuance, is determinable at the pleasure of either party. Thus, where several merchants in the city of Vicksburg signed the following agreement with the owner of the wharf-boat lying in front of the city: "We, the undersigned, as per our names attached, agree to pay B. J. B. the following rates (afterwards specified), for receiving and storing; he agreeing not to tax boats the two and a half per cent. now charged by him for collecting their freight bills;" it was held that the agreement only constituted B. J. B. the agent of the signers of the agreement, and that any one of them might determine it at pleasure, and thereafter refuse to pay the rates agreed on; *Buller v. Smith & Tharp*, 6 G. 457.

94. *Lien of factor.* A factor who has made advances to his principal, acquires no lien on goods shipped by the latter to him to be sold to pay the debt, by the mere delivery of the bill of lading to the vessel by which they are shipped, to be delivered to him. His lien will not commence until there is an actual delivery of the goods to him; *Bonner v. Marsh*, 10 S. & M. 376.

95. *Conversion of principal's property to agent's own use.* C. consigned goods to P. to be sold on C.'s account. P., being indebted, transferred the goods to E. to secure a debt which he owed, stating that he had authority from C. to use the goods in that way. The statement was false, and E. knew when he received the goods, they were held by P. simply as agent: *Held*, that C. was entitled to recover the value of the goods from E.; *Clarke v. Edwards*, 44 M. 778.

Principal and Surety.

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I The Contract of Suretyship.

1. Who is a Surety.

1. *All obligors in bonds, principals at law.* All the obligors in a bond, unless the contrary appear on its face, are to be regarded as principals at law; and hence, a part of them cannot allege that they are mere sure-

ties, and that they are released by a contract giving delay in payment to the principal, without their consent. Such a defence can be made only in equity; *Willis v. Ives*, 1 S. & M. 307.

2. *Surety to a surety.* Where there are sureties in the original debt, and an extension of the time of payment is granted upon condition of giving new and additional security, if the principal debtor, after getting the names of the old sureties to a new note, apply to and secure another, as the additional surety required, and the latter expressly, upon signing the note, agree with the principal that he does so as surety for all, the other sureties will be principals as to him, and he will not be liable to contribute to one of them who pays the whole debt; and this is so, notwithstanding on the face of the note, he with the others are stated to be sureties. He may introduce parol proof to show the real nature of the transaction and the agreement between him and the principal when he signed the note; *Hunt v. Chambliss*, 7 S. & M. 532. See *post*, 70.

3. *Same: Case in judgment: What words constitute.* C. had been purchasing goods at plaintiff's store on a credit; plaintiff determined to sell him no more goods until he could see defendant; plaintiff called on defendant, and told him that C. was making an account with him, and he did not wish to let him have any more goods unless he knew more about him; the defendant replied that C. was getting three hundred dollars a year and his board, and "to let him have on," which plaintiff did; *Held*, there was no promise on the part of the defendant to become either primarily or secondarily liable for goods sold to C.; *Lombard v. Martin*, 10 G. 147. See GUARANTY, 1, 6.

2. Suretyship must be in Writing.

4. The contract of guaranty or suretyship for another is valid only when made in writing; *Id.* See GUARANTY, 3.

3. Fraud in obtaining Signature of Surety.

5. *Fraud by principal: His false promise to procure other sureties.* If the principal obtain the signature of the surety to a bond, by the fraudulent representation that others would sign as co-sureties, and then deliver the bond to the obligee without these persons having signed as co-sureties, it will, nevertheless, be binding on the surety whose signature was so obtained. He having trusted the principal with the possession of a bond, good and binding on its face, he must suffer the consequences of the fraud, the obligee being ignorant of the agreement; *Graves v. Tucker*, 10 S. & M. 9; S. P., *Robb v. Halsey*, 11 S. & M. 140, which cites and confirms *Tucker v. Graves*.

6. *Fraud by obligee: Agreement that it is not to be binding unless another signed.* An agreement between the obligee or his agent, and a surety made at the time of the sealing and delivery of the bond by the

latter, that he is not to be bound thereby, unless the signature of another as his co-surety is procured, is a valid condition, the non-performance of which will render the bond void as to the surety (citing *Tucker v. Graves*, and explaining that it is not inconsistent with this); *Goff v. Bankston*, 6 G. 518.

7. *Fraud by payee, who is also principal in the note.* If the signature of a surety be obtained to a note by the representation of the payee, who is also one of the principal makers of the note, that another will sign also as co-surety, and such third person do not sign it, the note will not be binding on the surety in the hands of an endorsee for value and with out notice. In such case, it is by the fraud of the payee that the signature is obtained, and his endorsee, under our statute, stands affected by it; *Dunn v. Smith*, 12 S. & M. 602; S. P., *Read v. McIemore*, 5 G. 110.

8. *Fraud of sheriff in getting signature of surety to a forthcoming bond.* It is not a fraud upon the sureties to a forthcoming bond, given by S., as principal, that the bond recited that the execution was against W. & S., and the sheriff, did not disclose the fact that it was against S. alone; and if it were a fraud, without proof that the creditor was implicated in it, it would not discharge the sureties; *Walker v. Shotwell*, 13 S. & M. 544.

4. Construction of the Contract of Suretyship.

9. *Contract to be strictly construed.* The obligation of a surety is to be construed strictly, and his liability is not to be extended beyond the plain meaning of the terms of his contract; nor are incidents to be annexed to it, not plainly deducible from the language employed. Hence, a surety of an executor will not be held to have contracted, that he would be concluded by a judgment against the principal, by a stipulation in the bond, that the executor "will well and truly pay and deliver the legacies named in the will, so far as the law will charge him;" *Lipscomb v. Postell*, 9 G. 476.

10. *Same.* Although the contract of a surety is to be construed strictly for his benefit, yet it must be construed according to its true scope and legal import, and the subject matter to which it relates; and general and doubtful phrases in the contract must be construed with reference to the law and the circumstances of the case. Hence, as the object of an injunction is to restrain the collection of both principal and interest of the judgment enjoined, a stipulation in the injunction bond, to pay the money specified in the judgment, will bind the sureties also to pay the interest; *Weatherby v. Shackelford*, 8 G. 559.

11. *Surety on note payable in bank: His liability when principal negotiates it to another.* A note made payable in bank and delivered to the principal, is as to the sureties and endorsers, a letter of credit to the principal, and gives him authority to sell or dispose of it to another person; *Com'l Bank of Natchez v. Clairborne*, 5 H. 301.

II. Release of Sureties by a Contract of Forbearance of Suit.

See PLEADING, 125.

12. *There must be a valid contract, on valid consideration, for a definite time.* A voluntary forbearance or mere indulgence on the part of the creditor, at the instance of the principal debtor, in the levy of an execution (or in delaying collection of the debt), will not discharge the surety. To do this, there must be, without the surety's consent, a valid contract for delay for a definite period, and based upon a valid consideration and sufficient to tie up the hands of the creditor for the time agreed on; *Newell v. Hamer*, 4 H. 684; *S. P., Wade v. Stanton*, 5 H. 631. And the contract must also be such as is capable of enforcement in a court of justice; *Wadlington v. Gary*, 7 S. & M. 522; *S. P., Haynes v. Covington*, 9 S. & M. 470; *Payne v. Commercial Bank of Natchez*, 6 S. & M. 24; *Montgomery v. Dillingham*, 3 S. & M. 647; *Johnson v. Planters' Bank*, 4 S. & M. 165; *Union Bank of Tennessee v. Govan*, 10 S. & M. 333; *Thornton v. Dabney*, 1 C. 559; *McGee v. Melcalf*, 12 S. & M. 535; *Pickens v. Finney*, 12 S. & M. 468; *Govan v. Binford*, 3 C. 151; *President of Board of Police of Clarke Co. v. Covington*, 4 C. 470; *Freedland v. Compton*, 1 G. 424; *Hunt v. Knox*, 5 G. 655; *Kerr v. Baker*, W. 140; *McMullen v. Hinkle*, 10 G. 142; *Garnett v. Kirkman*, 4 G. 389.

13. *The consideration necessary: Instances.* A promise to pay the debt at a future time, is not a good consideration for the contract of forbearance; *Montgomery v. Dillingham*, 3 S. & M. 647. Nor is a promise by the principal to pay the debt in a particular way or out of a particular fund; *Wadlington v. Gary*, 7 S. & M. 522. And so an agreement that, if the debt is not paid at a particular day, to deliver a specific article in payment, is not sufficient; *Govan v. Binford*, 3 C. 151. Nor is the part payment of the debt already due, a thing the creditor was bound to do, a good consideration; *Roberts v. Stewart*, 2 G. 664; *Hunt v. Knox*, 5 G. 655. But *Rupert v. Grant*, 6 S. & M. 433, held the contrary, and is now overruled. Nor is the payment of interest then due; *President of Board of Police v. Covington*, 4 C. 470. Nor is the promise to pay usurious interest, for that contract could not be enforced; *Roberts v. Stewart*, 2 G. 664. But the pre-payment of interest is a sufficient consideration for an agreement for delay, and the following endorsement on the note was held sufficient evidence of such a contract to release the surety, viz.: "July 5th, 1852. Six months further time given on the within note, and interest paid to 3d January, 1853;" *Dubuisson v. Folkes*, 1 G. 433. And the conversion of interest into principal is a valid consideration; *Lyon v. Sanders*, 1 C. 530, and *post*, 17. See CONSIDERATION, 10. Nor is an unperformed promise to confess a judgment as a collateral security for the debt a good consid-

eration for an agreement for delay; *Hunt v. Knox*, 5 G. 655.

14. *Same: Agreement of record without consideration.* Where the plaintiff consented to an entry on the minutes of the court where the judgment was entered, "And the plaintiff agrees to stay execution till 1st May, 1840," it is no release of the surety, there being no consideration therefor; *Union Bk of Tennessee v. Govan*, 10 S. & M. 333. Nor are the sureties on an appeal bond from a justice of the peace released by a compromise made between the principal and the creditor, by which judgment was entered against all the parties with stay of execution for twelve months; *Ammons v. Whitehead*, 2 G. 99.

15. *The time must be definite.* There must not only be a consideration for the agreement, but a definite time of forbearance must be specified and agreed on. Forbearance which can be terminated at the will of the creditor, will not discharge the surety. Hence, a stay of execution "until further orders from plaintiff," though given on a valid consideration, will not release the surety on the execution so stayed; *McGee v. Melcalf*, 12 S. & M. 535; *S. P., Garnett v. Kirkman*, 4 G. 389.

16. *The time must also be certain, and not conditional.* The delay given to enable the principal debtor to comply with a conditional agreement to release all the parties, and which agreement was to take effect only on the principal's compliance with its terms, and which he never complied with, is no ground for discharging the sureties; *Payne v. Commercial Bank of Natchez*, 6 S. & M. 24.

17. *The agreement must stipulate for delay.* The taking by the creditor, after his debt is due, as collateral security, from the principal debtor, of a bill on a third person, having twelve months to run, and the execution of a receipt to the principal, in which the creditor promises to collect the bill, and apply the proceeds to the payment of the debt, does not constitute an agreement for delay, and hence, is no discharge of the surety; *Wade v. Staunton*, 5 H. 631. But if several new notes, payable in *futuro* at different times, be given by the debtor, for instalments of a debt then due, and they be accepted as collateral to the old debt; and if the arrangement be expressly to give time to the debtor, then no suit can be maintained on the old note, until the new notes fall due; and if the interest on the old notes be calculated to the time when the new notes fall due respectively, and be added in them, thus increasing the sum which would draw interest, this is a sufficient consideration for the forbearance; *Lyon v. Sanders*, 1 C. 532.

18. *The forbearance must also be without the surety's assent: Contract for debtor to secure this.* An agreement for forbearance will not discharge the surety, if it be stipulated between the parties, that all the rights of the creditor against all the parties to the securities he then held, shall remain unimpaired, for this imposes the duty on the principal debtor to procure the surety's assent;

and if this be not done, the creditor is not bound to extend the time; *Hunt v. Knox*, 5 G. 635; S. P., *Green v. Brandon*, W. 372.

19. *What contract releases surety.* It is well settled in this court, that if the creditor without the assent of the surety, enters into a contract with the principal, upon a sufficient consideration, to give him an extension of time of payment, for a definite period; or enters into any contract with the principal, which in its consequences may have the effect of giving such extension of time, the surety is released; *Govan v. Binford*, 3 C. 151. An extension of time on a valid agreement, even for a day, during which the creditor could not sue, will release the surety; *Johnson v. Planters' Bank*, 4 S. & M. 165.

20. *Attorney has no power to release surety by forbearance.* An attorney at law, without special authority from his client for that purpose, has no power to grant a stay of execution to the principal debtor, so as to discharge the surety (citing *Clark v. Kingsland*, 1 S. & M. 248; *Dunn v. Newman*, 7 H. 582; *Garvin v. Lowry*, 7 S. & M. 24); *Union Bank of Tenn. v. Govan*, 10 S. & M. 333.

III. Release of Sureties by Failure, Neglect, or Active Interference of Creditor.

See GUARDIAN AND WARD, 88, and EXECUTORS AND ADMINISTRATORS, 94, 95.

21. *The creditor must be active to cause a release.* The creditor, in order to preserve his rights against a surety, is not bound to active diligence; if he remain passive, whereby his rights may be lost against the principal, this does not discharge the surety; but if he use active interference, as by contract, tying up his hands from suing, or by releasing a security which he has, the surety will be released; but in the latter case, only to the extent of the value of the security released; *Johnson v. Planters' Bank*, 4 S. & M. 165. The principle on which the surety is released, is the active interference of the creditor, as to the principal, by which the surety is prejudiced. Mere passiveness of the creditor will not release the surety. He must do some positive act which increases the hazard of the surety; *Caruthers v. Dean*, 11 S. & M. 178; *Pickens v. Finney*, 12 S. & M. 468; S. P., *McMullen v. Hinkle*, 10 G. 142.

22. *Instances where no release was allowed.* Therefore, the failure of the creditor to present the debt to the administrator of the principal, whereby the right as against his estate is lost, does not discharge the surety; but the surety may compel the creditor to make the presentment; *Johnson v. Planters' Bk.*, 4 S. & M. 165; *Cohea v. Commissioner of Sinking Fund*, 7 S. & M. 437; *Kerr v. Branton*, 2 H. 910. So the failure of the creditor to issue execution on his judgment, or his negligence in finding property on which to levy, will not release the surety; *Caruthers v. Dean*, 11 S. & M. 178. And so, if an execution be levied on the property of the principal, and a claim of it be made by another, the creditor is not bound to the surety, to

tender an issue on the claim, and seek to subject the property. Whether he would be, if the surety offer to indemnify him for the trouble, delay and expense, and furnish evidence that the property is liable; *Quære?* *Mellon v. Howard*, 7 H. 103. And so, it is no ground for releasing a surety on a forthcoming bond, that the plaintiff failed to have the judgment on the bond enrolled, whereby junior judgments were let in ahead of it and consumed all the principal's property. If the surety had applied to the creditor to enrol the judgment, and he had refused, the case might have been different; but this is doubtful; *Pickens v. Finney*, 12 S. & M. 468. So a mere failure to levy an execution without a valid contract for forbearance, is no discharge of the surety; *Newell v. Hamer*, 4 H. 684; *McGee v. Metcalf*, 12 S. & M. 535.

23. *Duty of creditor with reference to collateral security.* A creditor who takes a collateral security for his debt is bound to hold it impartially and justly, and if it be lost by his negligence or improper conduct, the surety will be released from so much as might otherwise have been realized from such collateral; *Payne v. Com'l B'k of Natchez*, 6 S. & M. 24.

24. *Trust between creditor and surety, impairing surety's rights.* A trust exists between the creditor and the surety, that the former will do no act which will impair any security which the latter has by means of the principal's property; and if he do so impair the surety's rights, he will be released to the extent of the value of the security so impaired. And the rules of law respecting the application of payments, where there are several debts due from the payer to the payee, do not allow the creditor to receive from his debtor in satisfaction of one debt, property on which there is a lien for the satisfaction of another debt, so as to defeat the right of a surety on the last named debt, to have it applied to the satisfaction of that debt; *McMullen v. Hinkle*, 10 G. 142.

25. *Same: Case in judgment.* A. recovered a judgment against B. as principal, and C. as surety. B., the principal, had sufficient personal property, on which the judgment was a lien, to satisfy it. A. purchased the property from B. in satisfaction of another debt due by B. to him, the lien of which was junior and subordinate to the judgment against B. and C., and he then removed the property from the State, whereby the right of C., the surety, to have the judgment satisfied out of that property, was defeated: *Held*, that the purchase and removal of the property by A., the creditor, was such a fraud upon the rights of the surety as to release him from further liability, and that the judgment, as to him, should be perpetually enjoined; *Id.*

26. *Effect of failure to sue at common law.* A surety is not discharged by the failure of the creditor to sue the principal until he has become insolvent, though he gave him notice to sue; *Bullitt v. Thatcher*, 5 H. 689; S. P., *Milton v. Howard*, 7 H. 103.

27. *Same: Under our statute.* The statute

of 1954 (re-enacted in the Rev. Code of 1857, p. 362, art. 1), provides that any surety "may at any time after the debt is due give notice in writing to the creditor to commence suit against the principal, if living and resident in this State, for the recovery of the debt; and if the creditor fail to do so by the next term of the proper court, to be held after the expiration of thirty days from the giving of the notice, and to prosecute the same with effect, the surety who shall have given such notice shall be discharged from liability, and the creditor shall be barred of all recovery against him:" *Held*, under this act, that if the notice given be not in writing, it will not discharge the surety; *Bridges v. Winters*, 42 M. 135. But it was also held in *Taylor v. Davis*, 9 G. 493, that the creditor might waive the notice being in writing, and that if upon receiving verbal notice he expressly promise the surety to sue as directed, this is a waiver of the written notice, and a failure to bring the suit would release the surety. There will be no release by a failure to sue at the next term, according to the notice, unless it were held more than thirty days after notice given; *Pool v. Hill*, 44 M. 306.

28. *Same*: Where there are two or more sureties. If there be two or more sureties, and one only gives the notice to sue, the failure of the creditor to comply with the notice will discharge that surety only, and will not affect his rights against the others; *Ramey v. Purvis*, 9 G. 499.

See GUARANTY, 25.

IV. Remedies of Surety against Principal.

29. *Remedy by motion*. The statutory remedy by motion against a principal, in favor of a surety who has paid the debt, is constitutional, if the principal appear and submit to a trial by jury; *Woodward v. May*, 4 H. 389; S. P., *Scott v. Nichols*, 5 C. 94, where it is said a jury should be called, whenever any question of fact is to be ascertained in such a proceeding; these two cases overrule *Smith v. Smith*, 1 H. 102.

See CONSTITUTIONAL LAW, 54, 55.

30. *Surety must prove suretyship and payment*. In an action by an alleged surety to recover money paid for his principal, he must prove the suretyship and the payment. He must produce the writing by which the suretyship was created, or account for its absence; and if that does not on its face show his suretyship, he must then show that he signed it at the request of the alleged principal as his surety. And where the surety has alone been sued on the contract, and has been by law compelled to pay it, the record of that judgment is admissible in evidence on behalf of the surety, as a part of the evidence to establish payment by him; but it is no evidence of suretyship, though the declaration in that suit aver that he is a surety, and the other party is principal. That is an immaterial averment, and besides, the alleged

principal was not a party to the suit; *Edge v. Keith*, 13 S. & M. 295.

31. *Remedy of surety of agent against principal*. Where A signs a note with B., and as his surety, and trusting B. as his principal, he cannot, if he pay the money, recover it from C. upon the ground that B., when he signed the note, was acting as C.'s agent; *Edwards v. Simmons*, 5 C. 302.

32. *Surety's right to recover costs*. Costs incurred by litigation instituted by the principal, in which the surety was joined, and subsequently paid by the surety, may be recovered from the principal; *Whitworth v. Tilman*, 40 M. 76.

33. *Same*. But the surety cannot charge the principal with costs and expenses unnecessarily incurred by him in a litigation instituted and carried on by him in order to get rid of his liability, or to defeat the efforts of the creditor to enforce it. And it appears to be incumbent on the surety seeking the recovery of costs incurred by him, to show that the litigation was entered into in good faith, and upon reasonable grounds, and was a measure of defence proper to the interests of both parties; *Ib*.

34. *Same*. As a means of showing good faith, it is proper, and sometimes necessary, in the commencement of a suit against a surety, that he should give notice to his principal of the suit. Where this is not done, the surety cannot recover the costs of his defence, unless he show the good faith and reasonableness of the litigation, and that it was necessary to protect both his rights and the rights of the principal; *Ib*.

35. *Same*. A surety cannot recover the expenses of a litigation commenced by him to protect his own interest, although it resulted in a compromise, if the sum saved by the compromise do not exceed the interest accumulated during the period of litigation; *Ib*.

36. *Presumption as to time of payment by surety: Case in judgment*. The plaintiff, against whom a judgment had been rendered as surety for the defendant, brought this action to recover the amount thereof, and proved that by an agreement between him and the creditor and one T., the verbal *assumpsit* of T. had been received by the creditor before the commencement of this suit, in satisfaction of the judgment; and further, that T. had paid the judgment, but it was not stated whether before or after the suit had been commenced. The defendant demurred to the evidence. By the court: It must be presumed that T.'s *assumpsit* was upon valuable consideration from the plaintiff, and that he paid the judgment before the suit was commenced; and hence, the demurrer must be overruled; *Presley v. Donaldson*, 4 G. 92.

37. *Surety paying judgment bound to take notice of a presumptive satisfaction of it*. A surety is bound by the presumptive satisfaction of an execution arising from a previous levy of it on personal property belonging to the principal; and he cannot recover from the principal any sum which he may afterwards

pay in satisfaction of the judgment, unless he show an motion of the levy, or otherwise destroy by sufficient proof, the presumption of payment thus created; *Brown v. Kidd*, 5 G. 291.

38. *Right of surety of an administrator to enjoin him from collecting a d-bt.* The surety of an administrator on his official bond, cannot enjoin his principal from collecting a judgment in his favor, as administrator against the surety, upon the ground merely of the insolvency of the administrator, and the possibility that the surety may be compelled to pay the debt twice; once to the administrator, and then as his surety. In addition to insolvency, fraud, or misapplication of assets by the administrator, should be shown; *Marsh v. Bennett*, 6 H. 215.

39. *Surety of insolvent decedent: Right to re-open insolvent proceedings.* A surety of an insolvent decedent, who has paid the debt after the proceedings in insolvency have been closed, has no right to have them re-opened, so as to let in his claim. He should have paid the debt earlier, or caused the creditor to have presented the claim in due time; *Herring v. Wellons* 5 S. & M. 354.

40. *As to when statute of limitations will run against surety in favor of principal, see* LIMITATION OF ACTIONS, 190.

V. Right of Surety to enforce prior Collection out of the Principal.

See EXECUTION, 24 to 27.

41. *Statute on this subject: Duty of surety to designate property.* The statute which prevents the levy of an execution against makers and endorsers, on the property of the endorser, until after the property of the principal debtor has been first exhausted, is in derogation of the common law, and must receive a strict construction; and if the creditor comply with the law, by making an affidavit that the principal has no property, the endorser will not be entitled to an injunction against a sale of his property, upon the ground that the principal has property in the State, unless he specify and designate the property of the principal in the bill, so that the sheriff can know it, and make a levy on it. A designation of the land as in "Township. 22 & 23, range 7, west, on the banks of Bogue Phelia, in Washington county," will not do; *Gibson v. Hughes*, 6 H. 315.

42. *Sheriff compelled to resort to principal first.* The sheriff may be compelled to levy an execution in his hands against principal and surety, on the property of the principal, before he resorts to the property of the surety. The statute gives him no discretion in the matter. And where the fact of suretyship appears on the face of the execution, it is unnecessary that the surety shall file an affidavit of his suretyship in the clerk's office, in order to require the sheriff to proceed against the principal first; *Moss v. Agricultural Bank*, 4 S. & M. 726; S. P., *Baine v. Williams*, 10 S. & M. 113.

43. *Same: Case in judgment.* An execution issued on a forthcoming bond, and was levied on the property of the surety, who filed his petition, and obtained a *supersedeas*, on the ground that the principal had sufficient property in the State, out of which the money could be made; and the court below dismissed the petition, without any answer being filed to it, or there being any proof introduced to overturn its statements. And it was held that this action was erroneous; *Ib.*

44. *When affidavit of suretyship necessary.* The Act of 1822 (re-enacted in Rev. Code of 1857, p. 363, art. 5), provides that where a judgment shall be rendered against several joint defendants, and one of them be a surety, and he make and file an affidavit of his suretyship, the sheriff shall first exhaust the principal's property, before levying on the property of the surety, applies only where the suretyship does not appear from the execution. (See ante. 42.) The Act of 1837 (re-enacted in Rev. Code of 1857, p. 359, art. 16), does not require an affidavit, and applies only to cases where the suretyship appears on the record, as drawers and endorsers, &c.; *Walker v. Gilbert*, 13 S. & M. 693; S. P., *Work v. Harper*, 2 G. 107.

45. *Surety may waive affidavit of insolvency of principal.* If the surety do not object, his property may be sold under execution without an affidavit of the insolvency of the principal; *Hyman v. Seaman*, 4 G. 185.

The Rev. Code of 1857 does not require in any case an affidavit of insolvency of the principal, in order to levy on the surety's property. It requires an affidavit of suretyship where that fact does not appear of record; and requires the sheriff to proceed against the principal first, before resorting to the sureties.

46. *All the debt may be levied from one surety.* The sureties in a judgment are severally liable to pay it, and the creditor may enforce it, by collecting the whole from any one of them, the principal being first exhausted; *Davis v. Hoopes*, 4 G. 173.

46a. *Right of creditor to dismiss suit against principal.* But this right of the surety to compel prior satisfaction of a judgment out of the principal, does not extend so far as to prevent the creditor, when he has sued principal and surety jointly, from dismissing his suit as to the principal, and proceeding to judgment against the surety, except only where the surety is an endorser or drawer (and except also where notice has been given, under the statute, to sue the principal); *Wilkinson v. Flowers*, 8 G. 579.

VI. Indemnity of Sureties, and Counter Securities received by them.

47. *Right of endorser to use his indemnity.* An endorser who has received indemnity by mortgage from the maker against loss from his endorsement, cannot proceed to subject the property mortgaged to the payment of the debt, until he has paid the note, and procured a re-assignment of it; the right of the

holder of the note, to enforce the mortgage, whatever it may be, can only be enforced by a bill filed by him; a bill by the endorser will not be maintainable until after payment by him; *Lewis v. Starke*, 10 S. & M. 120.

48. *Same*. The condition of a mortgage executed by the principal debtor to his surety, to indemnify the latter against loss or damages arising from the payment of the debt, is not broken until actual payment made by the surety, and his right to foreclose the mortgage does not accrue till that time; *McLean v. Raysdale*, 2 G. 701.

49. *Same*: *Construction of mortgage to indemnify*. The condition of a mortgage given to a surety, was "that the principal should well and truly pay, or cause to be paid to the creditor the debt on which the surety was bound, and also from time to time save harmless and indemnify the surety from all actions, executions and demands, that should at any time thereafter be brought against the surety on the debt, then the conveyance was to be void." *Held*, that this was a contract of indemnity to the surety against loss or injury, by reason of the payment of the debt; and that the condition was not broken by a recovery of a judgment on the debt against the surety, but only by a payment of the debt by him; *Ib*.

50. *Same*: *Instance*. The sureties of a tax collector being advised that he was a defaulter, took from him a mortgage on land (his wife also joining), reciting that the grantor was "desirous to secure and save harmless and indemnify his sureties from all loss, damage, injury, or money by them, or either of them, sustained, received or paid, or that may be thereafter sustained," &c., and in the conditional clause were these words, "and shall fully satisfy and refund to said sureties, their heirs and assigns, all and any monies which they or either of them, shall or may pay out and expend as sureties," &c.; two of the sureties advanced \$3,000 each to the tax collector, to pay up his defalcation, and took from him his notes in which he recited, that they were secured on real estate; these notes were transferred to complainant, who filed this bill to foreclose the mortgage. The mortgagor and wife set up as defences: 1st. The coverture of the wife at the date of the mortgage. 2d. That the notes were not signed by the wife, and not mentioned in the mortgage. 3d. That the \$6,000 advanced was borrowed by the sureties, and they had never refunded the money, and therefore they were not damnified. 4th. That the notes had been assigned to complainant to defraud the creditors of the sureties: *Held*, that none of these defences were available; that the notes were covered by the mortgage, and that it was no concern of the mortgagors, whether the sureties had repaid the borrowed money, and that if the assignment to complainant was fraudulent, that question could only be raised by creditors of the assignors; *Holmes v. McGinty*, 44 M. 94.

51. *Duty of liability of surety receiving goods as indemnity*. If a surety receive a

stock of goods as indemnity, he will not be chargeable with the invoice price of the goods, but only for what they actually were sold for in the market by the surety, if the sale were made *bona fide* and with reasonable skill and care; *Walker v. Brungard*, 13 S. & M. 723.

60. *Security received by surety enures to principal debtor*. A counter-security given by the principal debtor to the surety, enures to the benefit of the creditor, and a surrender or release of the security by the surety, will not prejudice the creditor's rights; *Dick v. Mawry*, 9 S. & M. 448; nor where the security is by deed in trust, can the trustees discharge or defeat the creditor's rights, unless to a *bona fide* purchaser for a valuable consideration without notice; *Carpenter v. Bowen*, 42 M. 28; *Ross v. Wilson*, 7 S. & M. 753. Where the counter-security is not a mere indemnity to the surety against loss, but, also is intended to secure the payment of the debt, it enures to the benefit of the creditor; *Ross v. Wilson*; *Carpenter v. Bowen*, *supra*.

61. *Same*: *Example of counter-security enuring to creditor*. Where a conveyance is made to the sureties of the grantor, upon condition that it shall be void, if the grantor pays the debt on which the grantees are sureties—otherwise to remain in full force and virtue; though it be made without the knowledge of the creditor, yet, as it is for his benefit, his assent will be presumed, and the conveyance will be held to be not only an indemnity to the sureties, but as a surety for the debt. The sureties will be trustees for the creditor, and have no right to discharge or defeat the trust; *Ross v. Wilson*, 7 S. & M. 753; *S. P.*, *Carpenter v. Bowen*; *Dick v. Maury*, *supra*. And where such a conveyance describes the sureties as "endorsers," when in fact they are joint makers, the description will be sufficient; *Ross v. Wilson*, *supra*.

62. *Extent of creditor's right of substitution*. The creditor has a right to be substituted to all the counter securities which the surety may have acquired, and to stand in the shoes of the surety as to all remedies; but this right of the creditor is no higher or greater than the right of the surety, but is identical with it, and the right of the surety—and as a consequence the right of the creditor—is to be tried by the contract which creates it; *Bibb v. Martin*, 14 S. & M. 87; *Bush v. Stamps*, 4 C. 463.

63. *Same*: *Illustration of the principle*. There were two principal debtors, against whom judgment had been rendered; one of them filed a bill to enjoin the judgment, and gave an injunction bond with sureties. The other principal debtor, supposing that he also had joined in the bill, and had signed the injunction bond, afterwards executed a mortgage to indemnify the sureties on this and other debts. The condition of the mortgage was as follows: "that if the mortgagor should pay the bond, in case he should by law be required to pay it, and that he should at all events save the sureties harmless and

free from all costs, damages and loss on account of said bond, the conveyance was to be void." The creditor whose debt had been enjoined, filed the bill to get the benefit of the mortgaged property, and to have it applied to the payment of the injunction bond: *Held*, that the bill must be dismissed; the creditor could only claim the security on the conditions expressed in the mortgage; that the mortgagor never having executed the injunction bond, he could never be required to pay it, and the mortgage therefore gave no right to the sureties on that account. But if it were otherwise, the bill was premature, as no judgment had been rendered on the injunction bond, fixing the extent of the loss and liabilities of the sureties; *Bibb v. Martin*, 14 S. & M. 87.

64. *Same: Another illustration.* If the surety procure a deed in trust from the principal, which provides: "that should judgment be at any time rendered against the surety on the debt, and the principal fail to satisfy the same, then it shall be the duty of the trustee to sell the property, at such time as shall be necessary to protect the surety from the effect of such judgment," neither he nor the creditor will be entitled to have the deed in trust enforced, until the judgment is rendered as specified in the contract. And this is so, notwithstanding both the principal and the surety have been declared bankrupts, so that no judgment can be recovered against the surety (citing *Bibb v. Martin*, *supra*); *Bush v. Stamps*, 4 C. 463.

VII. Substitution of Surety to Principal's Rights.

65. *The right of substitution.* In all cases where a party secondarily liable, is compelled to discharge the obligation, he has the right, in a court of equity, to stand in the place of the creditor, and to be subrogated to all his rights and remedies against the party primarily liable, as to any lien or equity which the creditor may have against any other fund, person or property, on account of the obligation so discharged. And this right does not grow out of any contract between the parties to that effect, but is an interest or natural equity growing out of the circumstance that the party secondarily liable has a right to call upon the party primarily bound, for re-imbursement of every outlay he is compelled to make in discharging the obligation; *Conway v. Strong*, 2 C. 665; S. P., *Stanwood v. Clampitt*, 1 C. 372; *Bank of England v. Tarleton*, 1 C. 173; *Dozier v. Lewis*, 5 C. 679; *Parchman v. Conway*, 6 C. 85; *Lee v. Griffin*, 2 G. 632.

66. *Same: Examples.* Hence, an endorser paying the debt, is entitled to be subrogated in equity to the right of the creditor in a judgment which he has recovered on the debt against the principal, and will be entitled to enforce it with its liens and priorities unimpaired; *Conway v. Strong*, 2 C. 665. And so, if the debt be secured by mortgage, he will be entitled to have the mort-

gage foreclosed; *Stanwood v. Clampitt*, 1 C. 372. And so, if, where a surety has paid a judgment against himself and the principal, and has filed a bill to get the benefit of the right of subrogation, a motion be made in the court in which the judgment was rendered to satisfy it, without notice to him, and thereupon an order be made to that effect, the surety will not be bound by the order, and it will be void; *Parchman v. Conway*, 6 C. 85. And so, where an administrator gives his own note, with security, for a debt of the estate, and he then becomes insolvent, and the surety pay it, the latter is entitled to be substituted to all the rights of the administrator against the estate, and to have the amount refunded out of the assets of the estate; *Gowing v. Bland*, 2 H. 813.

67. *Qualification of the rule: Case in judgment.* But where the surety seeks to apply a security held by the creditor, for the debt on which he is bound, and also for other debts, the rule of substitution only applies to a case where the surety, in respect to that debt, is indeed a surety, as regards the creditor, as well as in respect to the principal. Hence, where, in satisfaction of a debt, the creditor took from his debtor, the notes of others, secured by mortgage, one of which notes he required the debtor to endorse, and the debtor, having paid the notes, and the mortgaged property being insufficient to pay that note (so endorsed and paid), and the other notes which were not endorsed by the original debtor, it was held, that the endorser was not a surety in respect to the creditor, as regards this debt, but was to be treated as a principal debtor as to him, and, therefore, he was not entitled to share in the proceeds of the mortgage, until the creditor was fully satisfied; *Bank of England v. Tarleton*, 1 C. 173.

68. *Surety's right no greater than creditor's: Right of surety giving a forthcoming bond.* A surety on the original judgment, who alone gives a forthcoming bond, which is forfeited, thereby loses the lien of the original judgment, and if he pay the judgment on the forthcoming bond, his right of subrogation will extend to the lien of that judgment, and not to the lien of the original judgment. For his right extends no farther than the right of the creditor to which he is subrogated, and the creditor's lien on the original judgment was extinguished by the forfeiture of the forthcoming bond; *Dozier v. Lewis*, 5 C. 679.

69. *Surety's right exists only after payment by him.* The right of substitution, however, is held to exist only where the surety has actually paid, or has secured the payment of the debt due by his principal; *Bank of England v. Tarleton*, 1 C. 173. And therefore a surety cannot maintain a bill in equity to foreclose a mortgage given by the principal in favor of the creditor, until he has paid or secured the debt. But it seems he may, at any time, file a bill *quia timet*, to prevent the persons in possession of the property from selling or otherwise dis-

posing of it, whereby his hazard would be increased; *Lee v. Griffin*, 2 G. 632.

69a. As to right of sheriff's sureties paying a judgment to be substituted to sheriff's right against a judgment debtor, see *SHERIFF AND SHERIFF'S SALES*, 144.

VIII. Contribution among Sureties.

70. *Privity between sureties necessary to contribution.* If a party to the original judgment, who is a mere surety thereon, give a forthcoming bond, with surety, and the surety on the forthcoming bond pay the debt, he has no right to contribution against a co-surety of his principal, on the original judgment, for there is no privity in the contract between them, and the suretyship of the surety on the forthcoming bond, arose out of a transaction separate and distinct from the first contract; *Knox v. Vallandigham*, 13 S. & M. 526.

71. *Principle on which the right rests.* The right of contribution among sureties, rests, not on contract, but on natural equity, on the ground of mutual burden and benefit, and if one surety shows he has paid the whole debt, the others will rebut his equity for contribution, by showing that the surety thus paying the whole debt, received from the principal a sum of money equal to the debt, and besides this, that he purchased with the money a tract of land of the principal's, at a greatly reduced price; *Dennis v. Gillespie*, 2 C. 581.

72. *Surety must refund mortgage property before contribution.* If one of two sureties be in possession of property which was mortgaged by the principal to secure the debt, and he then pay the debt, he will not be permitted to recover from the other, contribution for one-half, without accounting to him for one-half of the mortgaged property, and if that be of more value than the amount the surety paid, his bill for contribution will be dismissed. And it makes no difference, in such a case, that the surety seeking contribution claims the property under a subsequent mortgage given to him by the principal, to indemnify him for his suretyship. It is not in the power of the parties thus to defeat the first mortgage; *Stanwood v. Clampt*, 1 C. 372.

IX. Miscellaneous.

73. *Action against principal and sureties: The latter entitled to notice.* A judgment cannot be rendered against a sheriff and his sureties, upon notice to the sheriff only, nor is a judgment against the sheriff, without notice to them, evidence against the sureties; *Torrey v. Jordan & Smith*, 4 H. 401.

74. *Decree against executor, &c., not binding on surety.* There is no privity between an executor, guardian, &c., and his sureties, and hence, in the absence of a stipulation in the bond to that effect, a judgment against the former will not include the surety, but a decree in the Probate Court, against the executor, fixing his liability, is admissible against the surety, as a part of the *res gestæ*, and as the unsolemn admission of the princi-

pal, but it is only *prima facie* evidence against the surety; *Lipscomb v. Postell*, 9 G. 476. See *ante*, 9.

75. *Admission of principal as estoppel to surety.* The consideration of a contract enures to the principal and not to the surety. The contract of the surety is accessory to that of the principal, and when the latter is bound the former is bound. Hence, if the principal make a waiver of the defence of a failure of consideration in a way that it operates as an estoppel to him, it will also operate as an estoppel to the surety. Thus, when a person about to purchase a note, applied to the principal to know if it was good, and the principal answered him that the note was valid, and that he would pay it, and thereupon the applicant traded for the note, on the faith of the promise of the principal, it was held that both principal and surety were estopped to set up failure of consideration in the note; *Montgomery v. Dillingham*, 3 S. & M. 647; *Dillingham v. Jenkins*, 7 S. & M. 479.

76. *Quashal of forthcoming bond as to principal alone.* A forthcoming bond cannot be quashed as to the principal and left in force as to the surety; *Conn v. Pender*, 1 S. & M. 386.

77. *Bonus given to surety.* If a party about to purchase a large estate, give a bonus to another to endorse for him for the purchase money, and to procure other endorsers, the transaction will be legitimate, and the surety, after complying with the agreement, will not be afterwards compelled to account for what he has so received; *Walker v. Brungard*, 13 S. & M. 723.

78. *Sureties of officers: Extent of liability.* The sureties of a public officer on his bond for a second term, will not be liable for a defalcation which took place during his first term; and if he charge in his books the balance in cash due by him at the end of his first term, as cash then on hand, this admission will be only *prima facie* evidence against the sureties, and they may show that the defalcation took place before, and that the officer did not then have the money on hand; *Mann v. Yazoo City*, 2 G. 574.

79. *Bound by act of principal as to statute of limitations.* The sureties in a judgment which has been enjoined by the unconscientious litigation of the principal until it is barred by the statute of limitations, are in privity with the principal in that litigation, and will not be permitted in equity to take advantage of the bar of the statute thus accruing; *Davis v. Hoopes*, 4 G. 173.

80. *Relation of surety, a third party having interest in the indemnity.* Where land is conveyed by an absolute deed to a surety for his indemnity, and an obligation taken from him to convey to a third party (not one of the principal debtors), when he shall be released from his suretyship, there is no such relation of trust and confidence between the surety and the party to whom he is to convey, as will prevent the running of the statute of limitations in bar of a bill

to compel the surety to convey according to his obligation, or as will deprive him of the power to acquire an interest in the land in derogation of the rights of such third party; *Mitchell v. Woodson*, 8 G. 567.

81. *Surety of collector: His liability.* A surety on the bond of a party appointed administrator *ad colligendum*, may show that the appointment of the collector was void, and thereby relieve himself from liability on the bond; *Boyd v. Swing*, 9 G. 182.

82. *Same.* The surety on a collector's bond is not liable for the profits made by the collector by the use of the trust funds, but only for principal and legal interest; *Id.*

83. *Sureties on appeal bond from justice of the peace.* Where an appeal is taken from a justice of the peace to a jury, and the case there removed by *certiorari* to the Circuit Court, the sureties on the bond required for the appeal to the jury, are parties in the Circuit Court, upon the removal of the cause there; and upon affirmance of the verdict of the jury against their principal, judgment in the Circuit Court will be entered against them; *Wright v. Simmons*, 1 S. & M. 389.

84. *Right of sureties of guardians and executors, &c., to be released.* See GUARDIAN AND WARD, 88.

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I. Jurisdiction.

1. Constitutional Jurisdiction, and its Exercise Generally.

1. *Provision in the constitution.* Art. 4, sect. 18, of the constitution of 1832, provided for the establishment in each county of a probate court, "with jurisdiction in all matters testamentary and of administration, in orphans' business, and allotment of dower, in cases of idiocy and lunacy, and persons *non compos mentis*."

In 1865 this section was amended by striking out "orphans' business," and inserting "minors' business."

1a. *General jurisdiction.* The Probate Court is a court of general jurisdiction as to the matters confided to it by the constitution and laws over the administrations of estates; *Frisby v. Harrison*, 1 G. 452; *Hardy v. Gholson*, 4 C. 70; *Pollock v. Buie*, 43 M. 140. See post, 46a. 46b. 47.

2. *This jurisdiction is ample and exclusive.* The jurisdiction of the Probate Court over the matters confided to it by the constitution is exclusive, and its powers, so far as its jurisdiction extends, are as ample as those of a court of chancery over matters confided to it; and a chancery court has no right to revise its proceedings; *Blanton v. King*, 2 H. 856; *Carmichael v. Browder*, 3 H. 252; *Hamberlin v. Terry*, 7 H. 143; *Powell v. Burrus*, 6 G. 605. The grant embraces all incidental powers necessary to the proper

administration of estates; *Powell v. Barnes*, *supra*. And it has the unquestionable right to decide all matters relating to the administration of estates; *Gildart's Heirs v. Starke*, 1 H. 451. It has jurisdiction to give ample relief against an administrator; *Edmundson v. Roberts*, 2 H. 822.

3. *Illustrations of this principle.* A court of chancery has, therefore, no power to revise or review the proceedings of the Probate Court; *Blanton v. King*, 2 H. 856; nor to entertain a bill for a general settlement and distribution of an estate administered in the Probate Court; *Carmichael v. Browder*, 3 H. 252. The Probate Court has ample power to give full relief where the administrator has failed to return an inventory, or has converted the estate to his own use, or squandered it, or has made an illegal sale of the property, and a chancery bill will not be entertained for this purpose; *Edmundson v. Roberts*, 2 H. 822. The Probate Court can compel an administrator to account fully; *Carmichael v. Browder*, *supra*.

But it was said in this last case, that it seems if the Probate Court be wholly incompetent in any case to give relief, chancery would interfere. And in *McCrea v. Walker*, 4 H. 455, the court said, though the jurisdiction of the Probate Court over all matters confided to it by the constitution is exclusive, yet where the powers of the court are inadequate to do full and ample justice between the parties, either on account of the subject, or the want of authority to compel the appearance of the parties, a court of chancery will relieve. And a bill was entertained to recover, for a distributee, a slave which she claimed by descent from a person who had purchased the slave, there being no administration of the estate. And the court said, there being no administration, the Probate Court had no jurisdiction.

4. *Other instances: Allowance of commissions.* The Probate Court can alone determine what commissions shall be allowed to a guardian; and where the ward promises to pay "fair commissions," this does not change the rule, since "fair commissions" is but what may be lawfully allowed by the proper court; *Ratliff v. Davis*, 9 G. 107.

5. *Same: As to accounts.* The Probate Court has exclusive jurisdiction in the settlement of executor's, and administrator's, and guardian's accounts; *Searles v. Scott*, 14 S. & M. 94; *Neylans v. Burge*, *Id.* 201; *Ratliff v. Davis*, 9 G. 107. And if a guardian execute a mortgage to his ward for a sum certain, he cannot set off in a suit in chancery against that debt, what may be due on a settlement of his accounts, until he has first had the accounts settled in the Probate Court. Nor where a refunding bond has been given will a court of equity allow the amount alleged to be due thereon to be set off in that court, until there has been a settlement in the Probate Court, showing how much the obligor in the bond is bound to refund; *Ratliff v. Davis*, 9 G. 107.

6. *Rule to determine extent of constitu-*

tional grant. The Probate Court is vested by the constitution with jurisdiction over matters testamentary and of administration; but the constitution does not prescribe any rule by which to determine what are matters testamentary and of administration; and as it is competent for the Legislature to prescribe the duties of executors and administrators, these terms may be more or less extensive, according to the prevailing system. When, therefore, the Legislature imposes a duty on administrators and executors in reference to estates, real or personal, it must be considered as a matter of administration, and within the jurisdiction of the Probate Court to enforce its performance; *Servis v. Beatty*, 3 G. 52.

7. *The jurisdiction cannot be enlarged by the Legislature.* Nevertheless, the jurisdiction of the Probate Court, as defined in the constitution, cannot be enlarged, by the addition to it of duties not properly of the nature of the matters confided to it. Hence, it can have no jurisdiction over the partition of lands held by joint tenants, &c., except it be for a division of them among the heirs of a deceased person, or where one of the joint tenants dies, and there is a descent of his share; *Smith v. Craig*, 10 S. & M. 447.

8. *Same: Jurisdiction over minors.* The term "orphan," used in the constitution and laws, in reference to a grant of guardianship, means a fatherless child; and there is no power in the Probate Court, to appoint a guardian for a minor having property, who also has a father; *Stewart v. Morrison*, 9 G. 417. And art. 142, p. 460, of the Rev. Code of 1857, which confers the power on the Probate Court to appoint guardians for minors having property, whose fathers are living is unconstitutional; and the Probate Court has no power to compel a guardian so appointed, to account; *Stewart v. Morrison*, *supra*; *Ex parte Atkinson*, 40 M. 17; *Earle v. Crum*, 42 M. 165.

9. *The exercise of the jurisdiction should be full, to afford complete relief.* When the jurisdiction of the Probate Court has attached to a case, with all the parties in interest before it, and the subject matter properly cognizable by it, the court should so exercise its powers as to settle all matters in controversy, if practicable, so that the litigants should not be forced to other tribunals for a remedy. It should endeavor to discourage litigation and circuitry of action, by making its decrees as full and comprehensive as the facts and law will warrant; *West v. Gibbs*, 42 M. 168.

10. *Same: Example.* A deceased administrator's final account, showed a balance in his favor of \$35,000, and the proof showed that the balance consisted of a debt for plantation supplies, which was due and unpaid by the deceased administrator to another party. This debt before the final settlement was paid by the surviving administrator, and the estate of the deceased administrator released from liability on it: *Held.* that an exception to this item should have been sus-

tained, and the credit not allowed, and that it was improper to force the distributees in another court to get their rights; *Id.*

2. Jurisdiction in Particular Instances.

A. TO COMPEL INVENTORY.

11. *Inventory compelled when omitted.* The Probate Court has ample jurisdiction to compel an administrator to return an inventory when he has failed to do it, and to compel an additional inventory, when the one returned omits property in the hands of the administrator; *Edmundson v. Roberts*, 2 H. 822; *McWillie v. Van Vacter*, 6 G. 428. And after a court of chancery has annulled a sale made by the intestate to the administrator, on the ground of want of capacity in the intestate to make a contract, the Probate Court will take jurisdiction to administer the property according to law, and compel the administrator to account for hire; *Hill v. McLaurin*, 6 C. 288.

12. *Inventory of administrator's own debt.* By our statute, an administrator or executor indebted to the decedent, is required to return the debt in the inventory, and in case of failure, parties interested may petition to have an issue tried as to the indebtedness; and if it be found against the administrator, or executor, the debt is assets. But until it is returned, or the issue tried, the debt is not assets; *Kelsey v. Smith*, 1 H. 68. The distributees may also, in a petition for distribution, compel the administrator to account for a debt he owes on his private account to the intestate; *Cole v. Leake*, 5 C. 767. And where an administrator is one of the surviving partners of the intestate, and there has been a settlement of the partnership accounts, and a balance due intestate found against the administrator, he may be compelled to inventory it; but the distributees cannot compel such inventory, until there has been such a settlement; *Stewart v. Burkhalter*, 6 C. 396. See *post*, 27. As to administrator returning his own debt in the inventory, see *Franks v. Wanzer*, 3 C. 121, and *Kelsey v. Smith*, 1 H. 68, digested under EXECUTOR AND ADMINISTRATOR, 248, *et seq.*

13. *Inventory of property claimed by administrator.* The Probate Court has power to compel an administrator, at the instance of the distributees, to return an additional inventory, so as to embrace property claimed by him adversely, but which belongs in fact to the estate, and it may incidentally, in the exercise of this power, decide upon the validity of the adverse claim set up by the administrator; *Kilcrease v. Kilcrease*, 7 H. 311. And so the court has jurisdiction over a controversy between co-administrators, in which one seeks to compel the other to inventory property as belonging to the estate, which the latter claims as his own; and the court may decide whether the property belongs to the estate or not. The court distinguish this case from *Holloman v. Holloman*, 5 S. & M. 559, where the widow sought distribution of property claimed adversely by the adminis-

trator, and where it was held the court had no jurisdiction—the point of difference being that in *Holloman v. Holloman*, one party was a stranger to the administration, and here both parties are administrators (citing *Kilcrease v. Kilcrease*, 7 H. 316; *Compton v. Compton*, 6 S. & M. 194; but this distinction was not regarded in *Kilcrease v. Kilcrease*, *supra*, where the petitioners were distributees, nor in any subsequent case; and *Holloman v. Holloman* is therefore overruled.

14. *When property is claimed by another, but is in administrator's possession.* In the exercise of the power to compel the administrator to return an inventory of all the estate in his possession, the court may incidentally adjudicate titles and construe contracts, and may determine whether property in possession of the administrator, and claimed adversely by him or another, belongs to the decedent or not. And hence, may determine whether an alleged gift from the decedent to the administrator or his wife, of property now in possession of the administrator, was valid or not; *McWillie v. Van Vacter*, 6 G. 418.

15. *Devise to executor on condition subsequent.* But when a devise was made to an executor on condition subsequent, that he pay certain debts due by testator, and the devisee pay a part of them, this gives the executor an equitable title to the property which the Probate Court has no power to interfere with, by compelling him to inventory it; *Burnett v. Strong*, 4 C. 116.

16. *Mode of trial in such cases.* Where an issue has been made up between the distributees and the administrator, on their petition to compel him to return in his inventory property which he claimed, and an alleged debt due by him to the intestate, the court may, by consent of parties, try it; or it may be referred for trial to a jury in the Circuit Court. And if no objection be made to the court's trying the issue, the consent of the parties will be presumed. But if the evidence be conflicting, it is proper that it be referred to a jury; and if the High Court reverse a decree in such a case rendered by the Probate Court, it will direct that a new trial be had before a jury; *Ratcliff v. Ratcliff*, 12 S. & M. 134.

16a. *Cannot compel inventory of property held adversely by another.* But the Probate Court has no power to compel an inventory of property not in possession of the administrator, and claimed adversely by another; and it cannot, therefore, compel an inventory of property sold by decedent to defraud his creditors; *Snodgrass v. Andrews*, 1 G. 472.

B. MAY SET ASIDE SALE BEFORE CONFIRMATION.

16b. *Same.* The Probate Court has jurisdiction to set aside, on the ground of fraud, a sale made by an administrator, if objection be made before confirmation of the sale; *Planters' Bk v. Neely*, 7 H. 80. And this jurisdiction exists as long as the administration of the estate is pending, even after the lapse of twenty years. And this jurisdiction

is exclusive, and a court of equity has no power to entertain a bill to set aside such sale, which has not been confirmed, and to recover the property from the administrator; *Hart v. Hart*, 10 G. 221.

C. HAS POWER TO AWARD PAYMENT TO HEIR OF ILLEGAL LEGACY; AND LEGACY IN TRUST.

16c. *Power as to illegal legacy.* The Probate Court has power to entertain a petition to compel an executor to distribute to the heir assets, which, upon a partial and voluntary settlement between him and the heir, were left in his hands to pay an illegal legacy; *Wells v. Mitchell*, 10 G. 800.

16d. *Power over legacy left in trust.* The Probate Court has jurisdiction to compel an executor to distribute to a legatee, a trust estate left him by the will; *Van Vacter v. McWillie*, 2 G. 563. See *post*, 36, 37.

And where a legacy was left to a slave, and he is afterwards emancipated, whilst the legacy was still in the hands of the executor, whereby a valid trust is created in the legacy for the benefit of the freedman, the Probate Court has power to compel its payment to the legatee; *Hoover v. Brem*, 43 M. 603.

D. HAS POWER TO COMPEL ADMINISTRATOR TO MAKE TITLE TO REALTY.

16e. *Same.* The statute which authorizes the Probate Court to direct an administrator to convey the legal title to realty, which had been sold by the intestate in his lifetime—the conveyance to be ordered upon proof that the purchase money has been paid—is constitutional; *Servis v. Beatty*, 3 G. 52; *ante*, 6. And if the fairness of the sale be contested by the administrator, the court has jurisdiction to try that question. The issue should, however, be submitted to a jury. The remedy of the vendee in such a case is more complete in equity; *Crosby v. Covington*, 2 C. 619. But the court will not order the deed to be made where it appears that the intestate had made a valid sale of the land to another vendee, prior to the execution of the title bond to the petitioner, and of which the petitioner had notice when he purchased; *White v. Gilbert*, 10 G. 802. See *VENDOR AND VENDEE*, 83b, 86c.

E. POWER TO MAKE DISTRIBUTEES PAY SURPLUS OF VALUATION OF THEIR SHARES.

16f. *Same.* Where, in making a division of personalty, the shares of the several distributees cannot be equalized, the commissioners may charge on those having the most valuable lots the payment to the others of such sum as will make the division equal; and the Probate Court has power, by its decree, to enforce such charge; *Calhoun v. Rail*, 4 C. 414.

F. POWER TO MAKE DISTRIBUTEES REFUND ON FINAL SETTLEMENT.

16g. *Same.* The Probate Court has power, upon the final settlement of an administrator's account, when all the parties are before it, by regular service of process, to render judgment and award execution against the

distributees, who have previously received their distributive shares, for any balance that may be due to the administrator, on account of commissions allowed, or for disbursements made for the benefit of the estate; *Powell v. Burrus*, 6 G. 605.

G. JURISDICTION OVER FOREIGN ASSETS.

16h. *Same.* Foreign assets collected by an administrator, and voluntarily submitted to the jurisdiction of the Probate Court, are subject to administration here; but the administration must be according to the same rules which regulate the administration of domestic assets; *Satterwhite v. Littlefield*, 13 S. & M. 302; S. P., as to foreign assets received by a guardian and brought to this State; *Martin v. Stephens*, 1 G. 159.

As to grant of letters of administration here, where there are no assets here, but those removed from a foreign jurisdiction, see *post*, 39.

H. POWER OVER FOREIGN ADMINISTRATORS.

16i. *Jurisdiction over foreign administrators, &c.* The Probate Courts of this State have no jurisdiction over administrators, &c., appointed in another State, and removing to this State with the trust property. The remedy to compel them to account is in chancery; *Bell v. Suddeth*, 2 S. & M. 532.

3. Instances of Want of Jurisdiction.

A. NO JURISDICTION OVER CONTRACTS.

17. *Same: Widow's claim for compensation for dower.* The Probate Court has jurisdiction to give parties redress for any interest they may have in an estate by law, as heir or distributee, or by will, as legatee or devisee; but where the petitioner's claim rests in contract, he must resort to courts having jurisdiction of contracts; and hence, it seems that where a widow of an intestate concurs in a sale of the realty, made by the administrator, whereby her dower is relinquished, under an agreement with the administrator that she is to have compensation out of the proceeds, the Probate Court will have no jurisdiction to enforce her demands. But if there was a will converting equitably, the realty into personalty, the court would have jurisdiction; *Hart v. Dunbar*, 4 S. & M. 273.

18. *No jurisdiction to set aside an assignment for fraud.* The administrator of an insolvent estate, against which a large claim of the assignee of a bank had been allowed by the commissioners of insolvency, filed his petition in the Probate Court against the assignees, impeaching the validity of the assignment made by the bank, and under which the assignees claimed, as fraudulent, and seeking to have the privilege of paying the distributive share in the notes of the bank; *Held*, that the Probate Court had no jurisdiction, but the remedy of the administrator was to except to the report of the commissioners, and have the claim referred to referees under the statute, or the administrator might have

required a suit at law on the claims, and framed the pleadings in the suit so as to raise the question of the validity of the assignment. Whether he could have attained the same end by refusing to pay the dividend to the assignee and compelling a suit against him for a *devastavit*, and in that action pleading the bank notes as a set-off; *Quære?* *Robins v. Norcum*, 4 S. & M. 332.

B. ASSIGNED LEGACIES, &c.

19. *No jurisdiction to enforce assignment of legacy.* &c. The Probate Court has no jurisdiction to entertain a petition against the administrator and distributee to enforce an alleged assignment by such distributee of his interest in the estate; *Hill v. Hardy*, 5 G. 289; nor to compel the administrator to pay to the assignee the share so assigned; *Dixon v. Houston*, 6 G. 636; *Locke v. Williams*, 7 G. 187. Nor can the court refuse distribution to a distributee upon the ground that he has assigned his interest; *Read v. Brown*, 7 G. 329. Such an assignee is a stranger to the jurisdiction of the court, and a decree directing distribution to him is void and cannot be made the foundation of any judicial proceeding whatever; and hence, a suit on the bond of an executor or administrator, for the use of such assignee, cannot be maintained; *Portervant v. Neylans*, 9 G. 104.

C. TO TRY TITLES.

20. *Has no jurisdiction to try disputed titles.* The Probate Court has no jurisdiction to settle disputed titles to property; *McCrea v. Walker*, 4 H. 455; S. P., *Phillips v. McLaughlin*, 4 C. 597; *Clement v. Hawkins*, 8 S. & M. 339. It cannot make a decree directing the administrator to deliver up the property in his hands to a claimant adverse to the estate; and hence, cannot decree that the administrator shall deliver to the widow a note which he has received for rent of land, which was afterwards set apart to her as dower. And if it make such a decree, a court of chancery will not enforce it; *Clement v. Hawkins*, 8 S. & M. 339. Nor has the court jurisdiction of a petition filed by the administrator against the distributees, in which he seeks to recover from them the possession of property which he alleges belongs to the estate, but which is not shown ever to have been in possession of the petitioner as administrator; *Phillips v. McLaughlin*, 4 C. 597.

21. *May settle dispute as to legacy.* Where a testator bequeathed certain property to a life-tenant, with limitations over, it was held that the Probate Court had jurisdiction of a petition by a portion of those claiming in remainder, to have set apart to them their share, even though the other parties, claiming also under the will, claim the whole property; *Rail v. Dotson*, 14 S. & M. 176.

D. TO IMPEACH ITS OWN DECREES.

22. *Has no power to set aside decree for fraud at a subsequent term.* Whether the

Probate Court has the power to set aside one of its own decrees for fraud; *Quære?* It seems it has not; *Smith v. Hurd*, 7 H. 188. The Probate Court has no power at a term subsequent to the rendition of a decree (confirming a sale), to set it aside upon the ground of fraud, (citing *Smith v. Hurd*, *supra*, and *Smith v. Denson*, 2 S. & M. 326). The remedy is in equity; *Turnbull v. Endicott*, 3 S. & M. 302; S. P., *Neylans v. Burge*, 14 S. & M. 201; *Smith v. Chew*, 6 G. 153; *Jones v. Coon*, 5 S. & M. 751; *Searles v. Scott*, 14 S. & M. 94; *contra* *Hurd v. Smith*, 5 H. 562.

23. *When heir has been pretermitted in distribution.* After a final settlement has been made upon due notice to all who were adjudged by the court to be heirs, and payment to them of the balance due by the administrator, the Probate Court has no jurisdiction to entertain a bill by one who alleges he is an heir, and was pretermitted, to compel the administrator to pay him his share; *Lowry v. McMillan*, 6 G. 147.

And in such a case, where the pretermitted distributee filed a bill in equity against the other distributees, to recover his share from them, a demurrer was sustained to it, the court saying, the Probate Court has exclusive jurisdiction over the distribution of estates, and if in this instance error was committed to the prejudice of the complainant, his remedy was not by bill in chancery against one or more of the distributees; *Gaines v. Smiley*, 7 S. & M. 53.

24. *Cannot set aside decree at subsequent term, unless it be void.* The Probate Court has no power to set aside its own final decree, validly made, except at the term at which it was entered; *Smith v. Denson*, 2 S. & M. 326. It cannot, at a subsequent term, set aside a decree adjudging an estate insolvent and ordering a sale of the realty; *Id.* Nor can it set aside a decree dismissing a bill of review; *Alexander v. Smith*, 4 S. & M. 258. Nor a decree passing a final account; *Hendricks v. Huddleston*, 5 S. & M. 422; even when the distributees are minors; *Jones v. Coon*, 5 S. & M. 751; *Hunter v. Archer*, 9 S. & M. 91. And a decree confirming the report of commissioners of insolvency, cannot be set aside after the term at which it is made, unless for cause which makes the whole proceeding void; *Hemphill v. Fortner*, 11 S. & M. 344; *Harrison v. Motz*, 5 S. & M. 578; *Smith v. Berry*, 1 S. & M. 321; *Powell v. Carbry*, 4 S. & M. 86; *Addison v. Eldridge*, 1 S. & M. 510; *Chewning v. Peck*, 6 H. 524; *Herring v. Wellons*, 5 S. & M. 354; *Turnbull v. Endicott*, 3 S. & M. 302; *Dahlgren v. Duncan*, 7 S. & M. 280. Nor can a rehearing be had at a subsequent term on exceptions which have been overruled to an answer; *Scott v. Searles*, 5 S. & M. 25. But annual accounts, though allowed, may be surcharged and falsified at any time before final settlement; *Harper v. Archer*, 9 S. & M. 71. But if a decree be void for want of notice, it may be set aside at a subsequent term; *Neylans v. Burge*, 14 S. & M. 201; *Muirhead v. Muirhead*, 1 C. 97.

E. NO JURISDICTION TO ALLOW ADMINISTRATORS TO SUPPORT ORPHANS, OR TO CHARGE ORPHANS' LANDS WITH DEBT.

25. *Same.* The Probate Court has no jurisdiction to order a sale of legacies delivered to legatees of full age, to pay for board and maintenance furnished them by the executor, when they were minors, even when the will provided that they should be raised and educated under his directions; *Green v. Green*, 3 S. & M. 256. And an administrator has no power to charge in his accounts board and maintenance furnished to an infant distributee, and if he do so, the item is without the jurisdiction of the Probate Court to allow, and a decree allowing an account, embracing the item, may, to that extent, be treated as a nullity; *Washburn v. Phillips*, 5 S. & M. 600; *Jones v. Coon*, 1b. 751; *Stanley v. Langley*, 3 C. 252. But if, after the distributee becomes of age, he agree that such a charge is a proper set-off to his claim for distribution, and agree to leave it to the Probate Court to decide on the amount thereof, the consent is binding, and the decree of the court making the allowance, as a deduction from the distributee's share, is valid and binding; *Price v. Mitchell*, 10 S. & M. 179.

See EXECUTOR AND ADMINISTRATOR, 213.

26. *Power to bind orphans' land by improvements.* The Probate Court has no jurisdiction to authorize the erection of buildings on the land of orphans, and to bind the land for the costs thereof. An order directing the guardian to erect a building out of the funds of the ward, confers no authority to erect such building on a credit; *Payne v. Stone*, 7 S. & M. 367.

F. NO POWER TO COMPEL A SURVIVING PARTNER TO ACCOUNT.

27. *Same.* The Probate Court has no power, at the instance of the administrator of a deceased partner, to compel the surviving partner to account. And the rule is the same when the surviving partner was administrator in chief of the deceased partner, and the attempt to compel him to account is made by the administrator *de bonis non*; *Scott v. Searles*, 5 S. & M. 25 (see *ante*, 12); *S. P., Searles v. Scott*, 6 S. & M. 246.

G. A JURISDICTION OVER SECURITIES AND BOND OF ADMINISTRATOR.

28. *Same.* The Probate Court has no jurisdiction over a suit on an administrator's bond, nor over the sureties of an administrator, and it cannot render a decree against them. The remedy against the sureties and on the bond, is by action at law, after the liability of the administrator has been fixed by the Probate Court; *Green v. Tunstall*, 5 H. 638; *Washburn v. Phillips*, 6 S. & M. 425. Nor can the Probate Court allow the ten per cent. damages against an administrator and his sureties, provided for in the statute; *Austin v. Lamar*, 1 C. 189.

29. *Same.* An application to the Probate

Court to have an administrator's bond declared forfeited and put in suit, is intended to be *ex parte* in its character, and the sureties on the bond have no right to contest their liability in that stage of the proceedings. As a general rule, the court should allow the bond to be put in suit, on the application of a party interested, and the instances are rare in which it will be refused; *Washburn v. Phillips*, 6 S. & M. 425.

H. NO JURISDICTION TO RESTORE CHILD TO HIS FATHER.

30. *Same.* The Probate Court has no jurisdiction of a proceeding to restore a child to his father, though wrongfully detained from him; *Lowry v. Holden*, 41 M. 410.

I. JURISDICTION AS TO PARTITION.

31. *Same.* The Probate Court has no jurisdiction to order partition among joint tenants, etc., except where one of the joint owners has died, and a division is sought between his heirs and the others; *Smith v. Craig*, 10 S. & M. 447. And the statute of 1833 (H. C. 679), which authorizes a sale for partition under the order of the Probate Court, only applies to cases where by the death of a tenant in common, joint tenant, or coparcener, his interest descends to his minor heirs, and it contemplates a division between the surviving joint owners and the representatives of the deceased party (citing *Smith v. Craig, supra*); *Currie v. Stewart*, 4 C. 646. The Act of 1833, which transfers to the probate judge, the power of the presiding judge of the County Court, to make partition under the Act of 1822, makes the transfer to the judge personally, and not to the court; *Smith v. Craig, supra*. Under the Rev. Code of 1857, art. 117, p. 454, the Probate Court could make partition of lands devised or descended, where one of the devisees or coparceners was under age.

K. OVER BILL FOR DIRECTIONS TO ADMINISTRATOR, AND CORRECT COURSE OF ADMINISTRATOR.

32. *Same.* The Probate Court has no jurisdiction of a petition by an administrator for directions from the court as to the mode of administering an estate; *Robins v. Norcum*, 4 S. & M. 332. Nor of a bill to correct the general course of administration, by disallowing reports and accounts which have been allowed; *Harris v. Fisher*, 5 S. & M. 74.

L. CREDITOR'S BILL.

33. *No jurisdiction over.* Several creditors of an intestate filed their bill in the Probate Court against the administrator, alleging that sufficient property to pay all his debts had come to the possession of the administrator; that the administrator had improperly used the assets, and had fraudulently procured the estate to be declared insolvent; that the account on which the declaration was based was erroneous on its face, in showing that a large amount of debts, previous to the declaration of insolvency, had been

paid; that some of the debts reported as due by the intestate were not so due, but were debts contracted by the administrator; that the payment of the debts due to complainants had been put off for six years by the administrator, who had since the declaration, of insolvency continued to pay favored creditors large sums, and had retained a large sum, as due to himself; that the administrator, without proper notice and in vacation had made erroneous settlements with the judge, in which were claimed as credits, items of indebtedness without proof or authentication, and others which were barred by the statute of limitations; that one of the commissioners of insolvency appointed by the court was the attorney of the administrator, and he had uniformly refused to unite with the others in making a report; and that he had retained all the papers, claims, &c., which had been referred to the commissioners, for four years. The prayer was, that the administrator account for the assets he had received; that he be ordered to pay complainants their debts or their *pro rata* share of them: *Held*, that the Probate Court had no jurisdiction to entertain the bill; because,

1. It was a creditor's bill, which belonged to a court of chancery.

2 That, considered as a bill of review, the court has no jurisdiction.

3. That the payment of debts after the declaration of insolvency, was a *devastavit* over which the Probate Court could exercise no other control than by refusing to allow the administrator's accounts, or removing him from office.

4. That the administrator was not bound to pay complainants their debts until the dividend was struck.

5. That the Probate Court had power to coerce the commissioners of insolvency who failed to report, to do their duty, and a simple application for that purpose was all that was necessary; *Harris v. Fisher*, 5 S. & M. 74.

M. INJUNCTIONS, RECEIVERS, &c.

34. *Has no power to issue an injunction or appoint a receiver.* Injunctions are peculiarly matters of chancery cognizance, and no powers exist in the Probate Court to grant them; *Scott v. Searles*, 5 S. & M. 25. The Probate Court has no power to grant an injunction against an order of the Chancery Court, appointing a receiver to take charge of property in an executor's hands; *American Colonization Society v. Wade*, 8 S. & M. 610. Nor has it power to appoint a receiver in any case; *Searles v. Scott*, 6 S. & M. 246.

35. *Has no power to restrain creditors from getting priorities.* The Chancery Court, when it undertook to administer the assets of a decedent, proceeded at the instance of creditors, and not at the instance of the executor or administrator; and it also proceeded with a due regard to the preferences and priorities obtained before the decree ordering such administration. After the decree was pronounced, and not before, it restrained other

creditors from proceeding at law against the executor or administrator; but it restrained only at the instance of creditors, and not upon the application of the representative of the estate. This power of the Chancery Court is not vested in the Probate Court of this State; nor will the chancery court here interfere by restraining creditors from proceeding at law merely, because such creditor might thereby obtain a preference. Ample remedy for this is provided in the law, which prevents suits against insolvent estates, and provides for an equal distribution of assets; *Sanders v. Douglass*, 3 S. & M. 454.

N. NO POWER TO ORDER PAYMENT OF A LEGACY UNDER A FOREIGN WILL.

36. *Same.* A probate court in this State, wherein has been granted an administration ancillary to the primary administration in a sister State, has no jurisdiction to compel the administrator, with the will annexed, thus appointed, to pay a pecuniary legacy, directed by the will to be invested in a slave for the benefit of the legatee and his heirs. In such a case, the foreign executor, in whom a special confidence is reposed in reference to the legacy, is the proper party to be proceeded against; and, moreover, the legacy is a trust which the Probate Court cannot execute. Whether the court could enforce payment of the legacy, if there were no trust; *Quare?* *Lovelady v. Davis*, 4 G. 577. See *ante*, 16d.

37. *As to jurisdiction over foreign wills generally*, see *CONFLICT OF LAWS*, 21, *et seq.*

O. OVER LEGACY ORDERED TO BE INVESTED.

38. *Same.* Where an executor is empowered to invest money for a legatee on good security, and in doing so, he fail to act with ordinary prudence he will be liable, but his liability cannot be enforced in the Probate Court; *Bodley v. McKinney*, 9 S. & M. 339. See *ante*, 16d.

4. Jurisdiction to grant Letters of Administration.

39. *In what county the grant made.* The statute (H. & H. 395, § 35, Rev. Code of 1857, 438, art. 61), provides for the grant of letters of administration by the Probate Court of the county "where the intestate had his domicile, and if he had none, then in the county "where he died, or that in which his estate, or the greater part of it may be:" *Held*, that the latter clause gives jurisdiction to grant letters to the court of that county in which the estate was at the time of his death, and not to the court in a county to which the estate had been removed afterwards, even though it was brought to the latter county from another State; and that a grant of letters in a county to which the estate had been so brought, there being no other ground for the jurisdiction, was *coram non judice* and void, and should be revoked. But that the court could go no further than to revoke the grant, and could not set aside sales made by the person so appointed; *Wright v. Beck*, 10 S. & M. 277; but in *Roberts v. Rogers*, 6 C. 132, this

was made a *query*; and the court decided that even if the grant were void, the administrator was estopped to deny his liability as such for the property so brought into this State and administered by him. In *Cocke v. Finley*, 7 C. 172, where an application was made to have the sheriff appointed administrator, and the jurisdictional fact of death, residence or ownership of property in the county was not shown, the court refused the application, stating that the rule would be applied strictly in such a case.

40. *When new grant can be made.* After a grant of letters of administration and a settlement of the estate, another grant of letters will be void, except a grant of letters of administration *de bonis non*, in cases provided for by law; and such a grant may be revoked on the petition of a party interested, or on a suggestion of an *amicus curiæ*, or at the instance of the court itself; but it must be done on notice to the administrator; and notice to his attorney will not do; *Gasque v. Moody*, 12 S. & M. 153. But where a record from the Probate Court shows the appointment of an administrator *de bonis non*, but does not show a vacancy in the office of administrator, the High Court will presume that such vacancy existed, and that the appointment was legal; *Gray v. Harris*, 43 M. 421.

See EXECUTOR AND ADMINISTRATOR, 24.

41. *Power to appoint collector.* The court has no power to appoint an administrator *ad colligendum*, when there is already an administrator in chief; *Searles v. Scott*, 6 S. M. 246. The statutes (H. C. 654, § 37. Rev. Code of 1937, 434, art. 56), limit the power of the court to appoint collectors to cases where there is a contest about a will, or where the executor is an infant, or absent. No power exists to make the appointment in a case of intestacy, where there is no suggestion, of a will, or contest in relation to its validity; and an appointment so made is void; *Boyd v. Swing*, 9 G. 182.

See EXECUTOR AND ADMINISTRATOR, 22, 23. *Post*, 216.

42. *Appointment of administrator c. t. a.* The power of the Probate Court to appoint an administrator with the will annexed, is special and limited, and the record must show a state of facts authorizing the appointment, or it will be void; *Vick v. Mayor of Vicksburg*, 1 H. 379.

Jurisdiction over Sales of Personality.

See EXECUTOR AND ADMINISTRATOR, 335, *et seq.*

43. *Power of sale is a common law power.* An administrator does not derive his power to sell personality from the statute, but from the common law. The statute requiring him to procure an order of sale from the Probate Court, and to give notice, is a restriction imposed upon his common law powers, and must be strictly construed; *Bland v. Muncaster*, 2 C. 62.

44. *Power of court to order sale after distribution.* The administrator with the will an-

nexed, who was also guardian for the legatees, filed his petition in the Probate Court, asking for a sale of slaves—which had been inventoried by a former guardian, and which he himself held as guardian for the legatees—to pay debts of the testator, there being no assets of the estate: *Held*, that the legacies having been delivered with the administrator's assent, his only remedy was by bill in equity, to compel them to refund, and it was also stated, *arguendo*, that the only remedy of the creditor was by bill to refund; *Turner v. Chambers*, 10 S. & M. 308. But in *Smith v. The State*, 13 S. & M. 140, the court affirmed the rule laid down in *Brooks v. Lewis*, 1 H. 207, and in *Vanhouten v. Reilly*, 6 S. & M. 440, that a creditor having an execution, may levy it on property which has been distributed, and said that that point was not in *Turner v. Chambers*.

45. *Power to sell legacies for distribution.* Whether the Probate Court has power to order a sale of personality, bequeathed by the will to be equally divided among the legatees, for the single purpose of division, where a sale is not necessary for the preservation of the property itself; *Quære?* But if it has, the power can be exercised only upon due notice to the legatees, otherwise the sale will be void; *Joslin v. Caughlin*, 4 C. 134.

46. *Power to sell slaves for distribution.* By the statute, the Probate Court has power to order a sale of slaves, for distribution among the heirs; *Nabors v. McKay*, 5 C. 799.

But such order of sale must be on notice to the heirs, though a sale to pay debts may be without notice. And if the record does not show for what purpose the sale was made, and the order be without notice, it will be presumed in favor of the order, that it was made to pay debts; *Hutchins v. Brooks*, 2 G. 430.

6. Jurisdiction: And Proceedings in Sales of Realty.

See EXECUTOR AND ADMINISTRATOR, 357, *et seq.* GUARDIAN AND WARD, 52, *et seq.*

A. THE JURISDICTION IS SPECIAL AND LIMITED, AND RECORD MUST SHOW IT.

46a. *The jurisdiction is limited.* No jurisdiction is granted by the constitution, to the Probate Court, over the realty of an intestate decedent. The power of the court over realty, is derived from legislative grant, and this grant is the donation of a special and limited jurisdiction, which can only be exercised in strict accordance with the limitations and conditions prescribed by the Legislature; *Root v. McFerrin*, 8 G. 17; *Planters' Bk v. Johnson*, 7 S. & M. 449; *Com'l Bk of Manchester v. Martin*, 9 S. & M. 613. But a term of years is personality, and the same strictness is not required in making a sale of it, as in other cases; *Dillingham v. Jenkins*, 7 S. & M. 479; *S. P., Webster v. Parker*, 42 M. 465; *Winston v. McLendon*, 43 M. 254; *Hollman v. Bennett*, 44 M. 322.

The power to sell realty is derived from legislative grant, which may embrace cases not in the constitution. The statute, Rev. Code of 1857, p. 464, art. 153, which authorizes, on the petition of the guardian of a minor, co-heir, or co-devisee, a sale of all the land, including the interest of the adults, for a division, is constitutional; *Hanks v. Neal*, 44 M. 212.

B. THE RECORD MUST SHOW THE JURISDICTIONAL FACTS.

46b. *Same*. The court, as to this subject, being one of inferior, special and limited jurisdiction, no presumption will be indulged in favor of the jurisdiction; but all jurisdictional facts must appear affirmatively in the record. Parol proof of these facts will not do; *Root v. McFerrin*, 8 G. 17. But this rule, it is said, applies only to questions of jurisdiction as to the subject matter, and not to the person; for wherever the jurisdiction has once vested, as to the subject matter, the rules which govern its exercise as to the person, with respect to evidence, process, &c., are generally the same as those applicable to courts of general jurisdiction; *Cason v. Cason*, 2 G. 578.

That the jurisdictional facts must appear affirmatively on the record, to sustain an order of sale of realty, is held also in the following cases; *Campbell v. Brown*, 6 H. 106, 230; *Puckett v. McDonald*, 6 H. 269; *Smith v. Denson*, 2 S. & M. 326; *Planters' Bk v. Johnson*, 7 S. & M. 449; *Gwin v. McCarroll*, 1 S. & M. 351; *Com'l Bk of Manchester v. Martin*, 9 S. & M. 613; *Martin v. Williams*, 42 M. 210; *Gelstrop v. Moore*, 4 C. 206; *Stevenson v. McReary*, 12 S. & M. 9; *S. P. Sullivan v. Blackwell*, 6 C. 737, where it was held, that notice of a guardian's final account must appear by the record; *S. P., Stren v. Steen*, 3 C. 513. But the notice need not appear of record, where the sale is of a term for years; *Dillingham v. Jenkins*, 7 S. & M. 479.

47. *Effect of recitals in the decree, as to jurisdictional facts*. Whether a recital in the decree, "that it appearing to the satisfaction of the court that publication had been made according to the order of the court, made," &c., is evidence, without other proof that such publication was made; *Quære?* But if it is evidence of that fact, it is not evidence that the notice was also posted at three public places in the county; *Planters' Bk v. Johnson*, 7 S. & M. 449.

If the record recite that "this day came the parties, by themselves and their attorneys, and it appearing to the satisfaction of the court that due notice has been given by the administrator, in pursuance of the statute," &c., this, it seems, will be *prima facie* evidence of appearance and notice; *Com'l Bk of Manchester v. Martin*, 9 S. & M. 613.

The Probate Court has the power, in a proceeding to sell the land of a decedent, to determine the regularity and the sufficiency of the proof of service of notice upon the

heirs; and if the decree recite that proof of the service of notice upon the heirs according to law, was made, it will be presumed, in the absence of proof to the contrary, that the service was legally and duly made; *Monk v. Horne*, 9 G. 100.

But in *Pouns v. Gartman*, 7 C. 133, it was said, that "the recital must be controlled by the facts, as they appear in the record. The process is a part of the record, and if it do not appear to have been served on the parties, or that notice was given according to law by publication, the recital in the decree will be insufficient." And this case was cited and confirmed in *Martin v. Williams*, 42 M. 210, where it is said, "admitting that the decree recited every fact necessary to constitute it a valid decree, it could not be sustained, unless the process issued in the case, which is a part of the record, had been properly executed or served on all the parties to be affected by the decree."

Yet in *Harris v. Ransom*, 2 C. 504, the decree recited, that "all persons interested were cited, and that the cause was heard upon the petition of the administrator, and the answer filed by the several heirs-at-law." And it was held that this showed actual service of process, and the appearance of the heirs, though there was no process in the record returned, served; and there was an order directing publication of citation against them, as non residents, in two newspapers (which the law then required), and there was proof of publication filed in one only; and there was no answer filed; and the sale was adjudged good.

In relation, however, to recitals of notice in decrees on final settlements, as to which the court is one of original and general jurisdiction, the doctrine is settled, that they are evidence and conclusive; *Frisby v. Harrison*, 1 G. 452; *Pollock v. Buis*, 43 M. 140; *Hardy v. Gholson*, 4 C. 70.

But even in final accounts, if the record recite a waiver of notice, and refer to it as endorsed on the account; if the endorsement be bad as a waiver, and there be no other evidence of a waiver in record, the recital will not make it good; and if in such a case, the decree recite that the distributees have been "duly notified," and no other notice appear, the waiver endorsed on the account will be considered as the only notice, and the decree therefore bad; *Treadwell v. Herndon*, 41 M. 38.

See post, 195. JUDGMENT, 8. APPEARANCE, 1.

And this rule is applied in all cases of courts of general jurisdiction, in the absence of a statement in the record of the evidence, on which the court acts; *Canon v. Cooper*, 10 G. 784.

C. PRESUMPTIONS IN FAVOR OF THE RECORD AND SALE, FROM LAPSE OF TIME.

48. *Possession of thirty-four years*. It is settled in this State, that the Probate Court cannot order a sale of realty, unless everything necessary to give the court jurisdiction of the person, and the subject matter, ap-

pear affirmatively in the record; nevertheless, when the sale was made in the infancy of the territorial government of Mississippi, and the record showed the appointment of the administrator, and an order declaring the estate insolvent, and directing a sale of the realty, but did not show that notice was given to the heirs, nor that a bond was given to account for the proceeds; it was held in favor of a purchaser, who had been in possession thirty-four years, under a deed from the administrator, reciting in detail the taking of all legal steps to condemn the land for sale, that from the great lapse of time, it would be presumed that the sale was regular in all respects, and that this presumption would prevail in the absence of countervailing proof, showing the contrary; and further, that this presumption was strengthened by proof, that at the time of the sale and subsequently, the officers in charge of the records of the court were careless and negligent in the discharge of their duties, as this proof would tend to show the probability of a loss of that part of the record which was defective: and in such case, it makes no difference that the order of sale as entered on the minutes, was in these words: "Same order in reference to the estate of Stephen Stephenson, deceased,"—following immediately an order of sale of the realty belonging to another estate; *Stephenson's Heirs v. McReary*, 12 S. & M. 9.

49. *Same: Recitals in administrator's deed.* The recitals in an administrator's deed, showing a compliance with the law, in procuring an order to sell, and in making the sale of realty, are, after the lapse of thirty-four years of undisturbed adverse possession by the purchaser, entitled to great weight, if they be not *prima facie* evidence of their own truth; *Ib.*

D. THE NOTICE TO THE HEIRS NECESSARY.

50. *Sale without notice void.* A decree of the Probate Court, ordering a sale of land of a decedent is absolutely void, if made without legal notice to the heirs; *Campbell v. Brown*, 6 H. 106. 230; *Puckett v. McDonald*, 1b. 269; *Gwin v. McCarroll*, 1 S. & M. 351; *Com'l Bk of Manchester v. Martin*, 9 S. & M. 613; *Smith v. Denson*, 2 S. & M. 326; *Planters' Bk v. Johnson*, 7 S. & M. 449; *Root v. McFerrin*, 8 G. 17; *Martin v. Williams*, 42 M. 210. And the notice must be of the purpose for which the sale is to be made, especially if it be constructive by publication; and hence, if notice be published of an application to sell land to pay debts, the court cannot, without a new notice in that proceeding, order a sale, upon the ground that it would be for the interest of the heirs; *Williams v. Childress*, 3 C. 78. And where the notice is constructive, it must be given in the exact mode required by the statute; and hence, when the statute requires both posting and publication of notice, it will be insufficient and void, if given by publication only; *Matlock v. Livingston*, 9 S. & M. 489.

And the notice must be given to all the heirs; if one heir be not served, the sale is void as to him, and being void as to him is void as to all; *Hamilton v. Lockhart*, 41 M. 460.

The statute (H. C. 577, §1, art. 12) does not require notice of an administrator's application to sell land, to be published in two newspapers, except only where the heirs are non-residents, and cannot be served with notice personally; *Harris v. Ransom*, 2 C. 504.

Now, personal service is required on all residents, and publication in one newspaper, and the mailing of notices to non-residents.

Under the Act of 1854, notice to non-resident heirs was to be made by publication in a newspaper for four consecutive weeks, and if the notice be published as long as the law requires, it is immaterial that the order of the court required a publication for a longer period; *Sellers v. Talby*, 4 G. 582.

E. THE BOND TO ACCOUNT FOR THE PROCEEDS IS NECESSARY.

51. *Sale without the bond is void.* Whether a bond to account for the proceeds of the sale, when required by the statute, is essential to the validity of the sale; *Quære?* *Stevenson's Heirs v. McReary*, 12 S. & M. 9. The execution of the bond is essential; *Currie v. Stewart*, 4 C. 646; *Hamilton v. Lockhart*, 41 M. 460; *Washington v. McCaughran*, 5 G. 304; *Rucker v. Dyer*, 44 M. 591. And the rule is the same, where the sheriff is appointed administrator *virtute officii*; *Rucker v. Dyer*, *supra*.

See EXECUTOR AND ADMINISTRATOR, 370.

F. EFFECT OF VOID SALE ON PURCHASER.

52. *He is not liable for the purchase money.* When the sale is void, the purchaser though in possession, is not bound to pay the purchase money; *Campbell v. Brown*, 6 H. 106, 230; *Williamson v. Williamson*, 3 S. & M. 713; *Laughman v. Thompson*, 6 S. & M. 259; *Planters' Bk v. Johnson*, 7 S. & M. 449.

And where a deed is made with covenants of warranty, the rule is the same, for it is the court that makes the sale, and the purchaser buys the title of the deceased; and if the sale is void the deed is void, and there is no consideration for the note for the purchase money; *Pucket v. McDonald*, 6 H. 269.

But if the sale be void, and there is a judgment for the purchase money, equity will not relieve the purchaser, if the heirs will, at the hearing make him a title; *McLauren v. Parker*, 2 C. 509.

Where, however, the sale is void, and the administrator and the vendee sell by a joint deed, with covenants of warranty to another, who gives his note for the price to the administrator, this last vendee cannot resist payment of the purchase money, if he be in possession under the deed, for in that case, the action is not on the original contract of sale, and the invalidity of the sale is but a defect in the title; *Duncan v. Lane*, 8 S. & M. 744; *Green v. McCarroll*, 2 C. 427.

But, where land was sold, to which the in-

testate had only a bond for title, and the purchaser executed his note to the vendor of the intestate for the balance due him, but took a deed from the administrator alone, if the sale be void, the note to the vendor cannot be collected; *Planters' Bk v. Johnson*, 7 S. & M. 449.

G. SALE BY PROBATE COURT ONLY MEANS TO APPLY LAND TO DEBTS.

53. *Same*. Except when judgment has been rendered against a decedent in his lifetime, his land can only be reached by his creditors in satisfaction of their debts, by a proceeding in the Probate Court. A *scire farias* will not lie on a judgment against an executor, to revive against the heir, and thereby reach the real assets in his hands; *Foster v. Sumner*, 3 S. & M. 606. But a term for years may be sold, under an execution against the administrator; *Webster v. Parker*, 42 M. 465; S. P., *Dillingham v. Jenkins*, 7 S. & M. 479.

H. THE PETITION FOR SALE.

54. *Petition necessary: It must lie over one month*. A decree declaring an estate insolvent, and ordering a sale of realty, without any showing in the petition that the estate is insolvent, and without any adjudication by the court that it is insolvent, is void. And in a proceeding under art. 88, p. 445, of the Rev. Code of 1857, to sell land upon the ground that the personalty is insufficient, the petition must lie over one month before the decree of sale is made; *Heard v. Whitehead*, 41 M. 404. *Sed vide post*, 59, 60. See *GUARDIAN AND WARD*, 58c, *et seq*.

As to irregularities in notice of the sale, see *EXECUTOR AND ADMINISTRATOR*, 352, 352a, 381. *SHERIFF AND SHERIFF'S SALES*, 95, *et seq*. *GUARDIAN AND WARD*, 58c.

J. THE REPORT OF SALE, AND ITS CONFIRMATION.

55. *Confirmation essential; when report of sale made*. It is essential to the validity of a sale of land made under the order of the Probate Court, that it be confirmed; *Smith v. Denson*, 2 S. & M. 326. The report of sale must be made to the term of court next succeeding the sale, and if not, notice must be given to the heirs of the motion to confirm; *Mundy v. Calvert*, 40 M. 181. The rule is the same with reference to report and confirmation of sales made by guardians; *Hoel v. Courtery*, 4 C. 511. Notice of the motion to confirm will not be presumed from the mere lapse of eleven years time since the confirmation, it not being shown that any of the records or papers were lost; *Mundy v. Calvert*, *supra*. See *GUARDIAN AND WARD*, 58a, 58b.

56. *Court not bound to confirm a sale, though it be legal*. The Probate Court is not bound to confirm a sale of realty, though made in accordance with law; it has a discretion in the exercise of its duty to protect the interests of creditors and heirs, to refuse its sanction to a regular sale if it be at a

ruinously low price; and this may be done of its own motion, without exceptions filed to the report; *Heard v. Whitehead*, 40 M. 404.

57. *Illegal sale will not be confirmed*. The sale is not final until confirmed by the court, and when the report is made, the purchaser may appear and object to its confirmation, on the ground that the sale has not been made in conformity to law; *Smith v. Denson*, 2 S. & M. 326. And a fraudulent sale will not be confirmed; *Planters' Bank v. Neely*, 7 H. 80.

K. JURISDICTION AND PROCEEDINGS TO SELL TO PAY DEBTS FOR INSUFFICIENCY OF PERSONALTY.

58. *Same*. The Probate Court has full jurisdiction to order a sale of land to pay debts, upon the ground of the insufficiency of the personal estate, and as included in this jurisdiction, it has the power to adjudge the insufficiency of the personalty. Its judgment therefore on that point, upon proper proceedings, is final and conclusive, except upon direct appeal from it; *Smith v. Denson*, 2 S. & M. 326.

59. *Proceedings to sell to pay debts: Case in judgment*. A regular petition was filed by an administrator, representing the insufficiency of the personalty to pay debts, and asking for an order to sell realty in Hinds and Copiah counties. On the petition in the year 1841 an order was made, directing the sale of the lands in Hinds county, but reciting "that B., administrator of R., had filed objections to an order of sale of the lands in Copiah county," which were judged good and sufficient, and the petition was dismissed as to them. In 1842, without any further proceedings, an order was made for the sale of a lot in Copiah county. In 1843, an order was entered directing notice by citations to all the heirs of the deceased, commanding them to show cause why all the real estate of the decedent should not be sold; and at the August term, 1843, an order was made, reciting that it was shown that the personalty was insufficient to pay the debts, and directing a sale of all the realty for that purpose; but there was no petition, other than that originally filed, on which this order was founded: *Held*:

1. That the decree made in 1841 dismissing the petition as to the lands in Copiah county, was not *res adjudicata*, and did not prevent subsequent proceedings for that purpose, as the citation issued on the petition filed in 1841, by reciting certain lands (which lay in Copiah county), narrowed the relief sought to that particular land, which land was not embraced in the order of 1843.

2. Whether the dismissal of a petition for the sale of land to pay debts, is a bar under any circumstances, to the filing of another; *Quære?*

3. That no petition in writing was necessary to procure an order of sale, nor was it essential to the validity of the order, that there should be a report showing the assets and

debts (citing *Eldridge v. McMackin*, 8 G. 72, and H. C. 666, § 98.) *Sed vide, ante*, 54.)

4. That the former report made in 1841, with the petition then filed, showing the insufficiency of the personalty, rendered any representation on that subject by the administrator, unnecessary; *Learned v. Matthews*, 40 M. 210.

60. *The exhibit of personalty and debts need not be under oath.* It is not essential to the validity of a sale of realty to pay debts, that the inventory of debts and assets filed with the petition, should be under oath; *Eldridge v. McMackin*, 8 G. 72.

61. *Decree only made on deficiency of personal assets.* The Probate Court will decree a sale of land to pay debts, only where there is not a sufficiency of personal assets; *McCoy v. Nichols*, 4 H. 31. But it is not necessary that the deficiency should exist at the time of the death of the decedent; if it occur afterwards from any cause, except the fault of the administrator or creditor, the court will order a sale of realty to pay the debts. Thus, where the deficiency was caused by the emancipation of slaves, the land was held liable to be sold; *Evans v. Fisher*, 40 M. 643; *Stigler v. Porter*, 42 M. 449; S. P., *Hollman v. Bennett*, 44 M. 322. But the court will not order a sale where the deficiency was occasioned by the waste of the administrator, until all legal remedy of the creditor against the administrator and his sureties has been exhausted, without collecting the debt; *Turner v. Ellis*, 2 C. 173; *Webster v. Parker*, 42 M. 465; S. P., *Hollman v. Bennett*, 44 M. 322. The mere fact that the sureties and the administrator are insolvent, will not dispense with the rule requiring the creditor's remedy against them to be exhausted; *Paine v. Pendleton*, 3 G. 320.

61a. *What debts land may be sold for.* But the land cannot be sold for any debt not created by decedent. It cannot be sold to pay debts created by the administrator, nor to pay his commissions; *Hollman v. Bennett*, 44 M. 322.

62. *Form of the decree for sale to pay debts.* It is unnecessary that the decree ordering a sale of land to pay debts, should specifically describe the land; it is sufficient if the descriptive terms used be comprehensive enough to embrace it; and, hence, where the decree directed a sale "of the lands and mills belonging to the deceased," it is a sufficient authority to sell any of the lands of the decedent, within the jurisdiction of the court; *Monk v. Horne*, 9 G. 100.

63. *Appointment of guardian ad litem.* The appointment of a guardian ad litem, is necessary to the validity of an order to sell an infant's land; *McAllister v. Moyer*, 1 G. 258. And the appointment must be made after and not before service of process; the court has no jurisdiction to appoint before service of process; *McAllister v. Moyer, supra*; *Prewett v. Land*, 7 G. 495; *Stanton v. Pollard*, 2 C. 154; *Ingersoll v. Ingersoll*, 42 M. 155; *Johnson v. McCabe*, 1b. 253. But in *Com'l B'k of Manchester v. Martin*,

9 S. & M. 613, it was said that it would be going a great way to hold that a sale of realty was void, because the appointment of a guardian ad litem, was made before service of process on the infant, who was afterwards duly served.

64. *Estate in remainder may be sold.* The interest of a decedent in an estate in lands in remainder, is liable to be sold for the payment of his debts; *Williams v. Ratcliff*, 42 M. 145.

65. *Sale of a term for years.* An estate for years in land is a chattel interest, and on the death of the tenant for years before the expiration of his term, descends to his personal representatives and not to his heir; and upon a deficiency of personal assets caused by the *devastavit* of the administrator, it may be sold before exhausting the remedies against the administrator and his sureties; *Webster v. Parker*, 42 M. 465. And it may be sold under an execution against the administrator; *Ib.*

65a. *For sale of land to pay the purchase money,* see VENDOR AND VENDRE, 110c.

II. Jurisdiction in Cases of Dower.

See DOWER, 24. *et seq.*

66. *Its extent.* The jurisdiction of the Probate Court in cases of dower is general, and extends to all cases—to controversies in relation to the title between the widow and strangers—as well as to all controversies between the widow and heirs, as to her right of dower; *Randolph v. Doss*, 3 H. 205. But this case is now overruled; and it is settled in the following cases that the court has no jurisdiction over an adverse claimant, and that no decree can be rendered affecting his rights, which remain after allotment, unaffected by the decree and subject to adjustment in the appropriate tribunals; *Farmers' & Merchants' Bank v. Tappan*, 5 S. & M. 112; *Holloman v. Holloman*, 5 S. & M. 559; *James v. Rowan*, 6 ib. 393; *Enos v. Smith*, 7 S. & M. 85; *Ware v. Washington*, 6 S. & M. 737; *Bisland v. Hewett*, 11 S. & M. 164; *Jiggilts v. Bennett*, 2 G. 610. And if the widow and adverse claimant consent that the court shall try the question of title between them, still there is no jurisdiction, and the decree is void and does not bind the parties; *Holloman v. Holloman*; *James v. Rowan, supra*. See fully on the subject, DOWER, 24.

67. *Same.* Has the Probate Court, on the petition of the widow for dower, a right to try whether the marriage was void upon the ground of a want of capacity of the parties to contract; *Quære? Powell v. Powell*, 5 C. 783.

68. *Power to try forfeiture of dower by waste.* The Probate Court has no jurisdiction to try whether the widow has wasted personalty of her deceased husband of greater value than her dower—the waste being set up in bar of her petition for dower; *Caruthers v. Wilson*, 1 S. & M. 527.

69. *As to power of court to compensate widow for releasing her dower,* see *ante*, 17.

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to decree for dower without notice, CR, 21.

s to power to order administrator to o widow a note he has received for or dower, see ante, 20.

*s to power of court to substitute ad-
tor to lien on dower discharged by
DOWER, 25.*

Insolvent Estates and Proceedings therein.

**Declaration of Insolvency: the Time for
ing it, and its Effect on Liability of
istrator.**

*Then the declaration should be made.
te may be declared insolvent at any
er the expiration of the nine months
an administrator is not allowed to*

*The whole period allowed for the
ation of claims against an estate, is
to the administrator to ascertain
it is solvent or insolvent, and at the
on of that time he should know its
n; but as a general rule, a declara-
insolvency ought not to be allowed
ds; *Parker v. Whiting*, 6 H. 332.*

Time: Duty of the administrator to be

*It is the duty of an administrator
ompt in reporting an estate insolvent,
t it be so. As a general rule, this
done before he pays any debt, for he
prefer creditors, and each of them has
the assets in proportion to his claim.
an administrator is coerced to make
ts, he should be excused upon a show-
hat effect. At the expiration of the
for the presentation of claims, he
know the condition of the estate. It
cuse for a longer delay in reporting
te insolvent, that there were pending
ainst the estate, especially if it be not
hat these suits were not brought to
payment of claims probated against
te.*

*fore, where an administrator, four
fter the granting of letters of ad-
ution, reported the estate insolvent
his report showed he had paid debts
amount of \$5,000, and had assets
d worth only \$400, and that over
f debts still remained unpaid, but
showing of any peculiar circumstan-
ch would justify the delay, and did
n state that he was ignorant of the
icy when he paid the debts in full, and
t, at the instance of creditors, refused
ve the report, it was held, that the re-
of the report was in some degree in
retion of the court, and in this case
as no error in its exercise.*

*ms, however, that in such a case if he
provide for the unpaid creditors, by
them what they would have received
there had been no payment in full of
ts, his report of insolvency should be
l; *Bramblett v. Webb*, 11 S. & M.*

Same: Depreciation of property.

*While it seems that great and sudden depre-
ciation in the value of property, causing in-
solvency of the estate, would excuse an ad-
ministrator from liability on account of pay-
ing in full certain debts, before the deprecia-
tion took place, yet if, in such case, he has
had the estate an unreasonable length of time
before he has reported it insolvent, or if the
insolvency is the fault of the administrator,
the depreciation will not protect him. If he
returns an estate insolvent, after paying debts
in full, he must have an undoubted excuse.*

*Therefore, where an action was brought on
an administrator's bond, alleging maladminis-
tration in paying certain debts in full, and
leaving plaintiff's debt unpaid, and the de-
fendant pleaded as an excuse, that the pay-
ments were made after the lapse of nine
months from the grant of administration, in
good faith, under the belief that the estate
was solvent, but that it had become insolvent
by a depreciation in the value of property;
it was held, that the plea was insufficient, as
it might be true, and yet the defendant still
be guilty of the grossest maladministration.
The plea ought further to have shown, that
the defendant had not been guilty of malad-
ministration; *Woodward v. Fisher*, 11 S. &
M. 303.*

*75. Same: Effect of declaration of insol-
vency in such a case. Yet, when debts have
been improperly paid in full and the estate is
then declared insolvent by the court, the un-
paid creditors have but the residue of the es-
tate to look to, and for the balance remaining
unpaid from this source, their remedy is on
the administrator's bond; *Bramblett v. Webb*,
11 S. & M. 438.*

*76. Effect of declaration of insolvency on
action against an administrator for not pay-
ing out assets. It is no answer to an action
by a creditor on an administrator's bond,
complaining of the failure of the defendant
to pay out a sum of money which he had re-
ceived from the proceeds of land sold to pay
debts, that before the money was received
the estate had been declared insolvent, for
this would excuse him entirely from paying
out the money. Whether the administrator
could retain the money until the report of the
commissioners of insolvency, and the ascer-
tainment of the plaintiff's *pro rata* share, was
not decided; *Woodward v. Fisher*, 11 S. &
M. 303.*

*77. Equality of creditors: Payment of
debts contracted by executor. To an action
on an executor's bond, alleging, as a breach,
that the executors had paid out large sums
towards debts wrongfully contracted by him
after the testator's death, and not in due
course of administration, when the estate was
insolvent, and leaving the plaintiff's debt un-
paid; it was pleaded that the money was paid
out by them on contracts rightfully made by
them, in pursuance of the will: *Held*, that
the plea was insufficient; that the creditors
of an insolvent estate have equal claims,
although there be a will, and an executor can
make no contract which will defeat their
claims; and moreover, the facts should have*

been pleaded, so that the court might determine whether the contracts were rightfully or wrongfully made; *Ib.*

77a. *Insolvent estate should be so reported.* An administrator of an insolvent estate should so report it, and pay the debts ratably. Hence, if there be several judgments against him, if he apply the assets to the payment of one (the junior), to the exclusion of another, (the senior), it will be a *devastavit*; *Black v. Barton*, 6 S. & M. 239.

77b. *Execution actually levied entitled to priority.* An actual levy, before a declaration of insolvency, of an execution, emanating from a judgment rendered against an administrator, secures to the creditor a right to appropriate the property seized to his execution; *Bass v. Heard*, 4 G. 131; *Trotter v. Parker*, 9 G. 473. See *Post*, 109.

78. *Failure to report insolvency no evidence of assets.* The failure of an administrator to declare an estate insolvent, is no evidence of assets in an action against him suggesting a *devastavit*; nor can the administrator in that action be rendered liable for such failure; the remedy is an action on his bond for a failure to administer the estate according to law; *Howard v. Cousins*, 7 H. 114.

79. *Proof requisite for the declaration.* An estate may be declared insolvent by the Probate Court, where from a comparison of the debts with the probable value of the assets, it appears that the assets are not sufficient to pay the debts; it is not necessary that the real and exact value of the assets shall be first ascertained by a sale; *Saunders v. Planters' B'k*, 2 S. & M. 287.

2. The Petition for the Declaration.

79a. *The petition for insolvency.* See *ante*, 54, 59, 60.

3. The Decree of Insolvency.

80. *The decree is conclusive.* The Probate Court has a discretion in declaring an estate insolvent, where proper proceedings are had for that purpose; and where this discretion is exercised, it is conclusive, unless appealed from; *Saunders v. Planters' B'k*, 2 S. & M. 287. And it will not be set aside on appeal, unless the error be manifest in the record; *Winston v. McLendon*, 43 M. 254. Such a decree cannot be set aside at a term subsequent to the one at which it was rendered; *Smith v. Denson*, 2 S. & M. 326. See *ante*, 24.

81. *It cannot be impeached collaterally.* The decree of the Probate Court declaring an estate insolvent, cannot be impeached collaterally. Hence, on a motion in the Circuit Court to stay execution on a judgment against the estate, it will be proper for the court to refuse to hear evidence tending to show that the estate is solvent, or that if it be insolvent, it is owing to the maladministration of the administrator; *Parker v. Whiting*, 6 H. 352.

4. Commissioners of Insolvency: Their Report, and its Confirmation and Proceedings before them.

82. *The court may compel them to report.*

If the commissioners of insolvency unreasonably delay to make a report of their action on the claims laid before them, the court may compel them to report; *Harris v. Fisher*, 5 S. & M. 74. See *ante*, 33.

83. *Exceptions to the report.* Exceptions to report of commissioners of insolvency should be filed at the term to which the report is made; *Chewning v. Peck*, 6 H. 524.

84. *Action of commissioners presumed correct.* That the record of the court does not show that the commissioners of insolvency made their report under oath; nor show that the advertisement of their meetings was made according to the order of the court, does not vitiate their proceedings. These matters will be presumed to have been correctly done, unless the record show affirmatively the contrary; *Herring v. Wellons*, 5 S. & M. 354.

85. *The notice required, and time of making report.* The old statute (H. & H. 409, § 80), provided that the commissioners of insolvency should publish notice to creditors by "causing notices to be posted up in such public places, and published in such newspapers as the Orphans' Court shall direct; and six months, and such further time, not exceeding eighteen months, shall be allowed creditors for bringing in their claims * * * at the end of which time the commissioners shall make their report:" *Held*, 1st. That it was unnecessary to post notice in public places, if the court ordered publication in a newspaper only.

2d. That after the first six months, which had been allowed to creditors by the court, had fully and completely expired, during which the court had not extended the time, the court might afterwards allow another six months if the end of that period was still within eighteen months from the time of the first appointment.

3d. But if the commissioners did not report at the end of the time allowed by the court, but did report within the eighteen months from their appointment, the report was valid; *Saunders v. Planters' B'k*, 2 S. & M. 287. See *post*, 95. What would be the effect as to the validity of their proceedings, if the commissioners gave no notice to creditors, was not decided, but left an open question in *Smith v. Berry*, 1 S. & M. 321.

86. *Waiver of the notice.* Where a creditor has presented his claim and answered exceptions to it, without making any exceptions to the legality of the notice, he cannot afterwards, in the High Court, object that the notice was insufficient; *Robertson v. Agricultural B'k*, 6 U. 237. See *post*, 95.

87. *Actual notice not necessary: Appointment of new commissioners.* An estate was duly reported insolvent and commissioners regularly appointed, and their report made, at the proper time, and confirmed after due notice. Afterwards, a creditor who had failed to present his claim, asked to have the report set aside and new commissioners appointed, on the ground that he had no actual notice of the appointment of the commissioners, and of the time of their sitting, which petition was re-

fused: *Held*, the action of the court below was correct on both points; *Smith v. Berry*, 1 S. & M. 321.

88. As to power of court to set aside judgment confirming report of commissioners of insolvency, see *ante*, 24.

89. Appointment of commissioners of insolvency. Under the statute (H. & H. 409, § 80), which provides that if it appear that the estate is insolvent, "then after ordering the lands, &c., to be sold," the court shall appoint commissioners of insolvency, it is not necessary to the validity of the appointment of the commissioners, that the land be first ordered to be sold; *Saunders v. Planters' Bk.* 2 S. & M. 287.

5. The Presentation of Claims to the Commissioners, and the Bar for Non-presentation.

90. Failure to present is a bar. A creditor who fails to present his claim in proper time to the commissioners of insolvency, is barred; *Smith v. Berry*, 1 S. & M. 321; *Powell v. Carberry*, 4 S. & M. 86; *Trezevant v. McQueen*, 12 S. & M. 575. See *post*, 94a.

90a. Presentation of contingent claim required. A surety of an insolvent who has paid the debt, after the confirmation of the report of the commissioners of insolvency, cannot re-open it, to have his claim let in; it was his duty to have paid the creditor in time, and presented the claim, or to have caused the creditor to present it; *Herring v. Weltons*, 5 S. & M. 354.

91. What is a good presentation. If a judgment be presented to the commissioners of insolvency, in the name of a bank which has been dissolved by *quo warranto* proceedings, and the judgment has been revived in the name of the trustee of the bank, and the voucher presented shows this revivor, it will be regular, and considered as presented in the name of the trustee; *Robertson v. Agricultural Bank*, 6 C. 237.

92. Presentation under the Code of 1857. Under the provisions of the Rev. Code of 1857, p. 449, art. 101, it is not necessary, where an estate is insolvent, for a creditor, whose claim is duly probated and registered, to file it, within the time prescribed by law, with the clerk. But when the report of the clerk is made, showing what claims have been probated and registered, and notice is given of a day on which the report and claims will be taken up by the court, for examination and allowance, then it is necessary for the creditor to attend with the claim, and show its justice, if it be contested or doubtful; *Gibbs v. Sims*, 41 M. 706; *Powell v. Cooper*, 42 M. 221. But under the statute, as it existed before the Code of 1857, actual presentation was necessary, though the claim was probated and registered; *Hansell v. Forbes*, 4 G. 42.

93. Presentation where claim is in suit. Under the statute (H. & H. 673), a creditor of an insolvent estate, whose claim is in suit when the declaration of insolvency is made, is not required to present the claim until after judgment at law on it; yet if he omit to do so, and the commission is closed and the com-

missioners' report confirmed before he gets judgment at law, the claim will be barred, and the commission will not be re-opened for his benefit; *Trezevant v. McQueen*, 12 S. & M. 575.

94. Same: Remedy of creditor in such a case. In such a case it is the duty of the administrator and not of the creditor, to give notice of the suit to the commissioners, and insist on a reservation of enough assets to pay the *pro rata* share of the judgment, should it be obtained. And if he omit to cause such reservation to be made, and the report is confirmed excluding the claim, whereby it is barred, it will, it seems, be such an act of maladministration on his part as will make the administrator liable to the creditor for his *pro rata* share of the assets of the estate; *Trezevant v. McQueen*, *supra*.

But in the same case, in 13 S. & M. 311, the above was overruled so far as it expressed an opinion that the administrator was liable for not giving notice of the suit to the commissioners, and confirmed so far as it held that the creditor was barred.

And the creditor is barred, notwithstanding he may recover judgment after the report is confirmed; *Harrison v. Motz*, 5 S. & M. 578.

94a. The bar extends to a surplus remaining after debts are paid in full. The statute (H. C. 668), in relation to proceedings where the estates of decedents are declared insolvent, provides for the appointment of commissioners and referees, and for suits at common law in certain cases for the establishment of debts against the estate, and then provides that "if any creditor shall not make out his claim before the commissioners within the time of their commission, or before referees, or at common law in the manner the act provides, he shall be forever barred of his debt or demand, unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator before distribution: *Held*, that this is a statute of limitations, and is an absolute bar to the creditor who does not comply with its provisions as to all the estate inventoried, though it should turn out that a surplus of the inventoried estate remains after the payment of all claims which have been presented and established; *Allen v. Keith*, 4 C. 232.

95. Waiver of objection against premature report. It is no ground for re-opening a report of commissioners of insolvency, that the order appointing them allowed twelve months for the presentation of claims, and their report was made and confirmed two days before the year expired, when the application to re-open was made by a creditor whose claim, though in suit, was actually presented to the commissioners, in time, and not acted on by them because it was in suit; *Trezevant v. McQueen*, 12 S. & M. 575. See *ante*, 86 and 85.

86. Where administrator seeks a set-off on ground of invalidity of an assignment. See *ante*, 18.

97. What claims are presentable: Admin-

istrator's bond. An administrator's bond, without proof of its breach, or the damages occasioned thereby, is not a valid claim, which can be presented against the estate of the obligor; and if presented to and allowed by the commissioners, will be rejected; *Green v. Creighton*, 7 S. & M. 197.

97a. *Form of decree on report.* It is no objection to a decree confirming a report of commissioners of insolvency, that the Probate Court, on allowing the report, made no order of distribution of the assets. The omission can be supplied at any time; and, moreover, it is an objection in which creditors whose claims are allowed are alone interested; *Hemphill v. Fortner*, 11 S. & M. 344.

6. The Appointment of Referees; Report and Proceedings before them.

98. *When referees appointed.* The statute (H. C. 668, § 103) provides that after the report of the commissioners, "the creditor whose claim is wholly or in part rejected, or any executor or administrator who may be dissatisfied with the said report on a particular claim, may for good and sufficient cause shown to the Orphans' Court, have said claims referred by the said court to referees, whose report and award thereon returned to the next term of the court, and approved of, shall be final and conclusive." This provision for the appointment of referees, is, so far as relates to the creditors of the estate, subsidiary to the appointment of commissioners, and can only be invoked by a creditor whose claim has been submitted to the commissioners, and has been in whole or in part rejected by them; *Smith v. Berry*, 1 S. & M. 321.

99. *Same: Under Rev. Code of 1857.* Under art. 101, p. 449, of the Rev. Code of 1857, the Probate Court may, on overruling exceptions to a claim reported by the commissioner of insolvency, appoint referees to examine into its validity; *Allen v. Miles & Adams*, 7 G. 640.

101. *Waiver of irregularity in appointment.* When the creditor, under the Act of 1821 (H. C. 668), objected to the report of the commissioner of insolvency, and referees were appointed, who reported, and then it was agreed between the administrator and the creditor, that new referees should be appointed, it was held that this agreement was a waiver of any irregularity in the appointment of the first set of referees, and in setting aside the report of the commissioners of insolvency; *Regan v. Stone*, 7 S. & M. 104.

102. *Report of referees: Its effect.* The decree of the Probate Court affirming the report of the referees to whom a contested claim has been referred, is *res adjudicata*; and hence, in an action against the administrator on his bond for a refusal to pay a claim so settled, it will be incompetent for him to impeach the validity of the debt; *Shropshire v. Probate Judge*, 4 H. 142. But the decree is examinable in the High Court on appeal; *Reed v. Wiley*, 5 S. & M. 394. But if the report allowing a claim be simply rejected, it is

not final and the court may recommit it to other referees; *Green v. Creighton*, 7 S. & M. 197.

103. *Set aside by consent at a subsequent term.* The report of referees, to whom a claim against an insolvent estate has been referred, may be set aside at a term subsequent to the one at which it was confirmed, and a new reference made by consent of parties. Whether the attorneys alone have a right to make such consent; *Quære?* but if they make it, and it is acquiesced in by their clients, who without objecting, take testimony and re-litigate the claim before the referees, it will be binding on them; *Ib.*

104. *When claim should be referred to a jury instead of referees.* Where there is a conflict in the evidence in relation to the claim before referees; and where there is an allegation of payment, and there are various and indefinite transactions between the claimant and the deceased, and the evidence of payment is inconclusive, which, render the decision difficult, it is proper to submit the cause to a jury; and the High Court being dissatisfied with the report, allowing the payment, in reversing the case, ordered that the cause be referred to a jury; *Ib.*

105. *Referees should report the evidence on which they act.* Referees to whom a claim is referred, are not bound to report the evidence on which they act; but in all cases they ought to do so, as that is the only mode in which the judgment of the Appellate Court can be had on the validity of the claim; *Green v. Creighton*, 7 S. & M. 197.

106. *Same: Bill of Exceptions to.* In a petition by an alleged creditor to have his claim arising out of an administration bond executed by the deceased, allowed, it was stated, that a decree of the Probate Court had been rendered establishing a breach of the bond, and damages exceeding the penalty. The referees allowed the claim to the amount of the penalty, reporting the allowance as made on the bond itself, and reporting no other evidence. The Probate Court rejected this report, and the bill of exceptions taken to that order recited that the petitioner's counsel relied on the trial in the Probate Court of the exceptions to the report, on the bond, and the decree referred to in his petition: *Held*, that this was not sufficient evidence to show to the High Court that there was such a decree, and that it was introduced in evidence; *Ib.*

7. Miscellaneous as to Insolvent Estates.

107. *Creditor of insolvent estate may sue for devastavit.* A creditor of an insolvent estate, who has presented his claim and had it allowed, is not thereby precluded from bringing an action on the bond of the administrator for a *devastavit*. If the creditor sue on the bond for the *pro rata* dividend only, then he can recover that and no more; but he can sue for the *devastavit* and recover for that, and his remedy on the bond is not affected in the least by the action of the Probate Court, in confirming the administrator's accounts and declaring the estate insolvent (citing *Ran-*

dolph v. Singleton, 12 S. & M. 439); *Burrus v. Fisher*, 1 C. 228.

108. *As to payment of debts after declaration of insolvency.* See *ante*, 33.

109. *Same.* If an administrator of an insolvent estate fraudulently pay a creditor a sum larger than his dividend, it is a *devastavit* to the extent of the excess, and he will be liable therefor, in an action on his bond in favor of a creditor of the estate. And an allowance of such payment in an account rendered by an administrator, is no bar to such action; *Burrus v. Fisher*, 1 C. 228; *S. P., Gay v. Lemle*, 3 G. 309; for which see EXECUTOR AND ADMINISTRATOR, 110.

110. *The prohibition of suits against.* The statute prohibiting suits to be brought against an administrator after the estate has been declared insolvent, does not prohibit the bringing of a suit to set aside a fraudulent assignment made by the intestate; *Snodgrass v. Andrews*, 1 G. 472.

But suits which are already pending when the declaration is made, are not abated, but they proceed to final judgment; *Breckinridge v. Mellon*, 1 H. 273.

And the court in which the judgment is rendered will stay the execution as required by the statute; *Parker v. Whiting*, 6 H. 352.

And the stay will be granted not only on judgments rendered after the declaration, but on those rendered before, if they remain unexecuted at the time of the decree; and in this case a stay was ordered, when, it seems, an actual levy had been made before the declaration of insolvency; *Ib.* See *ante*, 77b.

Such judgments are entitled to no priority, though a judgment rendered against a decedent in his lifetime does not lose its prior lien by the declaration of insolvency; *Dye's Adm'r v. Bartlett*, 7 H. 224. But in the last case, the priority extends only to such assets as the judgment was a lien on; *Robertson v. Demoss*, 1 C. 298. But if an execution on a judgment rendered against an administrator be actually levied before a declaration of insolvency, it will be entitled to priority out of the property seized under it; *Barr v. Heard*, 4 G. 131; *Trotter v. Parker*, 9 G. 473.

An administrator may be sued at law on a claim due by his intestate, at any time after the expiration of nine months from his appointment, and before declaration of insolvency; *Sanders v. Douglass*, 3 S. & M. 454.

111. *Insolvency vests interest in realty in administrator.* A decree of insolvency so far vests an interest in the realty in the administrator, as to authorize him to bring a bill to remove encumbrances on it; *Norcum v. Lum*, 4 G. 299; *Williams v. Stratton*, 10 S. & M. 418. It then becomes assets as well as the personality, and he may maintain a bill to set aside a fraudulent sale made of it by a former administrator; *Forniquet v. Forstall*, 5 G. 87. The heirs also may, after insolvency, bring such a bill, since the insolvency may have been brought about by the fraudulent sale; and they are not precluded from charg-

ing that the estate was improperly so declared; *Grant v. Lloyd*, 12 S. & M. 191.

112. *Right to pay dividend to bank in its own notes.* According to the general rules of law, an administrator of an insolvent estate, could not pay a dividend allowed a bank in the depreciated notes of the bank obtained after the dividend is declared, and he would be compelled to pay it in specie; but under our statutes, which declare that banks shall at all times receive their own notes in payment of debts due them, such payment would be allowable. But the money saved by the administrator in making the purchase of the bank notes, will not belong to him, but will be subject to be divided among the creditors; *Dahlgren v. Peaic*, 2 C. 142.

113. *Accountability of administrator after decree for distribution.* After a decree for distribution of the assets among the creditors of an insolvent estate, the administrator ceases to be accountable to the Probate Court for all assets which have been reported to the court and embraced in the decree of distribution. The decree fixing the *pro rata* of each creditor and directing payment thereof to him, makes the administrator personally responsible to each creditor for his share, and for which he is suable at law. But the fiduciary character of the administrator and his accountability to the Probate Court would attach again upon the discovery of new assets which had not been accounted for; *Anderson v. Tindall*, 4 C. 332.

114. *Same: Execution on such a decree.* Where such a decree is rendered, the Probate Court has the power to order issuance of executions in favor of the several creditors against the administrator personally for the sums respectively due them; but such an execution ought not to be issued until there has been demand of payment and refusal, or until after ample time for such demand; *Powell v. Cooke*, 42 M. 221.

115. *Dower in case of insolvency.* Under § 22, art. 164, p. 468, of the Rev. Code of 1857, the widow's dower where her husband's estate is insolvent and he dies without issue, is only a life estate; *Quin v. Coleman*, 42 M. 386.

115a. *Interest of heir after declaration of insolvency.* After the return and confirmation of the commissioners' report of an insolvent estate, the heirs have no such interest in the estate as to authorize them to proceed against the administrator for final settlement; *Bird v. Furniss*, 4 G. 44.

IV. Distribution.

See DESCENT AND DISTRIBUTION, *ubique*. EXECUTOR AND ADMINISTRATOR, 261b to 271.

116. *Jurisdiction of Probate Court.* The Probate Court alone has jurisdiction to order distribution, where the estate is in the hands of an executor or administrator; *Ragland v. Green*, 14 S. & M. 194.

But the Chancery Court has jurisdiction to order distribution, where no administration

has ever been granted; *Farve's Heirs v. Graves*, 4 S. & M. 707; citing *McCrea v. Walker*, 4 H. 455.

117. *As to right of Probate Court to make distributee getting the most valuable lots, refund, see ante, 15.*

118. *As to jurisdiction of Probate Court, where the share has been assigned, see ante, 19.*

119. *May ascertain amount due.* The Probate Court, on a petition filed for distribution, without any formal allegation of maladministration, may go into a full investigation of the accounts of the administrator, and ascertain the amount due the distributees; and in such a proceeding, the administrator and distributees may lawfully consent, that auditors be appointed to state the amount, without any instructions being given to them; and on a reference, it is not necessary, that the principles on which the auditor shall proceed, shall be first settled, but the whole matter may be reserved until the coming in of the report; *Crowder v. Shackelford*, 6 G. 321.

119a. *Jurisdiction to compel executor to pay hire to legatee.* The Probate Court has jurisdiction to compel the executor to pay hire to a specific legatee; and this will be done, though the executor may be entitled to enjoin it in equity, upon the ground that the legatee is indebted to him; *Fonte v. Horton*, 7 G. 350.

119b. *Power of court to decide who are heirs.* The Probate Court has power to decide who are the distributees of an estate; and if it do so, and the administrator in good faith pay all the assets to them, he will be protected, though an heir be pretermitted; but if the administrator make payment to those he regards as heirs, without such a decree, and one be pretermitted, he will be responsible; *Lowry v. McMillan*, 6 G. 147. See *ante*, 23. DESCENT AND DISTRIBUTION, 47, 48, 49.

120. *Refunding bond.* See DESCENT AND DISTRIBUTION, 42 to 45, and *ante*, 5.

V. Issue Devisavit vel non.

See WILL, 122, *et seq.*

121. *Jurisdiction over.* The Probate Court has power to order an issue *devisavit vel non*; *Hamberlin v. Terry*, 7 H. 143. And a petition in that court attacking the validity of a will probated in common form, and asking for an issue *devisavit vel non*, is the proper course to pursue; *Cowden v. Dobyns*, 5 S. & M. 82.

122. *Where the issue not necessary.* The Probate Court may set aside the probate of a deed which was allowed as a will, without an issue *devisavit vel non*; *Wall v. Wall*, 1 G. 91; *Sartor v. Sartor*, 10 G. 760.

123. *Cannot set aside probate of will for illegal bequests.* The Probate Court has no jurisdiction to entertain a petition by the heir to set aside the probate of a will, on the ground of the illegality of the bequests therein made, and to re-admit it to probate, so far as the bequests are legal; in a proceeding in rela-

tion to the probate of a will, the court has no power to construe its contents; *Lusk v. Lewis*, 3 G. 297.

124. *Issue necessary to set aside probate of will as to realty alone.* Where a will has been admitted to probate, in common form, as a will of realty, and it appear from the record that it was attested and proved by three witnesses, the proper mode in which to contest its attestation and probate as a will of realty, is to petition for an issue *devisavit vel non*; *Murray v. Murphy*, 10 G. 214.

125. *Petition for in case of fraud: Case in judgment.* A petition in the Court of Probate, praying an issue *devisavit vel non*, charged that the executor had, for his own purposes, caused the will to be written, and then procured it to be signed by the testator, who was ignorant of its contents; that he had a false and fraudulent debt against the testator, which he caused to be recognized by the will so obtained; that the will virtually gave testator's slaves to the executor, by directing that he should take them at a cash valuation, which he could pay by means of his fraudulent claim so recognized in it; that the will was a consummation of a course of fraud and imposition, which the executor had been practicing on the testator for several years, by pretended friendship, and by furnishing testator ardent spirits until he became imbecile, and came to his death, and the fraudulent acts of defendant were so concealed that neither petitioner nor her co-heirs, by reasonable diligence, could have discovered the fraud until it was developed by accident, about two months previous to the filing of the petition: *Held*, on demurrer to the petition:

1. That the petition sufficiently charged fraud on the executor in procuring the will.

2. That the allegation of concealed fraud was sufficient to bring the case within the proviso, art. 43, p. 434, of the Rev. Code, allowing parties, in cases of concealed fraud, two years from the time of its discovery, or from the time it might have been discovered by reasonable diligence, in which to commence proceedings to set aside the will.

3. That from the nature of the acts charged they were secret and private, and not calculated to awaken suspicion or inquiry, and that they, of themselves, constituted concealed fraud; and hence, it is unnecessary for petitioner to show diligence in detecting the frauds until some fact should be developed to put her upon inquiry.

4. The petition was not multifarious.

5. That it need not be sworn to either by the petitioner or an agent; *Matthews v. Sontheimer*, 10 G. 174.

126. *Heirship of contestant must be first settled.* If, in a proceeding to set aside the probate of a will, the heirship of the petitioner be denied, the question thus raised is preliminary in its character, and should be determined before any trial is had as to the validity of the will; and it will be error, therefore, for the court to submit that issue

and the issue *devisavit vel non* to the same jury; *Edwards v. Gauding*, 9 G. 118.

127. *Duty of Circuit Court as to trial of the issue.* Where an issue *devisavit vel non* is sent from the Probate Court to the Circuit Court for trial, the sole duty of the latter court, in reference thereto, is to see the issue tried, and to certify the finding of the jury to the Probate Court, where a new trial can be granted or refused, and final judgment entered. If the Circuit Court enter judgment on the verdict it will be a nullity, and will not authorize the suing out of a writ of error to reverse it; *Wallace v. Wingate*, 6 S. & M. 151.

128. *Plea of res adjudicata to petition for.* A plea of former adjudication interposed to a petition for an issue *devisavit vel non*, should offer to prove the matter pleaded by the record; *Carpenter v. Booker*, 4 G. 45.

VI. Pleadings, Practice and Procedure.

1. Pleadings.

129. *Generally.* The same strictness in pleading is not required in the Probate Court as in chancery, but parties may, if they see proper, adopt the strict course of chancery pleadings, and, if they do, they will be bound by the rules of the Chancery Court on that subject; *Hurd v. Smith*, 5 H. 562.

130. *Vague petition not sufficient.* The petition of a distributee for the sale of a slave for distribution, did not state the condition of the estate, nor the time when administration was granted, nor show the necessity of a sale, nor show an inability to divide in specie by the division of other property with the slave: *Held*, that it was doubtful whether a decree could be rendered on so vague a petition; *Shattuck v. Young*, 2 S. & M. 30.

131. *Multifariousness.* A petition by an executor against the legatees, seeking to bring into contestation, the estate of the testator, and also the estate of one of the legatees under the will, who was dead, and whose estate was, by the will, to go to the surviving legatees, is multifarious; *Green v. Green*, 3 S. & M. 256. Is not a bill in the Probate Court, by the distributees against the administrator and his sureties, for an account, and to have the bond put in suit liable to a demurrer for multiplicity of parties; *Quære?* *Washburn v. Philips*, 6 S. & M. 425. A widow and heir may join in a petition for an account and distribution; *Smith v. Hurd*, 7 H. 188.

As to multifariousness in a petition for an issue *devisavit vel non*, see *ante*, 125.

132. *Petition to set aside sale must specify its defect.* A petition to set aside a sale of realty or personalty made under the order of the court, should set out in what respects they are invalid; a general charge that they were fraudulent and without authority of law, will not do; *Leonard v. Cameron*, 10 G. 419.

133. *For petition in case of distribution,* see *ante*, 119.

134. *Fraud must be answered.* A charge of fraud must be answered; and this rule applies to proceedings in the Probate Court,

in which chancery pleadings are adopted; a demurrer to a bill charging fraud admits it; *Hurd v. Smith*, 5 H. 562. See CHANCERY, 21, *et seq.*

135. *Answer overrules a plea.* If the administrator plead to a petition of an alleged distributee, by denying his heirship, and afterwards answer to the merits, the answer will overrule, and be an abandonment of the plea; *Price v. Mitchell*, 10 S. & M. 179.

136. *Waiver of plea and replication by answer and trial.* If a replication be filed to a plea in the Probate Court, and the defendant, without taking issue on the replication, answer, and the cause be tried on the petition, answer and proof, this is a waiver of the plea and the replication; *Quinn v. Moss*, 12 S. & M. 365.

137. *The defence in answer, and the proof, must correspond.* The administrator cannot, at the hearing, set up a defence to a petition for distribution inconsistent with his answer; and hence, if the answer set up as a defence a delivery of the distributee's share by the administrator, to the commissioners appointed to make division of the estate, he cannot, at the hearing, show that a delivery was made to the distributee; *Bradley v. Byrd*, 12 S. & M. 269.

138. *Demurrer to plea and answer.* A demurrer to a plea in the Probate Court is unwarranted in practice; objections to the plea must be made by setting it down for hearing; *Hardy v. Gholson*, 4 C. 70; *Robbins v. McMillan*, 4 C. 434. A demurrer to an answer is also improper practice. It is, however, more than a mere exception to it—it is an admission of its truth; and if the demurrant go to trial on the petition, answer and demurrer, and if the court, on overruling the demurrer, dismiss the petition, the petitioner cannot complain that he had no opportunity of contesting the answer by proof, it not appearing that he applied for such permission; *Coleman v. Lamar*, 40 M. 775. Objections should be taken to an answer by exceptions, and not by demurrer; *Ricard v. Smith*, 8 G. 644.

139. *Effect of demurrer as an admission.* A demurrer to a petition is no admission of the truth of an allegation, where the allegation is shown to be false by a record filed with the petition, and incorporated in it; *Murray v. Murphy*, 10 G. 214. See CHANCERY, 170.

140. *Demurrer good in part.* If a petition be good as to any part of the relief prayed for, though bad as to other parts, a demurrer filed to the whole petition will be overruled; *Cole v. Leake*, 5 C. 767; *Leonard v. Cameron*, 10 G. 419. *Wells v. Mitchell*, 1b. 800. See CHANCERY, 160.

2. Practice and Procedure.

A. APPLICATION TO DECLARE BOND FORFEITED IS EX PARTE.

141. *Same.* An application to the Probate Court to have an administrator's bond declared forfeited and put in suit, is intended to be *ex parte* in its character, and the sureties on the bond have no right to contest their liability on the bond in that stage of the pro-

ceeding. As a general rule, the court should allow the bond to be put in suit, on the application of a party interested. The instances are rare in which this will be refused; *Washburn v. Philips*, 6 S. & M. 425.

B. ATTACHMENTS FOR CONTEMPT.

142. *Same.* The Probate Court has power to enforce obedience to its orders, by attachment; *Moore v. Probate Judge*, W. 310. The Act of 1846 (Session Laws, p. 144), which provides for the issuance of attachments to enforce the decrees of the Probate Court, introduces no new remedy—such power has long belonged to the Probate Court (citing *Moore v. Probate Judge*, *supra*); *Vertner v. Martin*, 10 S. & M. 103. The Probate Court has power to imprison an administrator, executor, or guardian, for contempt, on account of his failure or refusal to comply with any lawful order of the court; *Watson v. Williams*, 7 G. 331.

143. *Same: High Court has no power to revise.* The High Court has no power to revise the action of the Probate Court, in imprisoning an administrator, &c., for a contempt in refusing to obey its lawful orders. The Probate Court, like all others, is the sole and exclusive judge of contempts against its authority; *Watson v. Williams*, *supra*.

144. *What is a contempt, and proceedings to punish it.* It is a contempt for which he is punishable, for an administrator to refuse or neglect to pay over a sum of money adjudged by the Probate Court to be paid; and it is no bar to a proceeding to punish for the contempt, that a former citation had been issued for the same purpose, at the instance of the party now complaining, and that on the hearing thereof it had been dismissed by the court. Such a proceeding is only process to enforce the judgment of the court, and the quashal or dismissal of it does not affect the judgment from which it emanates, nor the right of the party to enforce it by similar process; *Vertner v. Martin*, 10 S. & M. 303.

145. *Same.* Where an insufficient plea is put in to a proceeding for an attachment for a contempt, the court will order a peremptory attachment; *Ib.*

C. AUDITORS.

146. *Same.* It is unnecessary that auditors to whom the stating of an account is referred, shall be sworn; *Benoit v. Brill*, 2 C. 83.

147. *Power of court to appoint.* The Probate Court is authorized by statute (H. C. 663, § 87), to refer the accounts of executors, guardians, &c., to auditors to restate the same whenever exceptions have been filed thereto. This statute is merely directory as to the mode of exercising, in a particular case, the general jurisdiction of the court over the accounts of administrators, &c. and the appointment of auditors to restate accounts being thus within the general jurisdiction of the court, the parties to a proceeding for distribution, may lawfully consent to their appointment, and a reference to them

of the accounts of an administrator, &c., with instructions to report the balance, subject to distribution; *Crowder v. Shackelford*, 6 G. 321.

148. *Exceptions to auditor's report.* When the final account of an administrator has been referred to auditors, exceptions may be filed to their report after it is brought in; and such exceptions may be determined by the court on the evidence reported by the auditors, and on such other evidence as the parties may see proper to bring before the court. And when exceptions are filed, it is the duty of the court to try them, and not for that reason to reject the report; *Benoit v. Brill*, 2 C. 83. See *post*, 151.

149. *Setting aside auditor's report.* After the report of auditors, to whom has been referred an administrator's account, has been confirmed, the Probate Court will not, at a subsequent term, set it aside. The party objecting to the confirmation should have appealed. Has the court the power, at a subsequent term, to set aside the report; *Quære? Freeman v. Rhodes*, 3 S. & M. 329.

D. COSTS AND CONTINUANCE.

149a. *Costs.* The awarding of costs in a litigation in the Probate Court, is a matter within the sound discretion of the court, according to the rule in chancery. Where there was a contest between two as to who should be appointed guardian of an orphan, and after two terms, one, who was step-father to the orphan, withdrew his application, and the court awarded that each party should pay the costs of his own witnesses, the High Court approved it, as a proper exercise of its discretion; *White v. Littlefield*, 7 H. 406.

149b. *Continuance on failure of the term.* Where parties are cited to appear at a certain term of the Probate Court, and the term fails, this operates as a continuance; and the parties are bound to appear at the next term, as if they had regularly been cited to appear then; *Hanks v. Neal*, 44 M. 212.

E. ECCLESIASTICAL COURTS.

150. *Same.* In the absence of statutory directions, the modes of procedure adopted in the Ecclesiastical Courts in England are necessarily in force in the Probate Courts; *Cowden v. Dobyns*, 5 S. & M. 82; *McWillie v. Van Vacter*, 6 G. 428. But questions of jurisdiction are determined by the constitution, and not by reference to these courts; *McWillie v. Van Vacter*, *supra*.

F. EXCEPTION TO ACCOUNTS.

151. *Same.* When an account is stated by the probate judge in vacation, or by a commissioner, exceptions thereto may be filed in the court when it is presented for allowance. The chancery rule, requiring exceptions to be filed before the commissioner, does not apply to the Probate Court; *Smith v. Hurd*, 8 S. & M. 682. See *ante*, 148. EXECUTOR AND ADMINISTRATOR, 70.

G. FIERI FACIAS.

152. *Fieri facias in Probate Court.* The

remedy by *fiery facias* provided in the act of 1846 (Session Laws, p. 144), for enforcing the decrees of the Probate Court, is a new remedy; *Vertner v. Martin*, 10 S. & M. 103. But it allows that writ only on judgment or decree rendered after its passage; *Caruth v. Anderson*, 2 C. 60. The power exists under the Act of 1857. See *GUARDIAN AND WARD*, 80a.

H. JURY TRIAL.

153. *Same*. See *DESCENT AND DISTRIBUTION*, 28, and *ante*, 12, 104.

I. MOTION TO DISMISS.

154. *Effect of*. A motion to dismiss a petition without answer or proof, is an admission of the truth of the facts stated in it, and it will be error to sustain the motion if the facts stated in the petition entitle the petitioner to relief; *Treadwell v. Sorrell*, 1 C. 563.

K. PROCEEDINGS AGAINST ABSENT ADMINISTRATORS.

155. *Same*. Where an administrator has left the State, taking with him the personal property of the intestate, can the distributees proceed against him for an account, and to have his bond put in suit against the sureties, on publication of notice to him as a non-resident; *Quere? Washburn v. Phillips*, 6 S. & M. 425.

L. PROCEEDING FOR NEW SECURITY.

156. *Same*. Where a petition is filed against an executor, &c., complaining of the insufficiency of his sureties, and asking that he be compelled to give other security, the sureties are competent witnesses to prove their own sufficiency, and if they do this, the petition must be dismissed, unless the evidence is overturned by other proof; *Ross v. Mims*, 7 S. & M. 121. See *post* 163, 164. *EXECUTOR AND ADMINISTRATOR*, 95.

M. PRO CONFESSO.

157. *Same*. In plenary proceedings in the Probate Court, it is irregular to take a decree against a defendant not answering, without first entering a *pro confesso* against him; *Washburn v. Phillips*, 6 S. & M. 425. Yet in a proceeding by a distributee, for distribution, it will be error to enter a final decree against an administrator, upon *pro confesso*, without any account being taken, or any proof introduced, to show the amount in the hands of the administrator; *Mundy v. Calvert*, 40 M. 181.

N. PROCEEDINGS TO ATTACK CONSTRUCTIVE APPOINTMENT OF EXECUTOR.

158. *Same*. The propriety of the decree of the Probate Court sustaining the constructive appointment of an executor by a will, cannot be attacked, in a proceeding instituted by a distributee to revoke the letters testamentary so granted, and to procure the appointment of an administrator *cum testamento annexo*; *Grant v. Spann*, 5 G. 294.

O. RECORDS.

159. *Depositions*. Depositions taken in a suit in the Probate Court are not necessarily a part of the record of that suit, except on appeal to the High Court; *Lipscomb v. Postell*, 9 G. 476. See *post*, 224.

P. STATING ACCOUNTS.

160. *Same*. The Probate Court may, after referring an account to a master or commissioner to be stated, proceed to state the account without waiting for his report; *Satterwhite v. Littlefield*, 13 S. & M. 302. And generally, the court may audit or re-state an account, or refer it to a commissioner; *Gray v. Harris*, 43 M. 421. After sustaining exceptions to an account, the court may re-commit it to a commissioner with instructions to report in accordance with the opinion of the court; *Crowder v. Shackelford*, 6 G. 321. See *ante*, 147. The court may calculate interest due on an account, without referring the matter to a commissioner; *Crump v. Gerock*, 40 M. 765.

Q. WIDOW'S APPLICATION FOR ALLOWANCE.

161. *Same*. A widow's application for a year's allowance is purely *ex parte*, and cannot be contested by the administrator; *Morgan v. Morgan*, 7 G. 348.

In making the division of the year's allowance, between the widow and the children of the decedent by another marriage, the court may act directly, or through commissioners; *Womack v. Boyd*, 2 G. 443.

162. *Same*. The acts of ministerial officers required by law to be reported to the court, are binding and valid only by ratification of the court. Hence, an allowance made by the appraisers of an estate for a year's support to the widow and children, is subject to the revision of the court, and it may be set aside, and the whole matter re-committed, if the allowance be exorbitant; *Donald v. McWhorter*, 40 M. 231. See *WIDOW*, 7, *et seq.*

R. DUTY OF PROBATE COURT TO REQUIRE NEW SURETY.

163. *Same*. If the surety of an administrator, &c., be insufficient, it is the duty of the court to require new surety; *Kilcrease v. Kilcrease*, 7 H. 311. And so if the penalty of the bond be insufficient, the court may, of its own motion, require a new bond. The duties of this court are peculiar in this respect, and it may exercise a general supervision over executors, &c., and see they do their duty, without being requested to do so by persons interested; *Ward v. The State*, 40 M. 108. But the judge has no such power, yet if he exercise it in vacation, and the administrator give the bond, it will be binding, unless the order were set aside on appeal; *Ward v. The State*, *supra*. See *ante*, 155, 156.

164. *Requiring executor to give bond when he is excused by the will*. Art. 54, p. 436, of the Rev. Code of 1857, provides that, "when the testator by will shall direct that his executor shall not be required to give bond, then none shall be required, unless the court, at

any time, should have good reason to suspect the executor of fraud or maladministration." This statute only reiterates what has been the rule of courts having the jurisdiction of the administration of estates. And if on application of a party interested, or on its own motion, the court direct the executor to give bond, and he fail to obey, the court may revoke his letters; *Clark v. Niles*, 42 M. 460.

VII. Bills of Review.

165. *Power of the court to entertain.* Whether the Probate Court can entertain a bill of review; *Quære?* But if a bill of review be filed and dismissed, the court cannot afterwards entertain another bill to set aside the decree of dismissal, upon the ground that it is erroneous; *Alexander v. Smith*, 4 S. & M. 258.

The Probate Court has no power to entertain a bill of review; *Couden v. Dohyns*, 5 S. & M. 82; *Harris v. Fisher*, 5 S. & M. 74; *Farmer & Merchants Bk v. Tappan*, 5 S. & M. 112. And the rule is the same if the judgment sought to be reviewed is void; in that case it may be treated as a nullity, and such proceedings had, as if it had not been made; *Washburn v. Phillips*, 5 S. & M. 600.

167. *Same: The statute of 1846, allowing bills of review.* By the statute of 1846 (H. C. 728, § 3), power was given to the Probate Court to entertain bills of review, "for the correction of any interlocutory or final decree of said court, in the same manner and according to the same rules, as the same are entertained by courts of equity." In proceedings for the final settlement of an administrator, any person interested may, by a bill of review, open and cause to be examined by the court, any annual or partial settlement, and any person interested may at any time within two years after final settlement, by bill of review, open the account of an administrator, &c., and surcharge and falsify the same, and not afterwards saving to minors and *femmes covert*, the same time after the removal of their disabilities.

The Rev. Code of 1857, art. 33, p. 431, allows bills of review in two years to any final order, saving to minors whose guardians have not been served with process, the like time after the removal of their disability, and in proceedings for final settlement, any party interested may surcharge and falsify annual and partial accounts.

168. *Constitutionality of the act.* The act is constitutional; *McCullom v. Box*, 8 S. & M. 619.

169. *Bills of review extend under the Act of 1846, to interlocutory orders.* Under the Act of 1846, the Probate Court has power to entertain bills of review "in the same manner and according to the same rules, as the same are entertained in courts of equity," and in addition, the power is granted to entertain bills of review to interlocutory decrees; *West Feliciania R. R. Co. v. Stockett*, 5 C. 739; S. P., as to interlocutory orders; *Austin v. Lamar*, *post*, 170, 174.

170. *The statute is not retroactive.* The Probate Court prior to the Act of 1846, had no power to entertain a bill of review; and final decrees of the court before that time were in fact final and conclusive, and were unimpeachable except on appeal, or writ of error, or by bill in chancery for fraud; that statute is not retroactive, and does not confer the power on the court to entertain bills of review, to final accounts made before its passage; *Austin v. Lamar*, 1 C. 189; *Hardy v. Gholson*, 4 C. 70; *Pendleton v. Prestridge*, 12 S. & M. 302; and if it were intended to have a retroactive effect, as to decrees which were final and conclusive, it seems it would be unconstitutional and void; *Hooker v. Hooker*, 10 S. & M. 599; *Stewart v. Davidson*, 1b. 351.

And in the last named case, a bill of review was filed by an infant creditor of an insolvent estate, which sought to re-open a decree confirming a report of commissioners of insolvency, upon the ground that the commission lacked one day of being kept open six calendar months, as the law required. The court said, that the Act of 1846, had no retroactive operation, and that the decree could only be corrected by appeal or writ of error, and that it would be unconstitutional to provide by law for the re-opening of decrees and judgments, which are final and conclusive according to the law, as it existed when they were rendered (but it was not decided whether the statute requiring the commission of insolvency to be kept open at least six months, meant *lunar* or *calendar* months); *Stewart v. Davidson*, *supra*.

171. *Effect of the statute on final decrees made after its date.* Under the Act of 1846, the final settlement of guardians, executors, &c., are not final and conclusive till two years have elapsed; and within that time any person interested may surcharge and falsify them, by bill of review; and this right extends to introducing proof, *dehors* the record, to show the falsity of the account; *McCullom v. Box*, 8 S. & M. 619. See *post*, 173.

But under the Act of 1857, bills of review are not allowed to interlocutory orders; and therefore a bill will not lie to review an order probating a will in common form; *Murray v. Murphy*, 10 G. 214; S. P., *Crump v. Gerock*, 40 M. 765.

172. *Bill of review for new matter.* It is well settled, that a bill of review for newly discovered matter, is allowable only where the new matter first came to the knowledge of the complainant, after the time when it could have been used on the former hearing. A claim which had been rejected by the commissioners of insolvency, was again presented by a petition to have it referred to referees under the statute, and a decree awarded for that purpose. After the lapse of seventeen months, their report allowing the claim, was confirmed by the court. After this, the administrator filed a bill to review these proceedings, upon the ground that the administrator had discovered that over one-half of

the debt had been paid by the intestate, and that the discovery was made after the order of reference was made (not after the confirmation of the report). A decree *pro confesso* was made setting aside the order of reference, and the order confirming the report: *Held*, on writ of error to this decree, that the bill showed no ground for a review of the proceedings; that the order of reference was proper, even though the payment had been made, and that ignorance of the administrator at that time of the payment, was no ground for reviewing the decree confirming the report; as he might have known of the payment when the order of confirmation was made; *West Feliciana R. R. Co. v. Stockett*, 5 C. 739.

173. *Extent of the right to a bill of review.* Under the Act of 1846, allowing bills of review to final settlements, for the purpose of surcharging and falsifying them within two years after the decree passing the accounts, a bill of review may be filed at any time within the two years, for any error which may exist in the account, whether the same be apparent on the face of the account or not, and without any showing that any new matter has been discovered; *Gadberry v. Perry*, 5 C. 114. It appears, therefore, that the rule, as to new matter, stated in *ante*, 172, does not apply to bills to review final accounts. See also, *ante*, 171.

174. *Bills of review to annual accounts.* A bill of review is unnecessary in order to re-open annual accounts. They are not conclusive, but only *prima facie* correct, and may be corrected on final settlement without a bill of review. But, nevertheless, if such course be adopted, it will be regular, as bills to review interlocutory orders are allowed by the statute; *Austin v. Lamar*, 1 C. 189; S. P., *West Feliciana R. R. Co. v. Stockett*, *ante*, 169.

175. *Right of guardian, administrator, &c., to review their own accounts.* Bills of review (under the Act of 1857) lie only to a final order or decree; but in proceedings for a final account, any party interested may surcharge and falsify the annual accounts; and this gives the right to a guardian to correct, on final settlement, errors in his annual accounts prejudicial to him; *Crump v. Gerrock*, 40 M. 765, decided in 1866. But in *Johnson v. Miller*, 4 G. 553, decided in 1857, it was held that the decree of the Probate Court, allowing the annual account of a guardian, was final as to him, in that court; that the ward might re-open it, but the guardian could not. In *Coffin v. Bramlett*, 42 M. 194 (decided in 1869), it was held that the annual accounts of guardians, &c., are conclusive against them in the courts where they are rendered; that inaccuracies in such accounts, arising from inadvertence, oversight, miscalculation, or palpable mistake, may, in proper cases, be corrected in the Probate Court, but where a guardian states a balance against him in dollars and cents, he cannot impeach it by showing that the balance was money collected in a depreciated currency; citing, among other cases, *Johnson v. Miller*, *supra*;

Effinger v. Richards, 6 G. 540; *McFarlane v. Randle*, 41 M. 411; which cases are to the same effect.

In *Effinger v. Richards*, 6 G. 540, it was held, that where a partial settlement was made jointly, by two co-administrators, and a debt due to the intestate by one of them, who was a distributee of the estate, was therein charged by the accountants as having been received by them, it is competent for the other, upon a final settlement of his accounts, to exonerate himself from liability therefor, by showing that the money was not in fact paid, but that the charge was made in pursuance of an agreement between him and his co-administrator, that it was to operate as a credit on the distributive share of the latter.

See EXECUTOR AND ADMINISTRATOR, 66, 68. *Post*, 187, 190a. GUARDIAN AND WARD, 15, *et seq.*

176. *For error on face of proceedings may be filed without leave.* A bill of review for error apparent on the face of the proceedings, may be filed without previous leave of the court; *Denson v. Denson*, 4 G. 560.

177. *As to performance of the decree.* A bill of review may be filed without performance, on the part of the complainant, of the decree sought to be reviewed. But the filing of the bill will not arrest the execution of the decree, unless complainant, by order of court, execute a bond according to the statute; *Ib.*

178. *Bill to review void decree.* A bill of review presupposes a valid decree to be reviewed, and if the final settlement sought to be reviewed, be void for want of notice, a bill of review is not the proper remedy; *Pendleton v. Prestridge*, 12 S. & M. 302. But *contra*, *Bowers v. Williams*, 5 G. 324, where it is held that a bill of review is the proper remedy to annul a final settlement made without notice; S. P., *Neal v. Wellons*, 12 S. & M. 649.

179. *What is a bill of review: Case in judgment.* A petition, in the Probate Court, attacking the final settlement of an administrator, as inaccurate and fraudulent, and seeking to surcharge and falsify his accounts, and praying for a decree to open the account for correction of errors, is a bill of review, and does not lie when the settlement was passed prior to the Act of 1846, allowing bills of review; *Pendleton v. Prestridge*, 12 S. & M. 302.

VIII. Rehearing.

180. *Not granted after the term.* A rehearing cannot be granted after the term at which the decree was entered. The remedy, in such a case, is by bill of review; and it is no ground for granting a rehearing at a subsequent term, that a bill of exceptions, taken on the trial, and embodying the evidence, has been lost; *Planters' Bk v. Neely*, 7 H. 80.

And so, if exceptions to an answer be overruled, a rehearing on the exceptions cannot be had at a subsequent term; *Scott v. Searles*, 5 S. & M. 25.

IX. Decrees.

181. *Must be on the minutes.* The judgments and decrees of the Probate Court must be entered on the minutes of the court; an entry by the judge, of the allowance of an account made on the account itself, but not incorporated in the minutes of the court, is void: *Steen v. Steen*, 3 C. 513; *Moore v. Cason*, 1 H. 53. And so an order made by the judge, allowing a guardian to exceed the income of his ward in his maintenance and education, must be entered on the minutes; it cannot be proven by a memorandum to that effect entered on the inventory, or other papers in the cause; *Gilbert v. McEachen*, 9 G. 469; *S. P., Burney v. Boyett*, 1 H. 39; *Dickson v. Hoff*, 3 id. 165, in which it is held that the judge's notes on the docket are no part of the record; *Russell v. McDougal*, 3 S. & M. 234, where it is held that a memorandum of the judge on the declaration is not a judgment or a part of the record. See JUDGMENTS, 71, 72.

182. *Conclusiveness of its decrees.* The judgment of a court in a matter within its jurisdiction, however erroneous, is final and conclusive until reversed, and it cannot be set aside in any collateral proceeding. The Probate Court has jurisdiction to determine whether a writing propounded for probate as a will, be in fact a will or deed, and if it admit such writing to probate, and record as a will, or as a part of the testator's will, its judgment is final and conclusive until reversed; and hence, where the widow files her petition for dower, and, under the statute, renouncing the will, and claiming to have certain property inventoried as a part of the estate, the executor cannot insist that such paper is not in fact a part of the will, but a deed, and that the property has been disposed of by the testator by it as a deed, wherefore it is not subject to the widow's claim for dower; *Wall v. Wall*, 6 C. 409.

183. *When final in form: Instance.* An administrator rendered a final account which was allowed, and the balance in his hands ordered to be paid over to the distributees; the decree however, allowed the administrator the right to apply to distributees for their consent to certain set-offs which he held against them; after his death a *scire facias* was brought to revive the decree against his executor: *Held*, that the decree was final and ought to be revived; *Torrence v. Kerr*, 5 C. 786.

184. *Same: Another instance.* A decree of the Probate Court rendered after hearing testimony in support of a will, "continuing the case for further proof," is not such a decree as can be appealed from, for it neither establishes nor rejects the will; *Morris v. Morris*, 5 C. 847.

185. *Presumption of correctness.* The decrees of the Probate Court, in all matters within its jurisdiction, are presumed correct, unless the record show to the contrary; *Smith v. Denson*, 2 S. & M. 326; *Herring v. Wellons*, 5 S. & M. 354; *Henderson v. Guy-*

ott, 6 S. & M. 209; *Prestige v. Pendleton*, 6 C. 379; *Hutchins v. Brooks*, 2 G. 430; *Crowder v. Shackelford*, 6 G. 321.

186. *Same: Instances.* Thus it will be presumed that commissioners of insolvency, whose report has been confirmed, made their report under oath, if there be nothing in the record to show the contrary; *Herring v. Wellons*, 5 S. & M. 354. And where the propriety of a decree depends upon the fact that a right accrued to the wife during coverture and not before, and there is no proof as to when it did accrue, the decree will be presumed correct, and that the right accrued during coverture; *Henderson v. Guyott*, 6 S. & M. 209. And so where an order to sell slaves was made without notice to the heirs, and the record did not show for what purpose it was made, it will be presumed that the purpose was to pay debts, and not for distribution, for the order to pay debts may be made without notice; *Hutchins v. Brooks*, 2 G. 430. And so where a voucher of an administrator appears to have been probated at a time outside of a regular term of the court, the presumption will be that it was probated at a special term, unless the record show the contrary; *Crowder v. Shackelford*, 6 G. 321. But this presumption was not indulged in *Moore v. Cason*, 1 H. 53, 60, in favor of an order which appeared to have been made on a date when there was no regular term.

186a. *Presumption not indulged as to jurisdictional facts.* See ante, 46, 47.

187. *Decree for "money:" Meaning of.* A decree of the Probate Court allowing an executor's final account, showing a balance due him of so many "dollars," means constitutional "dollars," and can be discharged in no other currency. And if the executor has, in a proper case, collected uncurrent funds, and they constitute the balance, he should show it to the Probate Court, and have the proper decree there rendered against him; *Bailey v. Dilworth*, 10 S. & M. 404; *S. P., Singleton v. Garrett*, 1 C. 195; *Coffin v. Bramlett*, 42 M. 194; *McFarlan v. Randle*, 41 M. 411; *Lambeth v. Elder*, 44 M. 80. See post, 190a. Ante, 175. EXECUTOR AND ADMINISTRATOR, 66, 68. GUARDIAN AND WARD, 15, et seq.

188. *Erroneous decree directing administrator to make title to land.* A decree of the Probate Court directing the administrator of the vendor, who had given bond to make title on payment of the purchase money, to make the title before the purchase money is paid, is not void, but is merely erroneous; and if the administrator acquiesces in it and make the title he cannot afterwards have it set aside, the land having passed into the hands of an innocent purchaser; *Boon v. Barnes*, 1 C. 136.

189. *Void decree: Effect of.* A void decree is no bar to subsequent proceedings in the same subject matter, and parties in interest who have given their consent thereto, are not estopped by it. And a decree to sell land void as to one of the defendants, is void as to all; *Martin v. Williams*, 42 M. 210.

190. *Decrees on final account: Effect of.* A decree of the Probate allowing an administrator's final account, and granting him a final discharge, when made on due notice, implies that it was founded on proper evidence, and that every prerequisite to entitle the administrator to his discharge had been complied with; and like the judgment of any other court, it is conclusive until attacked for fraud. A bill in chancery will not, therefore, be entertained to compel the administrator to file the vouchers which were necessary to be examined in passing the account. The presumption is that they were duly filed and examined; *Stubblefield v. McRaven*, 5 S. & M. 130.

190a. *Final as to administrator, &c.* The final decree of the Probate Court, on the final account of an administrator, &c., when regularly made on due notice, is final and conclusive on the administrator, &c., and he cannot afterwards impeach it, or show that it is incorrect. Hence, where an administrator sold land under a decree of the court, adjudging it was for the interest of the heirs that the sale should be made, and returned the proceeds of the sale as assets, and charged himself therewith in his annual accounts, and on final settlement there was a balance due by him of less than the amount of the proceeds of said sale, it was held in an action against him and the surety on his bond, to recover this balance, that it was incompetent to go behind the accounts, and that whether the proceeds of the sale were assets or not, the administrator and his surety were concluded by the decree on the account, and that the distributees were entitled to recover it; *Singleton v. Garrett*, 1 C. 195; S. P., *Lambeth v. Elder*, 44 M. 80; *Bailey v. Dilworth*, 10 S. & M. 404; *Coffin v. Bramlitt*, 42 M. 194; *McFarlane v. Randle*, 41 M. 411. See *ante*, 187, 175.

190b. *Creditors.* But creditors are not parties or privies to a final decree where the estate is solvent, and they are not bound by the decree; *Pollock v. Buie*, 43 M. 140.

191. *Finality of the decree: Cannot be set aside at subsequent term.* A decree of the Probate Court passing a final account of an administrator, executor, &c., is a final judgment, which cannot be set aside by the court at a term subsequent to the one at which it was rendered; *Hendricks v. Huddleston*, 5 S. & M. 422; *Jones v. Coon*, 5 S. & M. 751. See *ante*, 24; *Harper v. Archer*, 9 S. & M. 71. But since the passage of the statute allowing bills of review at any time within two years from the date of the decree, it has not fully a final character until the expiration of that period; *McCullom v. Box*, 8 S. & M. 619. The decree is final and conclusive when made on due notice, till set aside for fraud; *Scott v. Searles*, 14 S. & M. 94.

192. *Same.* But if the decree be void for want of notice, the Probate Court may at any time set it aside and order a new account; but it cannot set aside such a decree for fraud; the remedy in the latter case is in chancery; *Searles v. Scott*, 14 S. & M. 94.

193. *The decree void if made without notice: The record must show notice.* A decree allowing an administrator's final account is void, if the record do not show it was made on due notice to the distributees. Such a judgment is not a proceeding *in rem.*, but strictly a proceeding *in personam*. A judgment granting letters testamentary or of administration may be regarded as a proceeding *in rem.*; *Steen v. Steen*, 3 C. 513.

193a. *Final account without notice: Effect of.* A final account made by an administrator without notice, not only does not conclude the distributees as an account, but it does not discharge the administrator from his office as such; he still occupies that relation, not only to distributees, but to the creditors of the estate, and he may continue to act, and be proceeded against as administrator, just as if the final account had not been made; such a final account amounts only to a partial or annual account; *Treadwell v. Herndon*, 41 M. 38 (citing *Neal v. Wellons*, 12 S. & M. 649; *Neylans v. Burge*, 14 S. & M. 201).

194. *Same: Instance: Private accounting between guardian and ward.* To a petition filed by a ward, after his majority to set aside a final account of his guardian upon these grounds: 1st, it was made without notice; 2d, the account charges the ward with large sums of money, exceeding his income and unsuited to his condition, expended by the guardian without a previous order of court authorizing it; 3d, that it does not appear that the account was ever acted on by the court; the guardian pleaded, that after the ward's majority, he made an exhibit to the court of a true, full and perfect account of his guardianship, which was examined by the ward, and acknowledged by him to be correct; and both parties appeared in open court, and said account was then presented and was examined and allowed by the court, and ordered to be recorded by consent of the petitioner, given in open court; and afterwards the ward executed his receipt in full to the guardian for the balance of money shown to be due him by said account.

The guardian proposed to prove this plea by the probate judge and clerk: *Held*, that their testimony was incompetent; that the appearance and waiver of the ward could only be proven by the record, for everything necessary to the jurisdiction of the court must appear by the record. 2. The decree being void, the guardian was still liable to the jurisdiction of the court, to render his final account. And that it was no objection to that liability that the ward had acquiesced in an account which was illegal in its credits, and that his mere receipt of the balance due him by the account, would not preclude him from impeaching it; and that considered as a private accounting, the receipt, under the facts stated in the petition, could not discharge the guardian from an accounting with the court; *Sullivan v. Blackwell*, 737.

195. *Effect of recital in decree as to notice.* A recital in a decree passing a final account, that due proof of the publication of notice

to the distributees had been made, is conclusive, and a bar to a petition to re-open the account on the ground of want of notice; *Hardy v. Gholson*, 4 C. 70; *Pollock v. Buie*, 43 M. 140. See *ante*, 46b, 47. And so if the record state that the distributees appeared and waived notice, it is conclusive; *Frisby v. Harrison*, 1 G. 452. But if in the recital it be stated that the waiver is endorsed on the final account, and if there be no other waiver in the record, and that endorsement be bad as a waiver, the recital will not make it good; and if, in such case, the decree recite that the distributees had been duly notified, and no other notice appear than the waiver so endorsed, that will be considered as the only notice, and the decree therefore bad; *Treadwell v. Herndon*, 41 M. 38.

And so if the decree recite due service of notice, and the writ in the record show an illegal service, the latter will prevail, and the notice will be void; *Dogan v. Brown*, 44 M. 235. See *ante*, 47.

196. *Form of the decree on accounts.* An administrator's account is required to be examined by the Probate Court, and allowed or disallowed; a judgment directing it to be "received and recorded," is not an allowance of the account, and is void; *Steen v. Steen*, 3 C. 513; S. P., *Moore v. Cason*, 1 H. 53. It seems, however, that an order on the minutes of the court, "that the final account be filed and recorded," is a sufficient judgment of allowance, though no formal judgment of allowance be entered; *Fort v. Battle*, 13 S. & M. 133. But if the matters of an account thus informally passed, being only "examined and fairly stated" be carried into an account formally passed, the informality will be cured; *Crowder v. Shackelford*, 6 G. 321.

196a. *Court may render judgment against distributees on final account.* On final settlement by an administrator, on due notice to all parties, the court may render judgment and award execution against the distributees to compel them to repay, out of their distributive shares previously paid, any balance that may be due the administrator, either for commissions or disbursements made for the estate; *Powell v. Burrus*, 6 G. 605. The court may render a decree in *personam* against a guardian for a balance due by him; *Scott v. Porter*, 44 M. 364, and against an administrator for a *pro rata* share decreed on proceedings of insolvency, and enforce the same by execution, but in this last case there should be no execution without previous demand; *Powell v. Cooper*, 42 M. 221.

X. Accounts in Probate Court.

See EXECUTOR AND ADMINISTRATOR, subdivision Accounts.

1. Annual Accounts.

197. *Only prima facie correct.* Annual accounts which have been passed are not conclusive; they are only *prima facie* correct, and errors in them may be corrected on final settlement, without a bill of review; *Austin*

v. Lamar, 1 C. 189; *Harper v. Archer*, 9 S. & M. 71. See *ante*, 169, 174.

198. *As to conclusiveness of annual accounts against those who render them*, see *ante*, 175.

2. Final Accounts.

199. *When and how compelled.* Where a distributee, by his petition, shows that the debts are all paid, and that there is an estate for distribution, this is a *prima facie* showing that the administrator should make a final settlement; *Treadwell v. Sorrell*, 1 C. 563. Also, see EXECUTOR AND ADMINISTRATOR, 57. The Probate Court, of its own motion, may cite a removed guardian to settle his final accounts, and on giving notice to the succeeding guardian, may examine, and pass or reject the account; but the court cannot, unless upon being asked to do so by the successor, award judgment in his favor for the balance; a court cannot render judgment in favor of a party who does not invoke its aid; *Dowd v. Morgan*, 1 C. 587.

200. *Conclusiveness of final accounts against guardians, administrators, &c.* See *ante*, 190, *et seq.*, 23, 119b.

201. *Duty on reversal, and remanding decree for final account.* Where the decree of the Probate Court, allowing a final account, is reversed, and the proof of certain claims paid by the administrator adjudged insufficient, and the cause remanded, it is the duty of the Probate Court to hear evidence from the administrator to sustain the validity of the claims; and so of any other item in the account which the High Court has adjudged to be insufficiently established; *Donald v. McWhorter*, 40 M. 231.

202. *Representative of deceased administrator must render the final account.* Where an administrator or executor dies without making a final account, his personal representative may be compelled to make the final account of the decedent; *Steen v. Steen*, 3 C. 513; *Jones v. Irvine*, 1 C. 361.

203. *Decree cannot be enforced against personal representatives of the accountant.* The court has no jurisdiction, after the death of the administrator, to enforce against his personal representatives a decree rendered against the administrator on final settlement; *Dilworth v. Carter*, 3 G. 206.

XI. Probate Judge's Powers.

204. *Cannot surcharge an account passed by County Court.* The probate judge cannot surcharge and falsify an account settled by a decree of the County Court; *Gibson ex parte*, W. 377.

205. *Cannot compel new security in vacation.* The probate judge cannot in vacation compel an administrator to appear before him, and give new security on his administrator's bond. Such a proceeding is *coram non judice*; *Wingate v. Wallis*, 5 S. & M. 249. See *ante*, 163.

206. *Cannot issue sequestration.* Nor has the judge the power to issue process, commanding the sheriff to take the property of

an intestate out of the hands of the administrator, even though it be shown that his sureties are insolvent, and that he is about to remove the property out of the State. Such process is utterly void, and the sheriff is not entitled to costs for executing it; *Ib.*

207. *Power over partition.* The Act of 1833, which transfers the power of the presiding judge of the County Court, under the Act of 1822, to make partition of land among joint tenants, &c., to the probate judge, makes the transfer to the judge personally, and not to the court; *Smith v. Craig*, 10 S. & M. 447.

Yet when the law requires a certain duty to be performed by the judge of a court, composed of one judge only, it is sufficient if the duty be performed by the court, since, in that case, the act of the court is necessarily the act of the judge; *Boon v. Bowers*, 1 G. 246.

XII. Appeals and Writs of Error.

See APPEAL. WRIT OF ERROR.

208. *Writ of error a matter of right: How obtained.* Under the Act of 1830, a writ of error lies to revise the final decree of the Probate Court as a matter of right; and it may be obtained from the probate clerk under the Act of 13th May, 1837; *Green v. Whiting*, 1 S. & M. 579.

209. *What examinable on.* Errors in a decree dismissing a bill of review, as well as errors in the decree sought to be reviewed and reversed, are examinable on one and the same writ of error; *Denson v. Denson*, 4 G. 560.

210. *Who has the right to appeal.* No one has a right to contest by appeal the appointment of an administrator, except one who has applied for the appointment, or a distributee, or creditor of the estate; *Miller v. Keith*, 4 C. 166.

211. *How appeal granted.* Under art. 28, p. 431, of the Rev. Code of 1857, appeals from the Probate Court cannot be granted in open court; they can only be granted on petition to the clerk; *Ricard v. Smith*, 8 G. 644.

212. *All parties need not join in.* Any party feeling himself aggrieved by the decree of the Probate Court, may appeal therefrom; and he is not bound to join as co-appellants, his co-plaintiffs or co-defendants in the suit; *Porter v. Porter*, 7 H. 106.

213. *Decree of continuance cannot be appealed from.* A decree of the Probate Court, made after hearing testimony in support of a will, continuing the case for further proof, is not such a decree as can be appealed from, for it neither establishes nor rejects the will; *Morris v. Morris*, 5 C. 847.

214. *Interlocutory decree cannot be appealed from.* A decree of the Probate Court, overruling exceptions to an answer, is interlocutory, and cannot be appealed from; *Ricard v. Smith*, 8 G. 644.

215. *Action of High Court on decree allowing commissions.* The allowance of commissions to an executor, administrator and

guardian, within the statutory limits, is a matter of discretion in the Probate Court, which will not be interfered with in the High Court, unless the discretion be manifestly abused; *Satterwhite v. Littlefield*, 13 S. & M. 302; *Powell v. Burrus*, 6 G. 605.

215a. *No appeal from County and Probate Court.* No appeal was allowed to the High Court, from the old County and Probate Court; *Sellers ex parte*, W. 414.

XIII. Miscellaneous.

216. *Appointment of collector.* The statute (H. C. 654, § 37, and Rev. Code of 1857, art. 56) limits the jurisdiction of the Probate Court in the appointment of collectors, to cases where there is a contest about a will, or where the executor is an infant, or absent. No power exists to make the appointment, in a case of intestacy, where there is no suggestion of a will or contest in relation to its validity; and an appointment so made is void; *Boyd v. Swing*, 9 G. 182.

See EXECUTOR AND ADMINISTRATOR, 22, 23.

217. *New grant of letters after final settlement.* See ante, 40.

218. *Irregular and improper grant of letters.* If on a void order annulling the probate of a will, the Probate Court appoint an administrator, who proceeds to administer the estate regularly, as in a case of intestacy, the action of the court in making the appointment, and the consequent action of the administrator, whilst erroneous, are not void. The Probate Court has jurisdiction to grant administration, and even if exercised improperly, the appointment must be upheld, until set aside regularly. And the purchaser of a slave under the administration so granted, can interpose these acts as a bar to a suit in equity to recover the slave; *Rail v. Dotson*, 14 S. & M. 176.

219. *Revocation of letters.* The Probate Court may revoke a grant of letters of administration when it shall be sufficiently advised that they were improperly granted; but such revocation must be on due notice to the administrator; *Gasque v. Moody*, 12 S. & M. 153; but the Probate Court has no jurisdiction over an administrator after his letters have been revoked; *Washburn v. Dorsey*, (citing *Smith v. Hurd*, 7 H. 188; *Bell v. Suddeth*, 2 S. & M. 532); but this is changed now by statute, and overruled by *Davis v. Cheves*, 3 G. 317; *Denson v. Denson*, 4 G. 560.

See EXECUTOR AND ADMINISTRATOR, 71.

220. *Proceedings against same party as executor and guardian.* Where a defendant has two characters, as executor and guardian, they are separate and distinct, and a proceeding against him in one character, cannot affect his rights in the other; *Smith v. Hurd*, 7 H. 188.

221. *Process: How served.* Process from the Probate Court is required to be executed in the same manner as process from the Circuit Court; *Martin v. Williams*, 42 M. 210;

Mundy v. Calvert, 40 M. 181. See PROCESS, 9 to 24.

222. *Res adjudicata*. The decree of the Probate Court dismissing a bill against an administrator of an estate, is no bar to a subsequent bill filed against the same party, in his character as surety for his co-administrator on the same estate; *Washburn v. Phillips*, 6 S. & M. 425.

223. *That the court cannot render judgment in favor of a party not asking it*, see ante, 199.

224. *Record of an administration not an entire thing*. The record of an administration in the Probate Court is not an entire thing, and it is competent in a suit against an administrator for a *devastavit* to introduce parts of it, as the plaintiff sees proper; as the inventory, account of sales, or final account, &c. And so a copy of a receipt on file as a voucher to an administrator's account, showing payment of assets to the heir instead of the creditors, is also admissible in evidence; *Lee v. Gardiner*, 4 C. 521.

225. *Transfer of administration to another county by statute: Case in judgment*. The Legislature passed a private act, "authorizing and requiring" the probate judge of Hinds county, at the cost of H., the administrator, to transfer and transmit to the probate judge of Copiah county, "a full and complete copy of the record of all proceedings in the Probate Court of Hinds county, in relation to the estate of E. L., together with the original administration bond;" and "authorizing and requiring the probate judge of Copiah county to receive said record and original bond, and enter the same on the records of his court;" and requiring the administrator to conduct and administer the estate, "as if letters had originally been granted" in the Probate Court of Copiah county. A copy of the proceedings were transferred, complete, so far as the administrator of A. (who was only administrator *de bonis non*) was concerned, but wholly omitting the record of the former administration; and it was insisted, that as the power to transfer the administration was granted only on the condition that a "full and complete copy of the record" of the whole administration of the estate was transmitted to Copiah county; that the Probate Court of that county acquired no jurisdiction; that the subsequent proceedings before that court were void; but it was held that the act itself made the transfer, and the failure to transmit a complete copy of the record, did not invalidate the transfer; *Learned v. Matthews*, 40 M. 210.

226. *Publication of notice to non-residents: No affidavit need be made*. The affidavit of an executor or administrator, stating the non-residence of a distributee, provided for by the 13th section of the Act of 1846 (H. C. 652), is not essential to the order of the Probate Court, awarding publication of citation against such non-resident; and is not required to be in writing, or to be recorded.

Such affidavit is only a species of evidence

in pais, which that act requires for the consideration of the Court, in determining the fact of non-residence; and the court may act upon any other proof of non-residence, without requiring the affidavit of the administrator or executor; *Cason v. Cason*, 2 G. 578.

227. *Same order for*. It is not essential that the order for publication of notice, to non-resident distributees of an estate, of the final account of an administrator, &c., should specify the names of the non-residents, provided, that the citation which is issued and published, is directed to them by their proper names; *Ib*.

228. *Judgment ordering publication unimpeachable*. In a proceeding by a distributee to annul an order passing the final account of an administrator, it is incompetent to show by parol proof, that the requisite evidence was not before the court to justify it in awarding publication of citation against the distributee as a non-resident. The matter being within the jurisdiction of the Probate Court, its judgment is presumed to be correct and founded on sufficient evidence, and cannot be attacked in a collateral proceeding; *Ib*.

229. *Publication against non-resident minor*. But publication under this statute, when made against a minor who is a non-resident, must be directed to the guardian of the minor, if he have one, and if he have no guardian, a guardian *ad litem* must be appointed and cited. A final settlement on notice published and directed to the minor alone, and without any guardian *ad litem* appointed, would be void; *Ib*.

230. *Mistake in Christian name of non-resident*. If there be a mistake in the Christian name of one of the distributees, in the publication made against him, as a non-resident, the settlement will be void as to him; *John A. Cason v. Cason*, 2 G. 597.

231. *Exempt property not subject to jurisdiction of Probate Court*. The personality of the husband, exempt by law from execution, descends, upon his death, without a will, directly to the widow, and vests absolutely in her, and is not, therefore, subject to administration in the Probate Court; *Whitley v. Stephenson*, 9 G. 113. See EXEMPT PROPERTY, 15.

232. *Power to allow claims against the county*. The Probate Court has no jurisdiction to allow against the county, a claim of the clerk for *ex officio* services rendered to the Board of Police. Such allowance must be made by the board; *Williams v. Board of Police of Lowndes Co.*, 5 C. 621.

233. *Power of the clerk to receive payment of decree*. The probate clerk has no power to receive payment of a decree rendered in his court, and if such payment be made, it is no discharge of the defendant; *Bailey v. Dilworth*, 10 S. & M. 404.

234. *Ratification of illegal sale of slaves*. If a final settlement be made without due notice, in which the administrator accounts for the proceeds of a sale of slaves, illegally

made by him, and purchased by him at his own sale, and this settlement be recognized as valid by the guardian of the minor distributees, and he receive the proceeds of the sale and apply them under the order of the court to their benefit, they will not be heard in a court of equity afterwards to complain of the sale as illegal, without restoring the proceeds of it which have thus been applied to their use. And this is so, though their guardian afterwards purchase the slaves from the administrator; *McLeod v. Johnson*, 6 C. 374. This principle applied to the illegal sale of land. See EXECUTOR AND ADMINISTRATOR, 371, 372.

Procedendo.

1. *When a proper remedy.* A writ of *procedendo* lies only where there has been a neglect or refusal of justice by an inferior tribunal. If the appellant from a special court composed of justices of the peace to try a writ of unlawful detainer, dismiss his appeal, the appellee is not entitled to the writ, without a showing of neglect or refusal to do justice by the court; *McGilvrey v. Jackson*, 4 H. 245.

Process.

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I. What is Proper Process, and how Issued, Signed, Sealed and Tested.

1. *Capias is proper process on certain indictments.* A *capias* is the proper process to issue on an indictment, when imprisonment may be a part, or all, of the punishment fixed on conviction; *McEwen's Case*, 3 S. & M. 120.

2. *Process in garnishment.* Except in garnishment on judgments, no process is issued against persons summoned as garnishees. In attachment cases, however, though the sheriff has no separate process against the garnishee, he must state on the writ of attachment fully how he served the writ on a garnishee, and that he summoned them to attend the proper court, and to make answer as garnishees. A return "summoned as garnishee herein, J. C.," will not do; *Crizer v. Gorren*, 41 M. 563.

3. *Case of construction of process.* A writ issued in October, 1847, bearing *teste* however, as the law then required, of the preceding April term, and returnable on its face on the second Monday after the fourth Monday of September next, is returnable in October, 1847, and not in October, 1848; the word "next" refers to the date of the *teste* of the writ, and not to the date of its issuance; *Winston v. Miller*, 12 S. & M. 550. Under Rev. Code of 1857, no *teste* is required. See *post*, 26.

4. *The signing of process.* Process must be signed in the name of the clerk, though

issued by his deputy; *Felder v. Meredith*, W. 447. Process need not, however, be actually signed by the clerk, or his deputy; if signed in the clerk's name, and by his authority and consent, it is good; *Gamble v. Trahen*, 3 H. 32.

5. *Sealing of process.* Process must have the seal of the court on it, or contain a statement that there is no seal, or else it will be abated; *Pharis v. Conner*, 3 S. & M. 87.

6. *Testatum capias: When proper.* A *testatum capias* to another county than the one in which the action is brought, is allowable only, where it is shown that the defendant resided in the county where the suit is brought at the commencement of the action, and afterwards went away before service of process on him; *Bank of Vicksburg v. Jennings*, 5 H. 425.

See CIRCUIT COURT, 25, 26. JURISDICTION, 9. VENIRE, 1.

7. *How original process made returnable.* Original process, if issued within five days of the commencement of the term of the Circuit Court, should be made returnable to the term succeeding that term, and be tested of the term next preceding it; *Hurst v. Strong*, 1 H. 123.

II. Waiver of Process.

See APPEARANCE, 8. WAIVER, 1.

III. Service of Process, and the Return.

As to service on infants, see INFANTS, 22, and *post*, 19.

9. *Service within five days of the court.* If *mesne* process from the Circuit Court, be served within five days before the return term, it will, nevertheless, be good, unless objection be made thereto by plea in abatement. Without such objection, it will be good to make the return term the imparlance term of the action, so that the cause will be regularly triable at the next term; *Thornton v. Fitzhugh*, 10 S. & M. 438. But unless served five days before the return term, a judgment by default cannot be taken at that term; *Rainey v. Planters' Bk of Tennessee*, 4 C. 177.

10. *How the five days are computed.* In making the computation of the five days to elapse between the service of the writ and the return term, the day on which the service is made is included, and the first day of the term is excluded, from the count; *Morrison v. Gaillard*, 3 C. 194.

11. *The return—before Revised Code of 1857.* Where the return is general, as "executed," the court will presume it was served according to law. But where it is special, the return must show that it was served exactly as the law requires. Hence, a return, of "executed by copy left at defendant's residence," is insufficient; *Fatheree v. Long*, 5 H. 661. A return of "served" on a subpoena in chancery, is good; *Smith v. Bradley*, 6 S. & M. 485.

12. *Same: Under Rev. Code of 1857, p. 489, arts. 63, 64.* Under this act, a general return of "executed," on original process

from the Circuit Court, will not do. The sheriff must state in his return, all that he did in execution of the process, so that the court may determine whether the process was properly executed or not; *Merritt v. White*, 8 G. 438; *Hammond v. Olive*, 44 M. 543. And garnishment is original process, and is regulated by the same rules; *Jefferies v. Harvie*, 9 G. 97; *Moore v. Coates*, 43 M. 225. And so is a writ of attachment; *Crizer v. Gorren*, 41 M. 563. And so is a *scire facias*; *Dobbs v. Patty*, 42 M. 509. Process in the Probate Court is regulated by the same rule; *Munday v. Calvert*, 40 M. 181; *Martin v. Williams*, 42 M. 210. The rule is the same in chancery. See Rev. Code of 1857, p. 544, art. 27; *Foster v. Simmons*, 40 M. 585. The return under this act, must show that a true copy was delivered; a return therefore of "executed on the defendant in person," will not do; *York v. Crawford*, 42 M. 508; *Rankin v. Dulaney*, 43 M. 197. But a return of "executed by delivering a true copy to the defendant, in person," will do; *Carler v. Daizy*, 42 M. 501; *McCutchen v. Doherty*, 44 M. 419. The return, "duly executed personally, with original and copy, defendant claiming such," is good; *Presley v. Anderson*, 42 M. 274. So is "executed in person and by copy"; *Nelson v. Nye*, 43 M. 124.

See GARNISHMENT, 4.

12a. *Personal service: Where defendant refuses to receive a copy.* The following return of service on process was held good: "Executed personally on defendant, as follows: I told him I had a writing for him, in the within named case, and offered him a true copy thereof, which he refused to receive. I then commenced reading the within to him, and he refused to hear it and left me. H. J. R., Sheriff;" *Story v. Ware*, 6 G. 399.

12b. *Construction of return on process.* The court will not indulge in nice criticisms of the words used by a sheriff in his return, in describing his acts. If it can be fairly inferred from the return, that he met the requirements of the law, it will be sufficient; *Bacon v. Bevan*, 44 M. 293.

13. *Constructive service of process: Power of the Legislature to order.* It is competent for the Legislature to provide for bringing parties into court, by either actual or constructive notice, by personal service of process or constructive service, by publication, or otherwise; *Griffith v. Vertner*, 5 H. 736.

14. *Statute allowing constructive service must be strictly complied with.* Where the service of process is not personal, the terms of the statute allowing constructive service must be strictly complied with; thus, where the service was by copy left at the residence of the defendant, the return must show not only that the defendant could not be found, but also show the existence of that state of facts which authorize the service in the particular way stated in the return. Thus, where the return was that the copy was left at a public place at the defendant's residence, it will be bad, unless it also show that there was no person present competent in law to

receive it; *Eskridge v. Jones*, 1 S. & M. 595; S. P., *Fatheree v. Long*, ante, 11. So a return "executed by leaving a copy at the boarding house of defendant," is insufficient; *Smith v. Cohea*, 3 H. 35. And so a return "executed on defendant by leaving a copy with his clerk, at his store (Mr. Ewbanks), who is a free white person, over the age of sixteen years, he having no other place of residence and not being found," is bad; *Ford v. Coleman*, 41 M. 651. And so a return "executed on W. V. Collins, by leaving a copy at his residence on a table in the porch, he not being found at home," is bad; *Tomlinson v. Hoyt*, 1 S. & M. 515. And a return in these words, "executed on the defendant by leaving a true copy of the original at his residence, in the hands of his wife," was held insufficient, because it did not show that the defendant could not be found; *Foster v. Simmons*, 40 M. 585; S. P., *Mullens v. Sparks*, 43 M. 129. And a return in these words, "executed on defendant by leaving a copy with his son," is insufficient, for not stating that the defendant could not be found, and for not stating that his son was over sixteen years of age; *Glenn v. Wragg*, 41 M. 654. And so "executed on defendant, he not being at home, I left a copy with his wife," is bad; *Mullens v. Sparks*, 43 M. 129. And the omission to state that the person with whom the copy was left is a member of defendant's family, is bad; *Bustamente v. Bescher*, 43 M. 172.

14a. *Constructive service: What return must show.* The officer must make personal service of the writ, if practicable, before he can resort to the secondary mode of leaving a copy at the residence of the defendant; and he must declare in his return that the defendant could "not be found." And before he can make the return of service by leaving a copy at defendant's residence, he must show not only that defendant could not be found, but that his wife, if he had one, could not be found at his residence, nor any other free white person over sixteen years of age; *Hammond v. Olive*, 44 M. 543; S. P., *Mullens v. Sparks*, 43 M. 129.

14b. *Same: Case in judgment.* A return of "executed by handing a copy to H., a member of the family, over eighteen years of age, at the residence of defendant, he being absent," is defective, in not stating that H. was a "free white person," and also for not stating that defendant could "not be found." "Being absent from home," and "not found," are not equivalent; *Id.*

15. *Constructive notice by publication.* Notice to absent and non-resident defendants by publication, is an inferior mode of constructive service of process, and a strict compliance with the statute in reference thereto is required. Before an order of publication can be made, it must appear by affidavit or otherwise, that the defendant is absent from the State, and cannot be found, or that he is a non-resident; and his residence and post office must be stated, if they can be ascertained, after diligent inquiry; an affidavit that

the "affiant does not know the post office and residence of the defendant." is not sufficient; *Foster v. Simmons*, 40 M. 585; S. P., *Ingersoll v. Ingersoll*, 42 M. 155. These facts need not be stated in a separate affidavit, if they be stated in the bill, and that be sworn to; *Winston v. McLendon*, 43 M. 254.

See further on this subject, ATTACHMENTS, 64, *et seq.* CHANCERY, sub-division Publication to Non-residents. PROBATE COURT, 50.

16. *Service of brunch writ.* If on a brunch writ, issued to another county, against several defendants, it be endorsed that it is to be served only on two (naming them), and that another writ has been issued for the others, a general return of "Executed," will apply only to those whom the sheriff was commanded in the endorsement to summon; *Bozman v. Brouer*, 6 H. 43.

17. *Effect of defective return.* If the return of service of process be defective, the judgment will not therefore be void, but only erroneous; *Smith v. Bradley*, 6 S. & M. 485.

Where the return purports that the process was actually served, as, "Executed by personal service on all but M., and by copy as to her," and "Executed," though the return be insufficient and informal in not setting out the manner of the execution, a judgment by default will not be void and impeachable collaterally, but only voidable on writ of error, or other appropriate means to avoid it. The question in such a case is one of error, or no error; *Campbell v. Hayes* (citing *Smith v. Bradley*, *supra*); S. P., *Hanks v. Neal*, 44 M. 212.

And where the return is insufficient as to the service of the attachment on the defendant therein, the persons summoned as garnishees, cannot take advantage of the irregularity; *Crizer v. Gorren*, 41 M. 563.

See GARNISHMENT, 30.

18. *Service on an infant.* The statute, Rev. Code of 1857, art. 64, p. 489, provides that if the defendant be an infant, the process shall be served on him personally, and on his father, mother or guardian, if he have one in this State. A return on process against an infant, which does not show its service on the father, mother or guardian, or that he had not such in this State, is bad; *Ingersoll v. Ingersoll*, 42 M. 155; *Johnson v. McCabe*, *Id.* 255; *Mullins v. Sparks*, 43 M. 129.

See INFANT, 22.

19. *Waiver of defective service.* A plea is a waiver of a defective service of process; *Davis v. Patty*, 42 M. 509.

See APPEARANCE, 7, and *post*, 25.

20. *Service may be made by general deputy, though special deputy is appointed.* Service of process may be made by the regular deputy sheriff, notwithstanding the sheriff has appointed a special deputy to serve it; *Henry v. Halsey*, 5 S. & M. 573.

20a. *Service by sheriff when he is interested.* A sheriff is incompetent to serve pro-

cess in a suit in which he is a party, or in which he is interested. And process addressed to such an officer will be quashed, on timely application to the court. But if the party affected by such illegal service make no objection, his administrator cannot afterwards impeach the service, in answer to a *scire facias* to revive the judgment; *McLeod v. Harper*, 43 M. 42.

See SHERIFF, 94.

20b. *Waiver of service.* See APPEARANCE, 8. HIGH COURT, 158.

21. *Power of sheriff to serve.* The sheriff derives his power to serve process from the statute, and not merely from the fact that the process is directed to him; and his service of a subpoena in chancery will be good, though not directed to him; *Smith v. Bradley*, 6 S. & M. 485.

See EJECTMENT, 25.

22. *Powers of justices of the peace and coroners to serve process.* The power of justices of the peace and coroners to execute process, exists only in certain cases, and process intended for execution by them should be directed to them; and if directed to the sheriff, they have no power to execute it; *Arnold v. Wynn*, 4 C. 338.

23. *Return and service as to partners.* Service of process on one partner is not good as to his associate; *Pittman v. Planters' Bank*, 1 H. 527; *Demoss v. Brewster*, 4 S. & M. 661; And if the return be made of service on A. & Co., the firm name as stated in the writ, it will be bad for not showing upon whom it was executed; *Demoss v. Brewster*, *supra*.

24. *Return must show upon whom served.* Process was issued against L. S., Jr., and the sheriff returned it executed on L. S., omitting the affix "Jr.:" Held, in the absence of all showing to the contrary, the presumption is, that the sheriff did his duty and served it on the proper person; *Sanders v. Dowell*, 7 S. & M. 206.

25. *Cure of defective return.* A defective return is cured by appearance; *Hathcock v. Owen*, 44 M. 799; and cases digested in APPEARANCE, 7; and so if the defendant sue out a writ of error and cause the judgment to be reversed for a defective return, this will supersede the necessity of any other summons; it will be a good appearance as to the further proceedings after reversal; *Bustamente v. Shultz*, 43 M. 172.

See *ante*, 19.

25a. *Service of process on corporation.* The service of process on a corporation other than a railroad company, or telegraph company, must be on the president or presiding officer, the cashier, secretary, or treasurer; and if no such person be found, notice may be posted at the door of the place of business of the corporation; or in such other manner as the court may direct. Service on an "agent" of a corporation (other than railway and telegraph companies) is not sufficient; *Southern Express Company v. Craft*, 43 M. 508.

25b. *Service of process in ejectment.* See EJECTMENT, 25.

IV. Amending Process and Return.

See AMENDMENT, 20, *et seq.*

26. *Amending the process: Case in judgment.* The regular term of the court to which the writ was properly returnable, commenced on the 4th Monday in May, 1841. The writ was issued on the 11th of May, 1841, and was tested as the law required, on the first day of the preceding term, to wit, the 4th Monday in November, 1840. It commanded the sheriff to have the defendant before the court, on the 4th Monday in May, *inst.* The defendant, at the May term, 1841, moved to quash the writ because the contraction *inst.* did not indicate with certainty the time of holding the court: *Held*, the defect was clearly amendable, and the writ having performed its office, by bringing the defendant into court, an amendment was unnecessary; *Harrison v. Agricultural Bank*, 2 S. & M. 307. See *ante* 2.

27. *Amendment of the return.* The sheriff's return on final process is amendable at any time, but on *mesne* process no amendment is allowable after judgment; *Planters' Bk v. Walker*, 3 S. & M. 409; *Dorsey v. Peirce*, 5 H. 173, *Hughes v. Lapice*, 5 S. & M. 451.

See SHERIFF AND SHERIFF'S SALE, 43. AMENDMENT, 30 to 33a.

28. *Sheriff cannot amend after his term expires.* A sheriff cannot, after his term of office has expired, be permitted to amend his return on an attachment, or other process. His returns are to be made when he is bound by his official oath to make them true; *Cole v. Dugger*, 41 M. 557.

29. *Amendment affecting rights of others.* Whether even by order of court, and during his term of office, a sheriff can amend his return so as to affect the rights of persons not parties to the suit, acquired before amendment; *Quære? Ib.*

30. *Amendment of return on fi. fa.* A sheriff may amend his return on a *fi. facias*, at the return term, though a motion be then pending against him in relation to the return; *Trotter v. Parker*, 9 G. 473.

V. Miscellaneous.

31. *Acknowledgment of service.* An acknowledgment of the service of a writ endorsed on it, and signed in the name of the defendant, is insufficient, *per se*, to authorize judgment by default. The genuineness of the signature of the defendant should be proven. All returns on writs when made by private parties, must be proven like other facts. The return made by the sheriff proves itself; *Harvie v. Bostic*, 1 H. 106; S. P., *Davis v. Jordan*, 5 H. 295; *Bozman v. Brower*, 6 H. 9; *Byrne, Vance & Co. v. Jeffries*, 9 G. 533.

32. *Recital in record as to appearance.* Where only a part of the defendants have been served with process, and the record recites that "this day came the defendants and moved to quash the writ," it means that the defendants only who are served with process, appeared; *Harrison v. Agricultural Bk*, 2 S. & M. 307. See *post*, 37.

See APPEARANCE, 1. PROBATE COURT, 47, 195. JUDGMENT, 8. ATTACHMENT, 72, 73.

33. *Process against sheriff, on motion.* A simple notice of the motion against the sheriff and his sureties, is all the process required in such cases; *Lewis v. Garrett*, 5 H. 434.

34. *Endorsement of cause of action on the writ: Variance.* It is no ground for abatement to the writ, that there is a variance between the declaration and the endorsement of the cause of action on the writ, as to the date of the note sued on; *Pharis v. Conner*, 3 S. & M. 87.

35. *Same.* If the endorsement of the cause of action on the writ state the correct amount of the note sued on, it will be sufficient, though it erroneously state the amount claimed to be less than the amount of the note; *Fall v. Com'rs of Sinking Fund*, 3 S. & M. 127. Under the Rev. Code of 1857, no endorsement of the cause of action on the writ is required to be made; *Nance v. Webb*, 42 M. 268.

36. *Contradicting sheriff's return.* The sheriff will not be heard to give evidence contradicting his return on process; *Planters' Bk v. Walker*, 3 S. & M. 409.

But it is not a contradiction of a return of "executed" generally, to show that the service was made by copy left at the residence of the defendant; *Lapiece v. Hughes*, 2 C. 69.

37. *Process without seal.* Process issued without seal, though void, is yet a part of the record, when returned, and may be introduced in evidence to contradict a recital in the decree that the process had been duly served; *Dogan v. Brown*, 44 M. 235.

38. *Testatum writ.* See CIRCUIT COURT, 26.

Prohibition.

1. *Office of the writ.* The office of a writ of prohibition is to restrain and prevent a court of peculiar, limited, or inferior jurisdiction, from taking cognizance of causes not within its jurisdiction. The writ issues from a superior court, and is founded upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to the jurisdiction of the inferior court. But if the inferior court has jurisdiction, the superior court cannot inquire into the question whether the action of the inferior court is correct or not; *Clayton v. Heidelberg*, 9 S. & M. 623.

2. *Power of Circuit Court to grant the writ to Board of Police.* Whether the Circuit Court can grant a writ of prohibition to the Board of Police; *Quære?* It cannot do so for the purpose of preventing the levy and collection of a special tax on the county, for the payment of a contract for the erection of a court house therein; the jurisdiction of the board in such cases being unmistakable; *Ib.*

3. *Writ against municipal corporation.* A writ of prohibition from the Circuit Court to the municipal authorities of a city, is a proper remedy to compel them to abstain from the enforcement of an ordinance which

is contrary to the constitution and laws of the State; *Donovan v. Mayor, &c., of Vicksburg*, 7 C. 247.

Promissory Notes.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

Property.

1. *Meaning of the term.* The term "property," embraces both real and personal estate, and under it, when used in the residuary clause of a will, the real estate of the testator not attempted to be specifically disposed of, will pass; *Morris v. Henderson*, 8 G. 492.

2. *Meaning of personal estate.* It is a question whether the terms "personal estate of any kind whatever," taken alone, embrace promissory notes. The result of the authorities, in which the question has been involved, seems to be that they would not (see *Popham v. Lady Aylesbury*, Ambl. 68; *Moore v. Moore*, 1 Bro. C. C. 127; *Fleming v. Brooke*, 1 Sch. & Lef. 318; *Stewart v. Earl of Bute*, 3 Ves. 212; *Wms. on Executors*, 749); *McIntyre v. Ingraham*, 6 G. 25.

3. *Meaning of "effects" and "estate."* The terms "effects," "estate," and words of like general import, when used in a clause containing an enumeration of personal estate, will generally be confined to *estate* or *effects*, *ejusdem generis*, with those specified, if a different construction be not required by the context; *Ib.*

Prosecutor.

See **CRIMINAL LAW.**

Protest.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

Protestando.

See **PLEADING**, 156.

Publication to Non-residents.

See **PROCESS** 15, and references there made.

Public Contracts.

1. *Liability of the State on.* The State is liable for damages which a contractor, for doing work on the public buildings, has sustained, by reason of the failure of the authorized agents of the State to furnish materials and make payments according to the contract; *State v. Farish*, 1 C. 483.

2. *Evidence: Admission of public agent.* And the statement made by such contractor in reference to the subject matter of the contract, to the agent of the State who had charge of that business, and who had personal knowledge of the truth or falsity of the statement, and which is not denied by him, is evidence against the State for the contractor; *Ib.*

Purchase.

See **SALE. VENDOR AND VENDEE.**

Quit Claim.

See **DEED**, 85, 86, 87, 88.

1. *Effect of: Notice.* In a quit claim deed, the grantor does nothing more than acquit the grantee of any right or title which the grantor may have to the premises. And the taking of such a deed, in general, implies knowledge on the part of a grantee of a doubtful title; *Smith v. Winston*, 2 H. 601; and it cannot, therefore, be made the foundation of a bill to remove clouds from the grantee's title; *Kerr v. Freeman*, 4 G. 292.

Quo Warranto.

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I. Quo Warranto at Common Law.

1. *Quo warranto at common law.* At common law the writ of *quo warranto* is in the nature of a writ of right for the king, against him who usurps an office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right; *Lindsey v. Attorney General*, 4 G. 508.

2. *Information in nature of writ of quo warranto.* Owing to the great length of the process and the delay occasioned by the practice which prevailed under it, the ancient writ of *quo warranto* has fallen into disuse, and the more modern method of proceeding by information, in the nature of a writ of *quo warranto*, in the name of the attorney general, substituted; and now this latter proceeding can be supported in all cases in which the ancient writ was maintainable; *Ib.*

3. *In what court the writ is triable.* In ascertaining the nature and extent of rights, and the appropriate remedies to enforce them, we may look to the rules of the common law; but in determining the tribunal in which a specific remedy is to be enforced, we must look alone to our constitution and laws; and therefore, although by the common law of England the writ of *quo warranto* might have been grantable only at the pleasure of the king, yet being an appropriate remedy to enforce certain legal rights, it will be granted by the common law courts of this State; *Ib.*

4. *Proper remedy to recover an office.* A person, constitutionally eligible, has a legal right to an office to which he has been duly elected; and he is entitled to a writ of *quo warranto*, to oust him who holds the office; *Ib.* And this is the appropriate remedy; *Newsom v. Cocke*, 44 M. 352.

5. *Issued in attorney general's name.* The attorney general is the proper person in whose name an information, in the nature of a writ of *quo warranto*, should be prosecuted, in order to award to the relator the enjoyment of an office improperly withheld from him; *Lindsey v. Attorney General*, *supra*.

6. *Process and practice.* The process upon an information in the nature of a writ of *quo warranto*, to oust the usurper of an office, may be issued in term time, and be

made returnable to the same term of the court; and where the process contains a statement of what is alleged in the information, it is unnecessary that a rule *nisi* stating the objections to the defendants holding the office should accompany it; *Ib.*

II. Quo Warranto under the Acts of 1843 and 1846.

For the substance of these acts, see *BANKS*, 61 to 64: and for decisions under them in relation to banks, see *BANKS*, 65 to 72.

7. *Information under, a civil proceeding.* An information in the nature of a writ of *quo warranto*, under the Act of 1843, which makes it the duty of the district attorney to file such information, when he shall have reason to believe that a bank has been guilty of a violation of its charter, or where he is applied to and furnished with the affidavit, of one or more credible persons to that effect, is a civil and not a criminal proceeding, the act not prescribing any penalty upon the bank in case of conviction, but a judgment of onster of its franchises; *Com'l Bank of Rodney v. State*, 4 S. & M. 439.

8. *Injunction under that act constitutional.* The provision of the Act of 1843, which authorizes, upon the filing of the information in the Circuit Court, the clerk of that court to issue an injunction, restraining all persons from collecting any demands claimed by the bank or its agents, or assigns or others, does not impair the obligation of any contract between the bank and the State, and is not a violation of the Constitution of the United States (nor is the power therein vested in the clerk to issue the injunction, a judicial power, and for that reason unconstitutional); *Ib.*

9. *Effect of the judgment of forfeiture.* A judgment of forfeiture against a bank, under the Act of 1843, has none of the consequences of a judgment of forfeiture at the common law, the Legislature having waived the right to the common law penalties, by providing that, concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of the creditors of the bank; *Nevitt v. Port Gibson Bank*, 6 S. & M. 513.

10. *Same: Is an assignment of the bank's assets.* A judgment of forfeiture against a bank under this act, and the appointment of trustees, operate as an assignment of all the property of the bank to the trustees for the benefit of the creditors of the bank, and this assignment relates back to the rendition of the judgment against the bank, under that act, and preserves the property and assets of the bank from that time for the benefit of creditors; *Ib.*

11. *Mere judgment no dissolution.* The mere judgment of forfeiture does not *ipso facto* work a dissolution of the corporation; there must be first execution for the seizure of the franchises, before the penalties of forfeiture take place; *Ib.*

12. *Right of the trustees: Revivor in their*

name. Where a judgment of forfeiture against a bank has been rendered, under the Act of 1843, the trustees appointed by the court have the right to revive in their names, all suits then pending in the name of the bank, and those suits will progress in their name in the same manner, and to the same effect, as suits revived in the name of the executor of a deceased plaintiff; *Ib.*; *S. P., Com'l Bank of Natchez v. Chambers*, and *Chew v. Peale*, 12 id. 700; *Grand Gulf Bank v. Wood*, 12 id. 482. But it was held, afterwards, that these cases had reference alone to *revivors of judgments* in the High Court, and that the right to revive in the name of the trustee a suit *pending* in the name of the bank, at the time of the judgment of forfeiture, did not exist; *Torry v. Robertson*, 2 C. 192.

13. *Same: As to assigned assets.* The trustees of a dissolved bank, under the Act of 1843, are appointed to collect such debts only as belonged to the bank at the time of its dissolution, and to that end only are clothed with the legal title by the statute. They are not the general representatives of the bank, but only trustees for the accomplishment of defined ends, and they have full power for the accomplishment of those ends, but no more. They, therefore, cannot maintain an action in their name (upon a note made payable to the bank), for the use of a holder by assignment prior to the dissolution of the bank; but the remedy of such parties is in equity; *Bacon v. Cohea*, 12 S. & M. 516. And where suit is pending in the name of the bank, at the time of its dissolution, for the use of another, there can be no revivor in the name of the trustees, as no legal or equitable interest in the suit passes to them; *Grand Gulf Bank v. Wood*, 12 S. & M. 482. But suits pending in the name of the bank at the time of its dissolution, for the use of another, though incapable of revivor in the name of the trustees, will not, therefore, abate; but, under the statute which prevents the abatement of a suit upon the death of a nominal plaintiff, the suit will progress in the name of the uses. However, if a bank has assigned by deed its assets to assignees, for the benefit of creditors, suits pending in the name of the bank at its dissolution, but in which there is no use, must abate; since they are not within the statute in reference to the death of nominal plaintiffs, and the trustees have no interest in the assigned assets; *Grand Gulf Bank v. Jeffers*, 12 S. & M. 486. The remedy of the holder of a note transferred by a bank before its dissolution, where the legal title did not pass to the assignee, is in equity. Where the assignment is by deed, no legal title passes to the assignee; *Bacon v. Cohea*, 12 S. & M. 516; *Marsh v. Mandeville*, 6 C. 122.

14. *Same.* The trustees have no right to collect debts due the bank after the debts of the bank are all paid; they cannot collect for the benefit of the stockholders; see *Coulter v. Robertson*, 2 C. 278, digested under *BANKS*, 70, 71, 72.

See generally, as to title and powers of trustees of banks, *BANKS*, 65, *et seq.*

III. Miscellaneous.

15. *Effect of quo warranto on pending suit.* Where a suit has been regularly commenced by a bank, and afterwards a *quo warranto* is issued against it, this will not authorize the quashal of the writ—a motion to quash never being entertained when the writ in its inception was regular; *Com'l Bk of Rodney v. McCaa*, 8 S. & M. 720.

16. *Commercial & R. R. Bk of Vicksburg.* By the 5th section of the Act of 1843, which enacts that the provisions of that act shall not extend to the Commercial and Railroad Bank of Vicksburg, so as to affect the railroad and its operation, that bank is not entirely exempted from the force of the act; it is still liable to be proceeded against for a forfeiture of its banking franchises; *State v. Com'l & R. R. Bk of Vicksburg*, 12 S. & M. 276.

17. *Same.* Previous to the passage of the *Quo Warranto* Act of 1843, the Commercial and Railroad Bank of Vicksburg, made an assignment of all its assets for the benefit of its creditors. In the year 1846, proceedings in the nature of a writ of *quo warranto* were commenced against the bank, and the trustees under the assignment, made a motion to quash the information and dissolve the injunction, on the ground of the assignment to them: *Held*, that the motion could not be sustained only so far as the interest of the assignees in the railroad was concerned; *Id.*

On a judgment of forfeiture against the Commercial Bank, the State moved for the appointment of trustees to take charge of the assets: *Held*, that the judgment (under the said 5th section) only affected the banking privileges of the corporation, and did not dissolve the corporation, and that the trustees could not be appointed; *State v. Com'l & R. R. Bk of Vicksburg*, 2 C. 144.

18. *Quo warranto against a corporation: Proof of its organization.* In a proceeding by *quo warranto* against a corporation in its corporate name and character, for a forfeiture of its charter, the regularity of its original organization and the performance of conditions precedent to its organization, cannot be inquired into; its existence as a corporation is admitted by the proceedings; *Com'l Bk of Natchez v. State*, 6 S. & M. 599; *S. P.*, *State v. Com'l Bk of Manchester*, 4 G. 474.

19. *Same.* But the rule is different where the proceeding is against individuals, charging them with usurpation of the franchises of a corporation. If they rely on the fact that they used the franchises as a corporation, they must not only show a due organization of the corporation in the first instance, but that it remains in a state of legal organization and that they are members of it, and authorized by the corporation to do the corporate acts which they claim they are entitled to do; *State v. Brown & Johnston*, 4 G. 500.

20. *For decisions as to constitutionality of*

the Quo Warranto Acts of 1843 and 1846, see CONSTITUTIONAL LAW, 87, 88.

21. *Proceedings against individuals for usurping corporate rights.* The defendant, when proceeded against as an individual, may plead not guilty, and a disclaimer of any right to do the acts complained of, these defences are not inconsistent. And in such case the State is not entitled to a judgment against the farther exercise of the franchise on the plea of disclaimer, the plea of not guilty being a full defence; *State v. Brown & Johnston*, 5 G. 688.

22. *Same.* And under the plea of not guilty, the defendant may, in reply to evidence by the State, tending to show that he has used corporate franchises as an individual, show the corporation was duly organized, and that he acted under it, and not as an individual; *Id.*

Railways.

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I. Organization, Subscriptions for Stock.

1. *Power of commissioners expires with organization.* The power of the commissioners appointed in the charter of the Mobile & Ohio Railroad Company, to receive subscriptions for stock to the company, expired with the organization of the company, and thereafter the directors and their agents only were authorized to receive subscriptions; *Ellison v. Mobile & Ohio R. R. Co.*, 7 G. 572.

2. *Consideration for the subscription for stock.* Where a person subscribes for stock in a railway corporation, according to its charter, he thereby is admitted a member thereof, and becomes entitled to the franchises granted in the charter, which is a valuable consideration for the subscription. A plea, therefore, to an action by the corporation to recover the amount so subscribed, that the subscription was made without valuable consideration, is bad, because it appears from the defendant's own showing that it is false; *Thigpen v. Miss. Cent. R. R. Co.*, 3 G. 347.

3. *Subscription for stock on promise inconsistent with charter.* A verbal promise made by an agent of a railroad corporation to a person subscribing for stock therein, and

upon the faith of which he made the subscription, that payment for his stock should be delayed for a longer period than that prescribed by the charter, is not binding on the company; because, 1st. The written contract of subscription cannot be varied by a contemporaneous, verbal parol agreement; and, 2d. The promise being inconsistent with the charter is void for want of power in the corporation to make it; *Id.*

See CORPORATION, 21.

4. For subscriptions to stock generally in railway corporations, see CORPORATION, 15 to 21d.

5. For fraud in obtaining subscriptions, see CORPORATION, 21b to 21d.

6. For the rule in relation to the payment of the percentage required at time of subscription, see CORPORATION, 18, 19, 20.

7. For calls for instalments of stock and actions therefor, see CORPORATION, 22 to 25.

7a. Promise by agent to receive payment for stock in labor. Whether the representation of an agent who procured a subscription for stock in a railroad company, that payment of the amount subscribed would be accepted in labor and provisions, would bind the company; *Quære?* It would not bar a recovery of the amount of money subscribed, if it were not shown that the defendant had offered payment in that way, and that he was damaged by the refusal of the company to accept it; *Walker v. Mobile & Ohio R. R. Co.*, 5 G. 245.

II. Condemnation of Land for Right of Way.

See CONSTITUTIONAL LAW, 20 to 31.

1. Power of the Legislature on this Subject.

8. Private property cannot be taken for private use. The Legislature cannot, in the exercise of the right of eminent domain, provide for the appropriation of private property to a mere private enterprise, in which the public have manifestly no interest. Such provision would be, in effect, a judicial sentence, by which the property of one citizen would be taken from him and vested in another, and for that reason void; but it is not essential to the exercise of this right, that the enterprise for which private property may be taken should be exclusively a State undertaking, in which private individuals, as such, have no interest; *Brown v. Beatty*, 5 G. 227.

9. Same: Railways are public enterprises. It is the right and duty of the State, to promote the welfare and secure the happiness of its members; to facilitate and cheapen the transportation of the products of labor, and to increase the intercourse among its citizens. The construction of railways and other works of internal improvement, are obviously well calculated to promote these objects, and the Legislature may make, or cause them to be made, at the public expense. And when such enterprises are engaged in by private

individuals, under charters of incorporation, although in respect to the anticipated pecuniary gain of the corporators, they may be regarded as individual and private, yet the object and purpose of the corporation being the public advantage, they are also works of a public character. The Legislature may, therefore, in the exercise of the right of eminent domain, provide for the appropriation of private property to an incorporated railway company, so far as it may be necessary for the completion of the work; first securing the payment of a just and full compensation therefor to the owner; *Id.*

2. The Compensation, how Estimated, and how Paid.

10. The compensation must be paid before appropriation. Under that provision of the bill of rights, which declares that "no person's property shall be taken, or applied to public use, without the consent of the Legislature, and without a just compensation first made therefor;" the compensation must precede the seizure of the property for public use; and hence, that provision of the charter of the Grand Gulf Railroad & Banking Company, which directs that upon confirmation of the assessment of the jury, empanelled to assess the damages for taking land for the right of way, the land shall be conveyed to the company, and the owner shall have judgment and execution for the amount so assessed, is unconstitutional; *Thompson v. Grand Gulf R. R. & Banking Co.*, 3 H. 240.

11. The compensation must be wholly paid in money. That provision of the bill of rights above quoted, secures to the owner the right to receive in money the cash value of the property thus appropriated, and if it be land, then also full indemnity for the damages done by the appropriation to his adjoining land. The owner cannot, therefore, be compelled to receive as compensation, the enhancement in the value of his remaining property occasioned by the improvement to which he has thus been forced to contribute; *Brown v. Beatty*, 5 G. 227; *S. P., Isom v. Miss. Cent. R. R. Co.*, 7 G. 301; *Penrice v. Wallis*, 8 G. 172; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374.

12. When question of damages is referred to arbitrators. If the owner of the land and the company agree to refer the question of damages to arbitrators, and there be no agreement that credit shall be given, the award must be paid before the right to the land vests in the company, or the control of the owner over the land is divested; *Stewart v. Raymond R. R. Co.*, 7 S. & M. 568.

13. Estimation of the damages: Remote and consequential damages. The value of the property at the time it is appropriated to public use, and the injury then known to result to the owner, as the necessary and immediate consequences of such appropriation of this property, without reference to the unascertained and remote benefits or disadvantages that may or may not accrue in the

future, is the loss sustained by the owner by the appropriation of his property to the public use, for which he is entitled to compensation; *Isom v. Miss. Cent. R. R. Co.*, 7 G. 300.

3. Proceedings to Assess Compensation.

14. *Proceedings to assess: Jury of inquest.* The Legislature may lawfully authorize a justice of the peace to issue a warrant to the sheriff, requiring him to summon a jury to assess the damages occasioned to the proprietor, by reason of the location of a railway on his land; *Brown v. Beatty*, 5 G. 227.

15. *Legislature cannot prescribe rule for assessment, to the jury.* The ascertainment of the amount of damages sustained by the owner on account of the appropriation of his property to the public use, is a judicial and not a legislative act; and hence, a direction or instruction by the Legislature to the tribunal charged with the exercise of this duty, "that in estimating the damages accruing to the owner of the land by the appropriation of it to the construction of a railway, they shall allow, in extinguishment of the claims for damages, the benefit which will result to the owner from the construction of the railway through his land," is an invasion of the powers of the judicial department, and for that reason is void; *Isom v. Miss. Cent. R. R. Co.*, 7 G. 300.

16. *Appeal from assessment made by the jury.* Upon an appeal to the Circuit Court by the owner, from the inquest of a jury assessing the damages accruing from the use and occupation of his land by a railway company, either party has a right to demand that the issues of fact arising in the cause, shall be submitted to, and be tried by, a jury. This is a constitutional right secured by the 28th section of the bill of rights, which declares, that "the right of trial by jury shall remain inviolate;" *Ib.* (citing *Smith v. Smith*, 1 H. 102; *Lewis v. Garrett*, 5 H. 434; *Peck v. Critchlow*, 7 id. 243; *Scott v. Nichols*, 5 C. 94).

4. Assessment Without Payment, Encumbrance on Land, Dedication.

17. *Rights acquired by assessment before payment.* A railway company cannot prevent the exercise by the owner of full control over the track or roadway located on his land, until it has paid the amount which the jury (or arbitrators, where they have been selected) have assessed for damages to the owner; *Stewart v. Raymond R. R. Co.*, 7 S. & M. 568. And when the company neglects to pay the owner for the right of way, and he is exposed to the transit of the railway cars over his land for an indefinite period, with but little prospect for redress by action at law, owing to the insolvency of the company, a court of equity will grant him an injunction restraining the company from the use of the land; *Stewart v. Raymond R. R. Co.*, *supra*.

18. *Prior encumbrance superior to grant of right of way to a railway company.* A deed in trust executed by the owner and recorded prior to a grant by him of the right of

way over the land to a railway company, is superior to the grant; and a purchaser under the trust deed takes the land covered by the right of way free of the company's right, and the company are not entitled to use the right of way without first making compensation to such purchaser; *Ib.*

19. *Dedication of road bed.* The doctrine of dedication of land to public uses has no application to the appropriation of land to the right of way for a railway company; *Ib.*

20. *No right of entry on the land without assessment and payment.* Before a railway company can enter upon land for the construction of their road (without the consent of the owner) there must be at least an assessment and payment, or tender of payment, of the damages, according to the provisions of the charter; and an entry on the land before this is done is a trespass, for which the company may be sued at law; *Memphis & Charleston R. R. Co. v. Payne*, 8 G. 700.

5. Remedies to Condemn Lands, and for Damages, and Parol License to Enter.

21. *Remedy to condemn lands and for trespass.* Where the Legislature has authorized the erection of a work of internal improvement, and a mode is prescribed by statute for the assessment and payment of damages resulting to individuals from the construction of the work, the parties injured are confined to the remedy prescribed, which is without any negative words used, exclusive of the remedy which would otherwise exist at common law.

The charter of the Miss. Cent. R. R. Co. provided for the condemnation of land for the road bed; and declared that the inquest of the jury, after payment or tender of the valuation, should be admitted to record, &c., and be a bar to all actions for taking and using such property. In this case, B., a contractor to build the road bed for the company, was sued in an action of trespass for injuries done to the land of the plaintiff, within the one hundred feet allowed by statute for the right of way, and upon proof that there had been a due assessment of the damages, and a tender of the amount, the court held that the plaintiff could not maintain his action; *Brcun v. Beatty*, 5 G. 227. But the owner is not barred of his action at law for trespasses committed outside of the right of way; *Brown v. Beatty*, *supra*. Nor where the railroad company enters without at first having condemned the land in the mode pointed out in the charter, and paying and tendering the amount of the assessment; *Memphis & Charleston R. R. Co. v. Payne*, 8 G. 700; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374. See *post*, 26.

22. *Parol license to enter as a defence to trespass.* A parol license given by the owner to a railroad company, to enter upon his land and construct thereon their road, is not within the statute of frauds, and is a good defence to an action of trespass against the company for an entry on the land; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374.

6. Location of Road Bed over Public Streets.

23. *Right of way for railroad over public streets.* The title to the streets of a city or town is vested in the corporation, and the Legislature has no power to grant the right of way to a railroad company over them, without the consent of the corporation, or without providing for compensation to be paid to the corporation for the damages. And the corporation of a city has the power, for the protection of its citizens and their property, to regulate the mode of propelling railroad cars within its limits, and to prescribe the rate of speed at which they shall move; *Donnaher's Case*, 8 S. & M. 649.

7. Relocation of Road Bed.

24. *Same.* Railway companies have the power to relocate the line of their road after the completion of it under the first location, and to condemn for that purpose private property, if there be a manifest necessity for the change, and no detriment accrues thereby to the public; *Miss. & Tenn. R. R. Co. v. Devaney*, 42 M. 555.

25. *Same: Case in judgment.* The Miss. & Tenn. R. R. Co., on the first location of their road, connected with the road bed of the Miss. Cent. R. R. Co., at Grenada, immediately south of the Yallahusha river. Their bridge over the river was destroyed during the late war, and the structure being a costly one, and the embarrassed financial condition of the company being such that they could not rebuild, by agreement between them and the Miss. Cent. R. R. Co., a partnership bridge was constructed across the river on the line of the Central road. On the north side of the river, and a short distance from it, the Miss. & Tenn. R. R. Co. relocated their road, so as to form a junction with the Miss. Central, and to give both roads the use of the bridge. This relocation was made so as to connect the two roads, where, by the original location, they were only five-eighths of a mile apart: *Held*, that the Miss. & Tenn. R. R. Co. had the power to take the land to make the connection, by proceedings for condemning it, as provided in the charter for condemning land for the first location; *Miss. & Tenn. R. R. Co. v. Devaney*, 42 M. 555.

26. *Relocation: Void assessment: Trespass.* The Miss. & Tenn. R. R. Co. had the land of D. regularly condemned by a jury of review, and tendered him the amount of the assessment. In good faith, and under the belief that the title to the land was vested in them by the condemnation of the jury of review, the company located and built their road through D.'s land: *Held*, that though the action of the jury was void, and the title never passed, the company were not naked trespassers, but claimed under a color of title, and were entitled to the property, cross-ties and iron, placed on the land; *Ib.*

III. Amendment of Charter, Deviation, Consolidation.

27. Amendment of charter: Deviation in

location of the road. and consolidation with another company. See CORPORATION, 1 to 6.

IV. Power of Railroad Company to Assign its Property, and Liability of the Property to be Sold under Execution.

28. *Power to assign franchise.* Whether a railway company has the power to assign the road and the franchises annexed, is a matter between the State and the corporation. The question as to the power to assign, cannot be raised by a creditor seeking to annul the assignment on the ground that it is *ultra vires*; *Arthur v. Com'l & R. R. Bk of Vicksburg*, 9 S. & M. 394.

29. *Assignment of franchise: Sale of road under execution.* Whether the road bed is subject to sale under execution depends upon the nature of the estate the corporation has in it. If it has the fee in the road bed it may be sold or assigned, but the franchise cannot be aliened without the consent of the State. The sale or assignment of the road bed does not, therefore, carry with it the franchise; nor does it *ipso facto* work a dissolution of the corporation, it may, however, be a ground of forfeiture of its charter; *Ib.*

30. *Same.* Whether, when a railroad corporation makes an assignment of the profits of the road, this does or does not convey the road bed, for the term during which the profits are assigned; *Quære?* It seems that it does, since otherwise the road bed might be sold under execution and the assignment be defeated; *Ib.*

31. *Same.* When the time limited by the charter, in which a railway is to be finished, is about to expire, and the charter declares that the franchise shall be null and void, unless the road be finished in that time, the assignment of the unfinished road, and all other assets of the corporation, 1st, to raise money to complete the road within the time, and 2d, to pay the debts, will not avail to validate the assignment, if it be otherwise objectionable in law; *Ib.* See this case digested in FRAUDULENT ASSIGNMENT, 24. 27.

32. *Its property liable to sale under execution.* The tangible property of a corporation is subject to sale under execution just as the property of an individual. Whether the road bed is so subject; *Quære? Ib.*

V. Trespasses and Torts to Cattle on Road Bed.

33. *Right of owner to allow cattle to run at large.* By the common law of England, the owner of cattle, horses, &c., is bound to keep them within a sufficient enclosure, and if he permit them to escape and run at large, and wander upon the premises of another, whether enclosed or not, he is liable for the trespass, and the cattle so trespassing may be distrained *damage feasant*. But this rule of the common law is not adapted to the circumstances and condition of the

people of this State, the population not being dense, and there being large tracts of uncultivated and unenclosed lands fit for the pasturage of cattle; and moreover, the people of this State have, from its earliest settlement, permitted their domestic animals to run at large in the "range," and depasture on unenclosed lands; and hence, the rule of the common law above referred to is not in force here; *Vicksburg & Jackson R. R. Co., v. Patton*, 2 G. 156.

34. *Right of owner on his own land.* The owner of unenclosed land may prosecute his lawful business thereon, but in so doing he must exercise reasonable care and diligence to avoid injuring the cattle of others which may have wandered on the premises; *Ib.*

35. *Right of railroad over their track: Liability for killing stock.* A railway company has the exclusive right to the use, possession and enjoyment of the land upon which their track is located, and they may run their engines and cars on the same at whatever time and with whatever speed they may see proper, and not inconsistent with the safety of the persons and property committed to their charge; but this right of the company over the land is no higher and no more extensive than that of the original owner; and hence, if their tract be unenclosed, they must run their engines and cars with reasonable care and prudence, so as to avoid injury to cattle which may be depasturing on the track; and if they fail to do so, they will be liable for the injury done; *Ib.*

36. *Same: Duty as to condition of the track, &c.* A railway company is bound by law to keep its road and machinery in good order, and to have a sufficient number of faithful and trustworthy employees to manage and control the running of its engines and cars; and if, by its failure in any of these respects, the cattle of another depasturing on its unenclosed track be injured or destroyed, it will be responsible to the owner in damages; and if it appear that the cattle were destroyed by the gross negligence or wilful and wanton mischief of its agents, the company will be responsible in exemplary damages; *Ib.*

37. *Same: Character of engineer.* It is competent for the plaintiff in an action against a railway company for damages done by it to his property, by the careless and negligent running of its engine and cars, to introduce evidence to show that the general character of the engineer in charge of the train when the injury was done, was that of a reckless and untrustworthy agent; *Ib.*

38. *Same: Mutual fault.* Though there be negligence on the part of the plaintiff, remotely connected with the injury, yet if the defendant's fault or negligence was the immediate or proximate cause of the injury, the plaintiff may maintain his action for damages; *Ib.*

39. *Only bound to exercise reasonable care.* Railway companies are bound to the exercise of the utmost care in the transportation of

passengers; but with respect to cattle depasturing on their track, they are bound only to the exercise of reasonable care and prudence, such as a man of ordinary prudence engaged in the same business would exercise, to prevent injury to cattle; *Miss. Cent. R. R. Co. v. Miller*, 40 M. 45.

40. *Burden of proof.* The burden of proof in such cases is on the plaintiff to show, negligence; *Miss. Cent. R. R. Co. v. Miller*, 40 M. 45; *N. O. J. & G. N. R. R. Co. v. Enoch*, 42 M. 603; *S. P., Memp. & Cha. R. R. Co. v. Blakeney*, 43 M. 218; *Raiford v. Miss. Cent. R. R. Co.*, *Ib.* 233; *Memp. & Cha. R. R. Co. v. Orr*, *Ib.* 279. The company is not bound to fence its road; it is only bound to use reasonable care to prevent injury; *Memp. & Cha. R. R. Co. v. Orr*, *supra*.

41. *Proof of negligence by conduct of employees.* But in proving negligence, the plaintiff cannot show that the employees of the company in charge of other trains, and at other times, were guilty of negligence; the proof must be confined to their conduct in the transaction which is the subject of the suit; *Miss. Cent. R. R. Co. v. Miller*, 40 M. 45.

41a. *Form of action.* The gravamen of an action against a railway company for injury done to stock on their road bed, is the company's negligence, and the proper form of action is trespass; and though the owner may waive his trespass and sue in *assumpsit*, still he cannot take judgment by default for the value of the stock, as stated in his bill of particulars; this must be determined on writ of inquiry; *Miss. Cent. R. R. Co. v. Fort*, 44 M. 423.

VI. Injuries and Wrongs to Passengers and third Persons.

See COMMON CARRIERS, 21 to 26.

1. Duty as to putting off Passengers.

42. *Same.* In the case of goods, the obligation of the carriers is to carry them to, and deliver them at, the proper station. In the case of passengers, the obligation is simply to carry to their proper station, and then to allow passengers sufficient time and opportunity to get off the train without danger of being injured. But the company are bound, however, to cause an announcement to be made, in a distinct and audible manner, to the passengers, by which they shall be informed of the arrival of the train at the station to which they have tickets. Personal warning to each passenger that the train has arrived at the station of his destination, is not required. The passenger is bound to take notice of the general warning given to all the passengers; *Southern R. R. Co. v. Kendrick*, 40 M. 374; *S. P., N. O. J. & G. N. R. R. Co. v. Statham*, 42 M. 607. And the same rules apply when the passenger is on a freight train; *Mobile & Ohio R. R. Co. v. McArthur*, 43 M. 186. And it is not the duty of the conductor to see to the debarkation of passengers; *N. O. J. & G. N. R. R. Co. v. Statham*, *supra*.

43. *Same: Where passenger is sick.* Sick persons, and those unable to take care of themselves, should provide for themselves proper assistance while travelling in railway cars. It is not the duty of the company to supply this. And if a passenger be unable to walk, and require assistance to get from the car, and a longer delay than usual is required for him to be safely removed from the car, he should give timely notice of the same to the conductor; *Ib.*

44. *Company liable for not allowing time to get off.* A railway company is liable for damages, if it fail to stop the train at the station of a passenger's destination, and carry him beyond, and then compel him to get off; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660.

44a. *Duty of company as to platforms, and as to stopping at stations, and putting off passengers.* A railway company is bound to provide proper platforms, for the convenience of passengers in getting off and on the train; and they are also bound to stop the train at the platform, sufficiently long to enable passengers destined for that station, to get off. If the train pass the platform, the company is bound to back it, on the request of a passenger whose destination is there, and the failure to stop at the platform, and to back when requested, is *prima facie* negligence, for which the company is liable. And where there is no platform, and no proper steps to descend from the car, it is the duty of the company to assist a passenger in debarking from the train; and, if in getting off without such assistance, he be injured without fault on his part, the company is liable; *Memphis & Charleston R. R. Co., v. Whitfield*, 44 M. 466.

See DAMAGES, 9a, 9b.

45. *Effect of failure of passenger to pay fare.* It is no ground of objection to the right of a passenger, to recover for a neglect of the company to allow him time to get off the train at the proper station, that the passenger did not pay his fare. The carrier had a right to put the passenger off, if he refused to pay his fare, or he could trust to the personal responsibility of the passenger, or rely upon his lien on the passenger's baggage, and this the carrier is presumed to do, unless he demand payment in advance. The passenger is in no default until he has refused to pay; *Hurt v. Southern R. R. Co.*, 40 M. 391.

2. Injuries to Passengers.

46. *Injury by collision.* In an action by a passenger on a railway, against the company, to recover damages for an injury done to him by a collision, proof that a collision did take place, and that the plaintiff was thereby injured, is *prima facie* evidence of negligence or want of skill, on the part of the servants of the company; and it casts the burden of proof on the company, to show that its employees in charge of the colliding locomotives were in every respect qualified, and that they acted with reasonable skill and the utmost caution, and that the

collision could not have been prevented by any human care or foresight; *N. O. J. & G. N. R. R. Co. v. Allbritton*, 9 G. 242.

47. *As to liability of railway companies for torts of their agents and the warranty of the company of the efficiency of their agents,* see PRINCIPAL AND AGENT, 34, 35, 36, 37.

47a. *As to liability for baggage of passengers,* see COMMON CARRIERS, 26.

3. Injuries to Persons not Passengers.

48. *Same.* As a general rule, railway companies are only liable for the want of ordinary care and prudence, in avoiding injuries to third persons not passengers; the strict rule requiring the utmost diligence, being applicable alone, when the party injured is a passenger. But this strict rule will be applied in favor of third persons, who have been injured by the agents of a railway company, where the latter were doing an unlawful act, or where the person injured had not equal means of avoiding the injury. Hence, where an injury was done to a third person, lawfully engaged in business on the track of another railway—the party inflicting the injury having no right to be there—the strict rule was applied; *N. O. J. & G. N. R. R. Co. v. Bulley*, 40 M. 395.

49. *Same.* And in such a case a warning given by the agent committing the wrong to the party injured, which if heeded, might have avoided the injury, is no defence to the company, for the injured party had no right to expect the infliction of the injury, and was therefore under no obligation to use means to prevent it; *Ib.*

VII. Liability for Punitive Damages.

See DAMAGES, 15 to 22.

50. *For punitive damages for killing cattle.* If cattle, depasturing on the unenclosed track of a railway company, be injured by the gross and wanton negligence of the employees of the company, punitive damages may be allowed; *Vicksburg & Jackson R. R. Co. v. Patton*, 2 G. 156.

51. *Exemplary damages where passenger is injured.* A railway company impliedly warrants, that its engineers, conductors, and other employees, engaged in running its trains, are possessed of due skill, and are competent and faithful, and it is under all circumstances liable for any injury occasioned by the misconduct, rashness, or negligence of such persons; and where the injury is caused by the gross negligence, or wanton and wilful misconduct of its employees, it is liable for exemplary damages; *N. O. J. & G. N. R. R. Co. v. Allbritton*, 9 G. 242; *S. P., Memphis & Charleston R. R. Co. v. Whitfield*, 44 M. 466. The rule is the same where the injury is to a third person; *N. O. J. & G. N. R. R. Co. v. Bailey*, 40 M. 395.

52. *Exemplary damages for not stopping at proper station.* In an action by a passenger against a railway company to recover damages on account of the company's agent having conveyed the plaintiff to a point beyond his

destination, and there compelling him to leave the cars; the jury are authorized, in assessing the damages, to allow not only just compensation for the injury, but to inflict proper punishment on the defendants for their disregard of public duty; and in such case they may take into consideration, in adjusting the punishment, the pecuniary means of the defendant; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660. But they are not bound to assess exemplary damages; that is a matter for their judgment and determination in each case, and within their province to allow or disallow; and hence, it will be error for the court to instruct the jury in such a case, that in assessing damages, it is their duty to inflict proper punishment on the defendant for a disregard of his public duty *Southern R. R. Co. v. Kendrick*, 40 M. 374.

53. *Same* Punitive damages are not allowable, as a matter of course, for every breach of duty by a common carrier to a passenger. They ought to be allowed, in case of negligence, only where the neglect and want of care are gross. If the negligence be not gross, and it be unattended with circumstances of insult, of aggravation of feelings, of injury to the person or property, or of mental or bodily suffering, punitive damages should not be allowed; *R. R. Co. v. Kendrick*, 40 M. 374. To warrant the jury in finding exemplary damages, either malice, violence, fraud or oppression must be shown to have mingled in the wrongful act complained of; *N. O. J. & G. N. R. R. Co. v. Statham*, 42 M. 607; or gross negligence, rudeness or caprice; *M. & C. R. R. Co. v. Whitfield*, 44 M. 466.

54. *Same*. The fact that the general character of the agent of the railway company who commits the wrong, is that of faithfulness, is no shield to the company where the agent is guilty of wrong doing; *Southern R. R. Co. v. Kendrick*, 40 M. 374.

55. *Same* Special damage need not be proven, in such a case, to enable the plaintiff to recover nominal damages; but where exemplary damages were claimed, it was held error to instruct the jury, that special damages need not be proven, because the charge was indefinite and calculated to mislead the jury; *Ib.*

56. *Same: Liability for exemplary damages for acts of the company's agents.* Railway companies are responsible in exemplary damages for the negligent and wrongful acts of their agents and employees; *N. O. J. & G. N. R. R. Co. v. Bailey*, 40 M. 395; *M. & C. R. R. Co. v. Whitfield*, 44 M. 466. See PRINCIPAL AND AGENT, 34, 35, 36, 37.

57. *Same: Instances.* In this case the jury gave damages to the amount of \$4,500, on account of the defendant carrying the plaintiff four hundred yards beyond the station of his destination; and then compelling him to leave the cars against his remonstrance, and contrary to his request, that they should back the cars to the station. The defendant moved for a new trial, because the damages were excessive, which was refused

in the court below. This court, on review, express their regret that the jury had not acted with more leniency, but under the rules of law applicable to the granting of new trials in such cases, they did not feel at liberty to disturb the verdict; *N. O. J. & G. N. R. R. Co. v. Hurst*, 7 G. 660.

In this case the evidence showed that the plaintiff, who was a passenger on the defendant's train, was sick and unable, without assistance, to leave the car. The train stopped the usual time at the station, but plaintiff failed to get off and the cars started, and on the conductor's being informed that plaintiff had not gotten off the car, he stopped the train a few feet beyond the platform where plaintiff was carried from the car without circumstances of insult or oppression. Exemplary damages were allowed, and the court decided that plaintiff was not entitled to them; *N. O. J. & G. N. R. R. Co. v. Statham*, 42 M. 607.

In this case the train passed the platform of the station at which the plaintiff (a passenger) was to get off, and stopped several hundred yards beyond it, in a low, wet and unusual place. The passenger demanded that the train should be backed to the platform, and the conductor gave the signal to back, but the engineer made no effort to obey. The conductor then informed plaintiff, that owing to the condition of the track and the grade, the train could not be backed, and that he must get out where the train was stopped. No special circumstances of insult, or oppression or tyranny appeared, but the conductor stood by and saw the plaintiff alight from the car without any effort to aid him in so doing, and without giving him warning and advice. The car in which the plaintiff was being carried was not a regular passenger car, provided with proper and usual steps, but had some steps underneath the car, which the conductor did not point out. The plaintiff used the ordinary precautions in jumping from the car, and on alighting on the ground, which was wet and icy, he dislocated one of his knees. The conductor made no apology, and expressed no regret for the injury. The jury allowed \$4,500 as damages, and the court held (it being shown that the injury was probably permanent), that whether the verdict be considered as being for compensatory damages, or exemplary damages, it would not be set aside. That if the former only, it was not too high; and, if it embraced the latter, the circumstances well warranted the finding of punitive damages. And the verdict was upheld, notwithstanding an erroneous charge given at the instance of plaintiff in relation to exemplary damages; *M. & C. R. R. Co. v. Whitfield*, 44 M. 466.

VIII. Liability for torts of their Agents.

58. See PRINCIPAL AND AGENT, 34 to 37, and ante, 56.

IX. Miscellaneous.

59. *Venue need not be stated in declaration.*

In bringing actions against a railway company, for an injury done to a passenger, it is not necessary to aver in the declaration that the principal place of business of the company is in the county in which the suit is brought, nor to aver that the injury was done in that county. By the Rev. Code, 492, art. 87, the venue need not be stated in the declaration; *Hurt v. Southern R. R. Co.*, 40 M. 391.

60. *Powers and duties of directors.* The powers and duties of railway directors, in the absence of regulations in the charter and by-laws of the company on the subject, are confined to their action at the meetings of the board, and they have no power, and are under no obligations to act for the company, in their individual capacity.

But by resolution of the board, a single director may be empowered to transact any business or agency of the company; and if there be no agreement, expressed or implied, to the contrary, the law will imply a promise on the part of the company to pay a reasonable compensation for such services; *Shackelford v. N. O. J. & G. N. R. R. Co.*, 8 G. 202.

See BANKS, 41.

61. *Act of 1854 exempting railroads from taxation.* By the 15th section of the Act of 27th February, 1854, incorporating the South-western Air Line Extension Company, (see Session Laws, ch. 354, p. 516), it is enacted: "That the fixtures and property of said company shall be exempt from taxation, for and during the full period of twenty years from the passage of this act; and that the privileges and benefits of this provision shall be extended to such railroad charters heretofore granted by the Legislature of this State, as well as those hereafter to be granted, unless specially excepted, and the same shall be a part of said charters." This provision exempts all the property of railway companies from municipal as well as State and county taxation; *Southern R. R. Co. v. Mayor, &c., of Jackson*, 9 G. 334.

62. *Same.* This privilege of exemption, granted by this act, is secured to companies then chartered, for twenty years from the passage of that act, and companies thereafter chartered, will be entitled to such exemption for twenty years from the date of their respective charters; *Id.*

Real Estate.

See FRAUDS, STATUTE OF. VENDOR AND VENDEE. REGISTRATION. EXECUTOR AND ADMINISTRATOR. EMBLEMENTS. DEEDS.

1. *A term for years is a chattel.* An estate for years in land is a chattel interest, and on the death of the tenant for years, before the expiration of the term, goes to his personal representatives, and not to his heirs, and it may be sold under an execution against the administrator; *Webster v. Parker*, 42 M. 465; *S. P., Montgomery v. Dillingham*, 3 S. & M. 647.

2. *Remedy against disseisors, &c.* All who

assist in turning a party out of possession, and retaining it from him, are responsible for the rents during the occupation of any one of them; and hence, where an administrator bought the land of his intestate at his own sale, but gave the deed in the name of another, and then sold to a sub-purchaser having notice of the fraud, it was held that the administrator and the person to whom he made the deed, and the sub-purchaser, were all liable for the rents during the whole time the heir was kept out of possession; *Howcott v. Collins*, 1 C. 398.

3. *Trees are realty.* The term "land" embraces not only the soil, but its natural produce growing upon and affixed to it. Such things are a part and parcel of the realty, and pass by a grant of land; *Harrell v. Miller*, 6 G. 700.

4. *As to number of acres in a section of land.* see DEED, 25a, et seq. 74a. LAND LAWS OF THE UNITED STATES, 33.

Recognizance.

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I. What is a Good Recognizance, and what it must Contain.

1. *Description of the offence.* A recognizance should always set forth the cause for which it was taken, but a specific description of the circumstances of the offence need not be stated. The crime of larceny is committed in every county into which the stolen goods are carried; and hence, where the recognizance taken by the committing magistrate recites that the original asportation was in another county, but it proceeds to bind the party to appear before the Circuit Court of the county in which he is committed, it will, nevertheless, be good, if an indictment shall be found in the court to which the cognizor is bound. It is not necessary, in such a case, that the recognizance should recite a new taking in the county in which the recognizance is taken; *Dean's Case*, 2 S. & M. 200.

2. *How it should require appearance of cognizor.* A recognizance requiring the prisoner to appear before the judge of the proper court at a regular term, to which the recognizance is returnable, is not for that reason bad; *Dean's Case*, 2 S. & M. 200.

The recognizance should require the appearance of the accused at the next regular term of the Circuit Court of the county, after it is taken. And if it be returnable at a day on which by law the Circuit Court is not in session, it is void; and a judgment on it, and the execution on the judgment, will be both void, and may be so treated and vacated by the court in which judgment was rendered; *Butler's Case*, 12 S. & M. 470. But the rule is the contrary under Revised Code of 1857; *Curry's Case*, 10 G. 511. If it is in all respects regular, except in omitting the year in which the party is to appear, it will

be good to secure his appearance at the next term of the court after the recognizance is taken; *Kellogg's Case*, 43 M. 57.

3. *Effect of changing time of holding the court.* If a recognizance be taken returnable at the proper time, as fixed by law when it is taken, and the Legislature subsequently change the time of holding the court, and direct all process issued, and recognizances taken to be returnable at the time fixed by the new act, a judgment *nisi* may be properly taken, if the cognizor fail to appear at the time fixed by the new act; *McEwen's Case*, 3 S. & M. 120.

4. *How returned to court.* Where a sheriff takes a recognizance from a prisoner arrested by him on a bench warrant, he should return on the writ the taking of the recognizance; a mere return of the recognizance with the writ, without anything to connect them except the mere recitals in the recognizance, will not do; *Overaker's Case*, 4 S. & M. 738.

II. Who may take Recognizances.

5. *The sheriff's power to take.* A sheriff has the power by statute (H. & H. 294, § 13) to take recognizances from all persons arrested by him under process from the Circuit Court, where the crime is bailable; and if the court fix the amount of the bail to be taken, and direct the clerk to endorse it on the capias, the sheriff may, on the arrest of the accused, take a recognizance in a different amount from the one thus prescribed; *McEwen's Case*, 3 S. & M. 120. But he has no power to take a recognizance, except only from a person whom he may arrest on process from a Circuit Court, and who is charged with a crime not capital. He has no such authority where a party charged with a capital offence has been brought before a judge on *habeas corpus*, and admitted to bail; *Pace's Case*, 3 C. 54.

6. *Termination of sheriff's power.* Under the Act of 1822 (H. C. 444, § 13), the sheriff's authority to take a recognizance from a party arrested by him under process emanating from a circuit court, does not terminate until after the prisoner has been legally discharged from his custody; and hence, if after a mistrial, the court order the accused to be admitted to bail in a sum specified in the order, and the sheriff, in pursuance thereof, take a recognizance from him and his surety, it will be valid—it not appearing that the accused had ever been discharged from the sheriff's custody after his arrest; *Brown's Case*, 3 G. 275.

7. *Power of sheriff to take recognizance: Where arrest is in term time.* If a bench warrant be issued in term time, returnable to that term, but not "forthwith," the sheriff, upon making the arrest, may take a recognizance of the prisoner to appear at a particular day of the term; but a forfeiture cannot be taken on it at the next term without notice. The recognizance is, however, good until the defendant's discharge by due course of law; *Moss' Case*, 6 H. 298.

8. *Vice chancellors may take.* The vice chancellor is by law a conservator of the peace, and as such has power to take recognizances in criminal cases; *Wofford's Case*, 10 S. & M. 626.

III. Miscellaneous.

9. *Judgment nisi.* Where a party was indicted in four different cases at the same term, and gave recognizances in each case, an entry of forfeiture by a mere recital that a forfeiture was taken "in these four cases," without naming them, is erroneous; *Overaker's Case*, 4 S. & M. 738.

10. *Same.* If the judgment *nisi* be for a less sum than that mentioned in the recognizance, though it is erroneous, it will not be set aside on the objection of the cognizors, because it is not to their prejudice; *Ditto's Case*, 1 G. 126.

11. *Variance between recognizance, judgment nisi, &c.* There should be no material variance between the recognizance, judgment *nisi* *scire facias* and final judgment; *Daingerfield's Case*, 4 H. 658.

A variance between recognizance and the *scire facias* issued to enforce the judgment *nisi* thereon, as to the term of the court to which the defendant was bound to appear, is material, and will be fatal to the validity of the *scire facias*, if the objection be properly made by plea, but not otherwise; *Ditto's Case*, 1 G. 126.

12. *Recognizance for criminal to appear before Supreme Court.* A recognizance, and not a bond, must be taken for the appearance of the accused before the Supreme Court, or else the writ of error will not operate as a supersedeas; *Craft's Case*, W. 537.

13. *Several recognizances.* Where the principal in a recognizance is bound in the sum of \$1500, and two sureties in the sum of \$750 each, it is error to enter judgment jointly against the sureties for \$1500; the judgment should be against each for \$750; *Dean's Case*, 2 S. & M. 200.

14. *Suggestion in High Court of death of cognizor.* A suggestion to the High Court that the principal in a recognizance was dead, before the judgment in the court below was rendered, cannot be noticed or inquired into by that tribunal; *Ib.*

14a. *Void recognizance.* A void recognizance, and all proceedings thereon, may be vacated at any time by the court in which the proceedings took place; *Buller's Case*, 12 S. & M. 470.

15. *What is a recognizance.* A recognizance is an obligation of record, entered into before a court or officer authorized by law to take it, with conditions to do some act required by law; and it can only be taken by an officer in cases authorized by law; *Pace's Case*, 3 C. 54.

16. *Surety's defence: Plea in abatement.* The sureties in a recognizance of bail cannot defend a *scire facias*, issued on a judgment *nisi*, rendered on a forfeiture of the recognizance, upon the ground that the grand jury

who returned the indictment into court, were illegally organized. The right to plead this in abatement of the indictment, is strictly personal to the accused, and can be exercised by him only on his appearance; if he plead in bar it will be a waiver of the abatable matter; *Borrow's Case*, 3 G. 203.

16d. *Act of 1846, continued.* The Act of 1846 (H. C. 1009, art. 12), which prescribes the mode in which parties committed to jail may be bailed, has reference to commitments made by "a jury, justice of the peace or other officer," and not to commitments under process issued from the Circuit Court; *Brown's Case*, 3 G. 275.

17. *Recognizance as a part of the record.* On a writ of error to a judgment by default final rendered on a *scire facias* to enforce a judgment *nisi*, entered on a forfeited recognizance, the defendant cannot bring to the notice of the High Court anything contained in the recognizance, because after judgment *nisi* by default and *scire facias* thereon, the recognizance is not properly a part of that proceeding; *Ditto's Case*, 1 G. 126.

Record.

See CRIMINAL LAW, sub-division Record, JUDGMENT. EVIDENCE.

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I. What is a Part of the Record.

1. *Other records read in evidence.* Whatever is mere evidence in the court below, though it be a record, is no part of the record of that trial, unless made so by bill of exceptions. And hence, on the trial of a motion to quash a forthcoming bond, that paper itself, and the original judgment and execution, though read in evidence on the trial of the motion, are no part of the record of that proceeding, and will not be noticed in the High Court on writ of error to the judgment on the motion. And this is so, though those documents be copied as a part of the record, by the clerk, and it be stated in the bill of exceptions that they were read on the trial of the motion. To constitute them a part of the record, they must be incorporated in the bill of exceptions; *Abbott v. Hackman*, 2 S. & M. 510; *Merrett v. Vance*, 6 H. 498; *Huston v. Hayter*, 1b. 580; *S. P., Shields v. Graves*, 1b. 262; *Grigsby v. Francis*, 2 H. 845; *Sprawles v. Barnes*, 1 S. & M. 629; *Matthey v. Totten*, 2 id. 52.

In a proceeding under the statute for the trial of the right to property levied on under execution, the execution levied is no part of the record, unless made so by bill of exceptions; *Ross v. Garey*, 7 H. 47.

2. *Affidavits.* An affidavit for a new trial is no part of the record, unless made so by bill of exceptions; *Ross v. Garey*, 7 H. 47. But an affidavit for a writ of replevin is a part of the record; *Newell v. Newell*, 5 G. 385.

3. *Depositions.* A deposition in the Circuit Court is no part of the record, unless certified in a bill of exceptions; *McRaven v. McGuire*, 9 S. & M. 34. Depositions taken in the Probate Court are not necessarily a part of the record, except upon appeal, or writ of error; *Lipscomb v. Postell*, 9 G. 476.

4. *Motions.* Every motion made in a cause is as much a part of the record as the declaration, plea or judgment; *Puckett v. Graves*, 6 S. & M. 384. A motion for a new trial is a necessary part of the record, and cannot be certified in the bill of exceptions; *N. O. J. & G. N. R. R. Co. v. Allbrinton*, 9 G. 242. A letter accompanying a motion to dismiss, is no part of the record; *Torrance v. Betsy*, 1 G. 129.

5. *Plea not marked filed, a part of the record.* If the record certified to the High Court contain a plea in the proper place, but be without any statement, as to when it was filed, it will be presumed, notwithstanding judgment by default entered, that it was filed in proper time, before the entry of the judgment; *Tomlinson v. Hoyt*, 1 S. & M. 515.

6. *Special venire.* A special venire is no part of the record, and objections to it will not be noticed, unless it be incorporated in a bill of exceptions; *Newcomb's Case*, 8 G. 383.

7. *Judge's notes no part of record.* See JUDGE'S NOTES.

8. *Writ.* Under the practice in this State, the writ is a part of the record; *Walker v. Walker*, 6 H. 500.

9. *Papers sued on and filed with the declaration.* As to this, see PLEADINGS, 13. 14.

9a. *Record of final settlement in Probate Court.* The final account of an administrator, the citations and publications, and the orders and decrees of the court in respect thereto, constitute the record of that proceeding; *Dogan v. Brown*, 44 M. 235.

9b. *What constitutes the record.* The several courts are required to keep a record of their proceedings. That record is the official evidence of the orders and judgment of the court. These, together with the papers on file, which constitute the writ, pleadings, &c., are directed to be transcribed into a book, which in our system is the final record; *McKnight v. Dozier*, 44 M. 606.

II. Construction of Record.

9c. *How construed.* The court will construe the whole record together, and if it be contradictory, will not give it such a construction as will defeat its own end; *Lovelady v. Harkins*, 6 S. & M. 412; *Wooten v. Wingate*, 1d. 271. See JUDGMENTS, 44 to 54.

10. *Same: Case in judgment.* A statement in the record, that a *cognovit actionem*, signed in the partnership name by one of the partners, was proved to have been executed "by the defendants," will be construed to mean, that all the partners who were served with process, assented to and authorized the execution of the *cognovit*; *Hull v. Garner*, 2 G. 145.

11. *Same.* If a demurrer be filed to a plea, and it appear from the record that the defendant pleaded over, under a judgment of *respondent ouster*, this sufficiently shows that the demurrer was sustained; and if the plaintiff then file a demurrer to the second plea, and there be no disposition made of that demurrer, and the parties go to trial on the issues already made up, this will be a waiver of the last demurrer; *Smith v. Elder*, 7 S. & M. 507.

III. Proof and Impeachment of Record.

12. *Judgments can only be proven by the record.* Judgments of courts of record can only be proven by the record itself (if it be not lost or destroyed). A judgment cannot be proven by a memorandum on the judge's docket, or any paper connected with the cause; *Gilbert v. McEachen*, 9 G. 469; *Burney v. Boyett*, 1 H. 39; *Dickson v. Hoff*, 3 id. 165; *Russell v. McDougall*, 3 S. & M. 234; *Steen v. Steen*, 3 C. 513; *Eakin v. Vance*, 10 S. & M. 549.

See EVIDENCE, 113, 114, 115, 115a.

13. *Writ may be proven by parol.* See EVIDENCE, 115.

14. *Impeachment of record.* The record of a judgment must be tried by itself; it imports absolute verity; and if a party desire to controvert it, he must rely alone upon the record for that purpose; and if he desire to controvert the correctness of a transcript duly certified, he must introduce as evidence, a transcript of the entire record, as entered in the court below. He cannot do so by getting a transcript of that particular part, which he alleges to be wrong; nor by the testimony of the clerk, that that part is wrong in the transcript furnished to the other party, and giving a correction of it in his deposition; *Mandeville v. Stockett*, 6 C. 398.

15. *Same.* A record imports absolute verity, and must be tried by itself; it cannot be impeached by parol evidence; and hence, it is incompetent to show by the testimony of the clerk of the court, that the final record was made up by an unsworn deputy, and embraced a judgment not entered on the minutes of the court; *Shirley v. Farne*, 4 G. 653 (citing *Mandeville v. Stockett*, *supra*). As to the difference between judgment on the minutes and judgment on final record, see JUDGMENT, 120.

15a. *Same.* But for the record to have this effect, it must show on its face that the court had jurisdiction over the parties and the subject matter; *Dogan v. Brown*, 44 M. 235.

IV. Miscellaneous.

16. *Record of High Court as evidence.* In a suit on an executor's bond to recover the amount of a decree rendered against an executor in the Probate Court, the record of that proceeding remaining in the Probate Court, is the original and best evidence of the rendition of the decree; and a copy of the said record, certified by the clerk of the High Court, as the record was transmitted to

the court upon an appeal, is merely secondary evidence, and cannot, therefore, be admitted as evidence, except upon proof of loss or destruction of the original; *Lipscomb v. Postell*, 9 G. 476.

17. *Must show swearing of the jury.* The record must show that the jury were sworn to try the issue; if it show that the jury were sworn to try "causes," it will be error; *Buck v. Mosley*, 2 C. 170 (citing *Beall v. Campbell*, 1 H. 24; *Wolfe v. Martin*, 1b. 30; *Irwin v. Jones*, 1b. 497). See JURY, 28, 29, 30.

18. *Record as to.* If the record recite the jury were sworn to try the issue between the parties, when in fact there was no issue submitted, it is a clerical error, and will not vitiate the verdict; *Garrett v. Felt*, 3 G. 137. And so if the record recite that the jury were sworn "a true verdict to give according to the evidence," it will be presumed that they were properly sworn; *Welborn v. Spears*, 3 G. 138.

19. *Secondary evidence.* Secondary evidence of the contents of a lost or destroyed record is admissible upon proof that it once existed, and that it has subsequently been lost or destroyed; *Martin v. Williams*, 42 M. 210. See EVIDENCE, 113.

Redemption Law.

1. *Statute.* The Act of 1842 (H. C. 928, art. 20), provided that the debtor, whose lands were sold under execution, or decree in chancery, should have two years in which to redeem the same, upon paying to the purchaser the purchase money, and ten per cent. interest on the same. It was also provided that any *bona fide* creditor of the debtor might redeem, on the same terms, and by offering to credit the debtor with at least ten per cent. on the redemption money, unless the purchaser would secure to such creditor the amount so offered to be credited. And it was also provided, that if the purchaser was a creditor of the defendant in execution, that upon an offer to redeem or advance, by another creditor, he might keep the land by giving credit to the debtor for the amount so offered to be advanced on his bid.

2. *Right of vendee of debtor to redeem.* The vendee of a debtor, who purchased from the debtor before a sale of the land under execution, is substituted to the right of redemption which the judgment debtor has under the 1st section of the Act of 1842. Hence, where another judgment creditor of the vendor (defendant in execution) has, under that act, redeemed from the purchaser at sheriff's sale, the vendee of the judgment debtor can redeem from the creditor thus redeeming, or force him to credit his execution with an amount more than what the vendee is willing to pay for redemption, less what such creditor has paid out to redeem from the purchaser at sheriff's sale; *Watson v. Hannum*, 10 S. & M. 521.

3. *Same: Offer to redeem.* And in such a case, if the vendee (of the judgment debtor)

file his bill to redeem within the two years limited for the tender of the redemption money, and offer in it to pay whatever redemption money is due, it will be a sufficient offer to redeem; and the Chancery Court will then compel the judgment creditor who has redeemed from the purchaser at sheriff's sale, to state the *ultimatum* to which he will advance, on the money paid for redemption, and with which he will credit the execution; and the court will submit that to the option of the vendee to pay or not; *Ib.*

4. *Same.* This case was remanded to the Chancery Court, and the judgment creditor then filed a written offer to credit the execution against the judgment debtor with \$2,500, and the complainant (the vendee of the judgment debtor) asked and obtained leave to amend his bill, and then insisted on his right to the land, without advancing on this written offer. This conduct was held as a refusal to make an advance on the written offer of the creditor to credit the debtor with \$2,500, and the bill to redeem was dismissed; *Hannum v. Cameron*, 12 S. & M. 509.

5. *Redemption when the sale was for depreciated currency.* When the property was sold at sheriff's sale for depreciated bank notes, and a judgment creditor has redeemed by paying the value thereof in specie, the person entitled to redeem from him need pay only the specie value with the statutory interest; *Watson v. Hannum*, 10 S. & M. 521.

6. *Constitutionality of the redemption law.* The question of the constitutionality of the redemption law was presented in this case, but the court declined to decide it, on the ground that it was not essential to a decision of the case, saying they would not decide on the question, unless a case was presented which imperatively demanded a decision of that point; *Rollins v. Thompson*, 13 S. & M. 522.

Refunding Bond.

See DESCENT AND DISTRIBUTION, 42, *et seq.*

Registration.

See DEEDS, sub-division Registration. PERSONAL ESTATE.

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I. Three Years' Possession without Registration.

1. *Effect.* As to effect of three years' possession by loanee, &c., under the statute of frauds, without registration, see FRAUDS, STATUTE OF, 4 to 9.

2. *Possession need not be adverse.* The possession, by the bailee of property, need not be adverse, in order to bring it within the provision of the statute which enacts that the title shall be considered with the possession, when continued for three years, as to

creditors and purchases, without notice; *Palmer v. Cross*, 1 S. & M. 48 (overruling, on this point, *Moseby v. Williams*, 5 H. 520).

II. What Instruments are to be Recorded.

3. *Deeds to personally.* The 4th section of the Act of 1822 (H. & H. 344), requiring deeds to personally, in certain cases, to be recorded in the county where it is situated, does not apply to deeds made to property not within the State when the conveyance was made, nor to deeds made before the passage of the act; *Palmer v. Cross*, 1 S. & M. 48; S. P., *Taylor v. Stone*, 13 S. & M. 652; *Prewett v. Dobbs*, *Ib.* 431; *Presley v. Rodgers*, 2 C. 520.

See FRAUDS, STATUTE OF, 4.

4. *Foreign deed in trust.* It is not necessary that a foreign deed in trust should be registered here, in order to protect the interest of the *cestui que trust* against the claims of the creditors of the grantor in the deed, or of the trustee. But a *bona fide* purchaser of the legal title, without actual notice, will be protected in equity, unless the deed be registered here, notwithstanding its registration in the State where it was made; *Wyse v. Dandridge*, 6 G. 672.

See CONFLICT OF LAWS, 39.

5. *Registration laws have no extra-territorial force.* The registration laws of a State do not operate extra-territorially; nor do those of one State operate upon conveyances made in another State, unless express words to that effect be inserted in the statutes. Hence, if a mortgage be duly executed in this State, and registered here, and the property mortgaged be then removed to another State, and there sold, and then removed back to this State by the purchaser, the property will still be liable to the mortgage, it not being necessary that the mortgage should have been recorded in the State where the slave was sold, in order to defeat the title of the purchaser there; *Hundley v. Mount*, 8 S. & M. 387.

6. *Absolute deed to personally need not be registered.* An absolute deed to slaves or other personally, free from any trust, or condition, or reservation, need not, by the laws of this State, be registered, and, as a necessary consequence, a certified copy of such deed, taken from the registration, without due proof of the execution of the original, and accounting for its absence, is not admissible in evidence. The certificate of acknowledgment and recording such a conveyance, amounts to nothing upon the point of its admissibility in evidence; *Thomas v. Grand Gulf Bank*, 9 S. & M. 201. That such unnecessary recording of an absolute conveyance of personally is suspicious, see FRAUDULENT ASSIGNMENT, 42.

7. *Same: Equitable mortgage.* Where an absolute bill of sale, which need not be recorded, is accompanied by possession of the vendee of the property sold, and it is converted into an equitable mortgage by a court of chancery, it will be valid without registra-

tion, for equity will not make the conversion to the prejudice of the vendee, in this respect. The general rule is, that the instrument which gives rise to an equitable mortgage, must be registered, if it be not an absolute conveyance, but merely an instrument which raises a trust to secure a debt; *Humphries v. Bartee*, 10 S. & M. 282.

8. *Deeds of gift of personalty may be recorded.* The second section of the statute of frauds (H. C. 638), provides for the registration of deeds of gift to personalty, and gives efficacy and validity to such deeds when recorded, in certain important legal respects; and hence, a certified copy of such a deed, duly proven or acknowledged and recorded, is competent evidence; *Cogan v. Frisby*, 7 G. 178.

9. *Certificate of entry from United States land office.* The registration laws of this State do not apply to certificates of entry of land from the general government, or to assignments of such certificates; a purchaser of land, therefore, at a sheriff's sale, made under an execution emanating from a judgment rendered against the original enterer, and after assignment of the certificate by him to a third person, will not acquire a good title, though he had no notice, either actual or constructive, of the assignment; *Martin v. Nash*, 2 G. 324; *Huntington v. Allen*, 44 M. 654. The assignment is good, without registration, as against a purchaser, when the assignee is in possession; *Willy v. Hightower*, 6 S. & M. 345.

10. *Power of attorney to sell land.* A power of attorney to sell and convey land is a contract in relation to land, and is embraced in the statute of 1822 (H. C. 606 § 6), which provides that "every title bond or other written contract in relation to land, may be proven, certified, or acknowledged and recorded, in the same manner as deeds for the conveyance of land;" *Hughes v. Wilkinson*, 8 G. 482.

10a. *Marriage settlements.* See DEED, 53.

III. Proof and Acknowledgment for Record.

See DEED 41, *et seq.* CERTIFICATE OF ACKNOWLEDGMENT.

12. *Proof of deed in sister State: Case in judgment.* A deed in trust, executed in Tennessee, upon personalty in this State, and proven by two subscribing witnesses before the Circuit Court of that State, to have been duly executed, is not sufficiently proven for registration, according to the laws of this State, as they existed prior to the Act of 1841 (H. C. 617). Whether it would be good under that act not decided; *Tillman v. Cowand*, 12 S. & M. 262.

See DEED, 44d.

12a. *One subscribing witness sufficient.* One subscribing witness is all that is necessary to a deed, and proof by him is sufficient to entitle it to registration; *Wilkins v. Wells*, 9 S. & M. 325; and if there be two, proof by one is sufficient; *Shirley v. Fearne*, 4 G. 653.

See DEED, 44b, 44c.

13. *Registration without sufficient authentication.* See DEED, 55.

IV. Non-registration, Notice, &c.

14. *Registration not necessary between the parties.* It is not necessary to the validity of a deed in trust that it be registered, or that its execution be proven; as between the parties to the deed and all others claiming under them through it, the deed will be as valid without registration as with it; *Hill v. Samuel*, 2 G. 307.

15. *Notice equivalent to registration.* The object of the registration laws is to give notice of the conveyance; and notice is equivalent to registration, and creditors as well as purchasers, are bound by notice of an unregistered deed; *Dixon v. Doe*, 1 S. & M. 70; *Henderson v. Downing*, 2 C. 106; *Cohen v. Carroll*, 5 S. & M. 545; *Perkins v. Swank*, 43 M. 349.

16. *Class of creditors who can avoid unregistered deed.* What class of creditors have a right to avoid an unregistered deed of which they have no notice, is not determined in this case; but it is said by the court, that the reason of the statute confines the right to those who gave credit to the grantor on the faith of his apparent ownership of the property; and hence, those who became creditors before the conveyance was made, and those who became such after it became known, have no right to avoid it; *Dixon v. Doe*, 1 S. & M. 70; *sed vide*, *Pickett v. Banks*, 11 S. & M. 445, digested in DEED, 53. See also DEED, 45, for further explanation of the rule; also, VENDOR AND VENDEE, 64; HUSBAND AND WIFE, 38a.

17. *What is notice.* Possession by the grantor is notice of an unregistered deed; *Dixon v. Doe*, 1 S. & M. 70; *Hall v. Thompson*, 1b. 443; *Willy v. Hightower*, 6 S. & M. 345; *Walker v. Gilbert*, 7 S. & M. 456; *Humphreys v. Bartee*, 10 S. & M. 282; *Jones v. Soggins*, 8 G. 546.

18. *Party claiming through unregistered deed bound to take notice of it.* Where a party cannot make out his title but by a deed which leads him to another fact, he shall be presumed to have notice of that fact. Hence, the purchaser of land at sheriff's sale, under an execution against the original enterer of the land from the United States Land Office, will be held to have notice of the assignment of the certificate of entry by the judgment debtor made in the land office before the rendition of the judgment; *Martin v. Nash*, 2 G. 324.

19. *That registration is no notice to a party not compelled to deraign title through the party creating the lien.* See DEED, 44e, 44f.

20. *Non-registration as to creditors.* The statute requiring registration of deeds, and providing that in default thereof the deed shall be void as to the creditors of the grantor, makes the land so conveyed liable to a judgment rendered after sale and before registration according to law, if the creditors have no notice of the conveyance, so that the actual

interest of the debtor may be sold under the judgment as it existed without the conveyance. But it does not enlarge the liability of the land to the payment of the grantor's debts; and hence, if the grantor had only a legal title, and the beneficial interest was in another, whereby it was not liable for the grantor's debts, his conveying the land in obedience to a contract of sale made by the beneficial owner, and the failure to record that conveyance, will not render it liable to his debts; *Kelly v. Mills*, 41 M. 267.

V. Miscellaneous.

21. *Where registration shall be made.* See DEED, 50.

22. *Certified copies of deeds as evidence.* See DEED, 51, 52.

23. *Seal of court need not be registered.* The statute does not contemplate the registration of the impression of the official seal of an officer taking an acknowledgment. If the record state on its face it was made under the official seal of the officer it will be good, though no impression or *locus sigilli* appear on it; *Griffin v. Sheffield*, 9 G. 359.

See BILL OF EXCEPTIONS, 11.

24. *Registration is notice.* The registration of a paper required by law to be registered is notice to all subsequent purchasers and to all the world, of the rights thereby secured. All persons are bound to take notice of it; and a person buying afterwards from the grantor, cannot be a *bona fide* purchaser without notice; *Learned v. Corley*, 43 M. 687.

Relation.

See LAND LAWS OF UNITED STATES, 3, 6, 13, 21, 22.

1. *Relation on confirmation of void grant.* The doctrine of relation does not apply so as to make the confirmation of a void grant relate back to its date, and thereby to affect the rights of third parties immediately acquired; *Montgomery v. Ives*, 13 S. & M. 161.

2. *Relation on consummation of good title.* The doctrine of relation applies where there is a contest between legal titles; and then the court will inquire into the successive stages of the title from its incipient state until its consummation by grant; and if it be found regular and according to law in these progressive stages, the grant will relate back to the inception of the right, and have dignity accordingly. But the doctrine has never been applied so as to dispense with the necessity of the plaintiff's having a legal title at the commencement of his suit; for though the legal title will relate back to its inception, so as to defeat subsequent claimants or encumbrancers holding adverse to the right, yet in fact the legal title exists only from the date of its acquisition, and cannot be given in evidence to sustain an action of ejectment commenced before its acquisition; *Laurissimi v. Corquette*, 3 C. 177.

3. *Relation as to sheriff's deed.* The de-

livery of a sheriff's deed need not take place on the day it is signed, or on the day of sale, in order for it to take effect from the day of sale. The delivery of the deed dated on the day of sale, though, made afterwards, relates back to that period, especially when the sheriff acknowledges that it was delivered on the day of its date; *Kane v. Mackin*, 9 S. & M. 387.

4. *The doctrine further explained.* The doctrine of relation as equally recognized at law and in equity; and by it in either court, all the several acts, parts and ceremonies necessary to complete a conveyance, shall be taken together as one act, and operate from the date of the substantial part. Thus, under the treaty of Dancing Rabbit Creek, certain reservations were made to the Choctaw Indians, and where these reservations were afterwards located on particular tracts of lands, they operated from the date of the treaty by relation, and passed the title from that time; *McAfee v. Lynch*, 4 C. 257.

5. *Same: Case in judgment.* If the equitable title of the ancestor be perfected in the possession of the heir, the title will relate back to its inception, and so far as the rights of the creditors of the ancestor is concerned, will be considered as perfected in his lifetime; *Doe ex dem. Starke v. Gildart*, 5 H. 606.

6. *Relation of deed in chancery.* A deed conveying title to land out of the defendant, and vesting it in the complainant, executed by a commissioner appointed for that purpose, by a decree of the Chancery Court, will relate back to the commencement of the suit, so far as the rights of defendant, and those claiming under him, by title, commencing since the service of process is concerned; *Shotwell v. Lawson*, 1 G. 27.

Release.

1. *Release of error.* A release of errors, if founded on a valuable consideration, is binding, and may be pleaded in bar to a writ of error. Forbearance to sue out a writ of *habere facias possessionem* is a sufficient consideration for a release of errors in the judgment; *Barnes v. Moody*, 5 H. 636.

2. *Release of mortgage, &c.* Whether a mortgage or other lien by deed or bond, for the payment of money, is released or extinguished by payment alone without a formal release; *Quære?* *McCorkle v. Brown*, 9 S. & M. 167. See MORTGAGE, 69, 70.

3. *Release by parol.* The release of a debt due by open account, if made without a valuable consideration, must be by writing under seal—a verbal release will not do; *Young v. Power*, 41 M. 197. And so a declaration of the creditor to the surety, that he was indebted to the principal by open account, and that there was to be a settlement between them, and he would not, therefore, hold the surety further bound to pay the debt, is not good as a release, yet, it is *prima facie* an acknowledgment of payment, and will defeat a recovery against the surety, unless the

creditors show affirmatively that the claim of the principal against him is insufficient to pay the debt; *Foster v. Walker*, 5 G. 365. See ACCORD AND SATISFACTION, 2.

4. *Covenant not to sue.* A covenant by the creditor not to sue the debtor, is equivalent to a release of the debt; *Stebbins v. Niles*, 3 C. 267.

5. *Release of one of several joint debtors.* Under the statute (H. C. 555-6), if one of several joint debtors be released, the others will only be liable, each for his *pro rata* share of the whole debt; *Work v. Harper*, 2 C. 517.

Remainder and Remainderman.

See LIMITATION OF ESTATES.

1. *Remainderman's right to ultimate security.* A remainderman in personalty is not entitled to security from the tenant of the prior estate, to indemnify him against loss or destruction of the estate, unless the estate is in danger of being wasted; *Beck v. Montgomery*, 7 H. 39.

A court of equity, however, will interpose and grant relief upon a *bill quia timet*, to the remainderman of personal estate, when there is any danger of loss or deterioration, or injury to it, in the hands of the party entitled to the present possession, or where there is just ground to believe that it will be removed and placed beyond the reach of complainant, before his right of possession will accrue; *Gibson v. Jayne*, 8 G. 164.

2. *Laches of tenant of particular estate.* No laches will be imputed to a remainderman, nor will he be affected by the laches of the tenant of the particular estate; *Ib.*

3. *Sale by the tenant in possession.* The right of a remainderman entitled to a chattel under a deed which has not been recorded, will not be defeated by a sale thereof, made by the tenant of the particular estate in possession; if such possession has not continued for three years before the sale; nor even then, if the purchaser had notice of the remainderman's right. See H. C. 638, § 2, Rev. Code of 1857, 358, art. 2; *Ib.*

4. *Statute of limitations.* The statute of limitations will not commence running against a remainderman, until the determination of the particular estate; *Ib.*

5. *Same.* The tenant for life and the remainderman of personal estate, who join in a bill for its recovery, have not such a joint interest in the property, as will cause the statute of limitations to commence to run against both, if, at the time, the cause of action accrues to one, he be under no disability to sue; *Ib.*

See LIMITATION OF ACTIONS, 129 to 135.

6. *That distribution to life tenant is also distribution to remainderman*, see DESCENT AND DISTRIBUTION, 45, 46, 46a.

7. *Remainder to children.* Where a particular estate is carved out with a limitation over to the children of the person taking that interest, or to the children of any other per-

son, such limitation will embrace not only the objects living at the testator's death, but all who may subsequently come into existence before the period of distribution; *Nichols v. Denny*, 8 G. 59.

Remittitur.

1. *Power of counsel to make.* Counsel have power to enter a remittitur; *Pickett v. Ford*, 4 H. 246.

2. *Excess in forthcoming bond may be remitted.* The plaintiff, in a forthcoming bond, may enter a remittitur for an excess in the amount of the penalty, and thereupon a motion to quash the bond on that ground will be overruled; *Ridgeway v. Marshall*, 5 H. 286.

3. *Remittitur in High Court.* Where the judgment is for a greater sum than the damages claimed in the declaration, the defendant in error may cure the defect by releasing the excess in the High Court. And on entering such remittitur, the court will reverse the judgment below, and enter judgment for the proper amount; *Hurd v. Germany*, 7 H. 675.

Replevin.

See DETINUE. DISTRESS.

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I. The Right to the Writ, and where it Lies.

1. *Plaintiff must have right of possession.* To maintain this action, the plaintiff must have the right to the immediate possession of the property sued for. This is the rule at common law and under the statute; *Frizell v. White*, 5 C. 198; S. P., *Lloyd v. Goodwin*, 12 S. & M. 223.

2. *Defendant must be in possession.* Replevin can be maintained only against a party in possession at the time the writ is sued out. If the defendant, though a wrong-doer, part with the possession before the writ is sued out, the action cannot be maintained; *McCormick v. McCormick*, 40 M. 760. The rule is the same in detinue.

See DETINUE, 2.

3. *Lies against a sheriff.* Replevin will lie in favor of the owner of goods against a sheriff, who has wrongfully seized them under an execution against another. The owner, in such a case, is not bound to resort to his remedy under the act allowing him to propound his claim, and have an issue made up to try the right of property. He has an election to choose that remedy, replevin or trespass; *Farborough v. Harper*, 3 C. 112. The rule is the same where the property is seized under attachment; *Ford v. Dyer*, 4 C. 243; *Hopkins v. Drake*, 44 M. 619.

4. *Plaintiff must have title or right to possession.* Replevin cannot be maintained by one who has neither the legal title nor the

right to the possession of the chattel, and if one be in possession, and be tortiously deprived of it, but have no title, this possession will not enable him to maintain replevin in any other character than the one in which he held it. Thus, the husband, being in possession as such, after the death of the wife, cannot maintain replevin, as guardian for the wife's issue, to recover a slave held by the wife under the Act of 1839, against one wrongfully depriving him of the possession. The administrator of the wife should bring the suit; *May v. Rockett*, 3 C. 233.

5. *Joint owner cannot maintain*. One joint owner of property cannot maintain replevin for it against the other. Two jointly owned 1000 lbs. of cotton, and they directed the ginner to pack it in two equal bales, one for each. The bales when packed were unequal in weight, and one was taken by each—both being ignorant of the inequality. The plaintiff having the lesser bale, insisted that both should be carried back to the press and re-packed, so as to be equal; the defendant refused, but offered to let plaintiff take his share out of the heavier bale: *Held*, there had been no partition as to the heavier bale, and replevin would not lie; *Holton v. Binns*, 40 M. 491.

6. *Right of administrator*: When his cause of action accrues. The right of action of an administrator to recover property illegally taken or detained after the intestate's death, and before the administrator's appointment, accrues at the date of the appointment, and if replevin be brought within one year from that time, it will be sufficient; *Windham v. Williams*, 5 C. 313.

7. *Demand before suit brought*. It is not necessary to the maintenance of the action of replevin, under the statute giving the remedy where either the taking or detention is wrongful, that there should be a demand before action brought, even where the action is in the *detinet*. But if the original possession was rightful and no demand be made, the defendant may tender the property to the plaintiff, and upon its delivery, may, by proper plea, discharge the action, and the plaintiff may even be adjudged to pay the costs. But if the defendant contest the action, that will be a sufficient refusal and the bringing of the action a sufficient demand; *Dearing v. Ford*, 13 S. & M. 269; S. P., *Newell v. Newell*, 5 G. 385; S. P., in *detinet*.

See *DETINET*, 8.

II. The Affidavit.

8. *Sufficiency as to statement of the time of accrual of action*. An affidavit for replevin, under the statute, stated that the plaintiff's cause of action against W., the defendant, accrued within one year. It was objected that it was insufficient, because it did not aver that the cause of action to recover generally had accrued within one year, and the defendant might have obtained possession from another, and as to him the cause of action might not have accrued within one year:

Held, that the affidavit was sufficient, as the defendant could rely in his defence, upon the fact (if it existed) that another had had adverse possession prior to him, so that the whole adverse possession would be for a longer period than one year before the commencement of the suit; *White v. Graves*, 2 C. 166.

9. *Affidavit part of record*. The affidavit, which is the foundation of the action of replevin, is a part of the record; *Newell v. Newell*, 5 G. 385.

10. *Correspondence between affidavit and declaration*. If the affidavit set out only a wrongful detention, it will be improper to allege in the declaration both a wrongful taking and a wrongful detention, for the damages, which might be recovered, are liable to be increased by circumstances of aggravation attending a wrongful taking; *Ib.*

11. *Proof of lost affidavit*. If a motion be made to quash a writ of replevin, upon the ground that the preliminary affidavit required by the statute, was not made and filed, it is competent for the plaintiff to show by parol proof that a sufficient affidavit was in fact made and filed, and that it had been lost or mislaid; *Morgan v. Morgan*, 2 G. 546.

III. The Declaration.

12. *Correspondence between declaration and affidavit*. See *ante*, 10.

13. *Declaration is divisible*. A declaration in replevin for the recovery of a chattel, and for damages for the wrongful detention or taking, is divisible; and hence, a demurrer to the whole will be overruled, if it be sufficient, so far as it relates to the recovery of the chattel, although defective in reference to the damages claimed; *Newell v. Newell*, 5 G. 385.

14. *Use in action of replevin*. A declaration in replevin was in the name of A., for the use of B., and a demurrer was interposed on that ground: *Held*, that the demurrer must be overruled. That a suit may be brought in the name of the trustee, having the legal title, for the use of another to whom he has transferred the avails of the suit, and that this did not make the use a party, but the plaintiff was A., and if judgment were rendered for the defendant, it would be against A. and not against B.; *Pearce v. Twitchell*, 41 M. 344 (citing *Peck v. Ingraham*, 6 C. 246).

See *NOMINAL PLAINTIFF*, 3.

IV. Pleas and Evidence.

15. *Evidence under general issue: Award*. The defendant in an action of replevin, may, under the general issue, introduce in evidence the award of arbitrators, settling the title and right of possession of the property in dispute; *Newell v. Newell*, 5 G. 385.

15a. *Same: Incapacity of party to make a deed*. The defendant, in an action of replevin, may, under the plea of not guilty, impeach the validity of a deed purporting to be executed by him, and offered in evidence by the plaintiff, by showing his incapacity to

execute it; in such a case it is unnecessary to plead specially the incapacity to contract, as the title to the property, and not the evidence to support it, is put in issue by the pleadings; *Odum v. Harris*, 5 G. 410.

17. *Evidence of value.* In an action of replevin for a slave, the jury cannot assess the alternate value of the slave, without some evidence as to value, or some evidence as to the age and qualities of the slave; *Parr v. Gibbons*, 5 C. 375.

See *DETINUE*, 4.

V. The Verdict.

18. *Must assess separate value of each article recovered.* A verdict for the plaintiff, in an action of replevin, must assess the separate value of each article embraced in the finding. Whatever, in common understanding, is regarded as parts of a whole, may be assessed together—as a carriage and harness; but where the articles are clearly distinct, as carriage and horses—they must be assessed separately; *Drane v. Hiltzheim*, 13 S. & M. 336.

See *DETINUE*, 5, 6, 6a, for several cases on this subject, and *post*, 23.

19. *Verdict in gross: How corrected.* See *DETINUE*, 7.

20. *Assessment of life tenant's interest.* In an action by a person having only a life interest in the ch. tt. ls. against a defendant who took possession at the instance of the remainderman, the alternative value assessed by the jury, should be the value of the plaintiff's life interest, and not the value of the fee simple; *Lloyd v. Goodwin*, 12 S. & M. 223.

21. *Verdict in excess of damages.* The declaration in replevin claimed damages at \$1,000; the verdict was for \$800, for the alternate value of the property, and for \$300, for damages for its detention: *Held*, that it was good; *White v. Graves*, 2 C. 166.

VI. The Judgment.

22. *Form of.* Under the Replevin Act of 1842 (H. C. 818, § 5), where the verdict is for the plaintiff, the judgment should be "that the defendant restore the possession" of the property, &c., not "that the plaintiff recover of the defendant the possession," &c.; *Windham v. Williams*, 5 C. 313. The judgment is the same under Rev. Code of 1857, "that the defendant restore the possession of the property, or pay its assessed value;" *Pearce v. Twichell*, 41 M. 344. The judgment should not be for the assessed value alone, but for the goods, if to be had, and if not, then for the assessed value; *Anderson v. Tyson*, 6 S. & M. 244; *Harvey v. Edington*, 3 C. 22.

23. *Same.* When several articles are embraced in the finding, the judgment should require the delivery of each separate article found for the plaintiff, or the payment of its assessed value, so that upon the delivery of any one or more of the articles, the defendant would be discharged from the payment of

the articles so delivered; *Whitfield v. Whitfield*, 40 M. 352. See *ante*, 18.

24. *Should not blend damages and assessed value.* A judgment in replevin is erroneous, if it blend the assessed value of the property and the damages for its detention in one amount, and be for money alone, and not for a return of the property, if to be had, and if not for its assessed value; *Harvey v. Edington*, 3 C. 22.

VII. Miscellaneous.

25. *Question involved in trial.* In an action of replevin the right to the immediate possession by the plaintiff, and the wrongful taking and detention by defendant, are the questions involved; *Lloyd v. Goodwin*, 12 S. & M. 233.

26. *Appeal to Circuit Court under Act of 1863.* It is error for the Circuit Court to dismiss an appeal from the judgment of the Justice's Court in an action of replevin under the Act of 1863, for informality in the verdict in assessing the value of several articles sued for in one aggregate sum. It is the duty of the court on such an appeal, to try the case *de novo*, upon its merits; *Porter v. Forshee*, 41 M. 337.

27. *The common law action.* The common law action of replevin, except in distress for rent, is not a remedy now allowed by the laws of this State (Sharkey, J., dissented); *Wheeler v. Cozzens*, 6 H. 279.

28. *The bond.* The statute clearly contemplates that the officer executing the writ shall take from the plaintiff or defendant a bond for the forthcoming of the property, and shall return the same to court; but the failure to take the bond will not render the proceedings void, but will be good ground for a motion to dismiss; *Weatherby v. Sleeper*, 42 M. 732.

Res Adjudicata.

1. *The rule and the exceptions.* A judgment between the same parties on the same cause of action, is conclusive between them. The exceptions to this rule are 1st, where the first action was not competent (see *post*, 8, 9); 2d, where the plaintiff has mistaken his character; 3d, where the judgment is rendered for a fault in the declaration or pleadings (see *post*, 9).

The true question to be determined in such cases, is not whether the former suit was actually determined on the merits, but whether the merits were involved, and could have been determined in that suit. And the plaintiff who brings a second suit, must not leave it to nice investigation to determine whether the cause of action is the same, or different, but he should show clearly that they are different; and it is a matter of no importance that the form of action in the first suit was different from the form in the last; *Agnew v. McElroy*, 10 S. & M. 552; *Johnson v. White*, 13 S. & M. 584; S. P., as to the first exception; *Moseby v. Wall*, 1 C. 81, for which see *post*, 8.

2. *What is concluded by the former suit.*

A party failing to assert a claim or allowance in a suit in equity, in which it might have been litigated with propriety, will not be permitted afterwards to enforce it in a second suit, unless his failure to do so was caused by the fraud of his adversary, and was not attributed to his own negligence; *Stewart v. Stebbins*, 1 G. 66. See *post*, 18, 19.

And so if the defendant in an action of ejectment, or in action for *mesne* profits, fail without sufficient excuse to set up his claim, for valuable improvements made by him on the premises, he cannot afterwards come into equity for relief on that account; *Moody v. Harper*, 9 G. 599. See *vide post*, 14.

3. *Same*. All legal questions raised by a demurrer to a plea, are to be considered as reviewed and settled by a decision on the demurrer; and where the decision sustains a plea, as a good bar to an action on a written instrument which is fully set out in a declaration, the legal effect of that instrument, at least, so far as it is essential to the validity of the plea, is to be considered as also settled; and the construction thus given it, cannot be varied afterwards, so as to make the plea invalid as a defence to a recovery on the instrument; *Smith v. Elder*, 14 S. & M. 100.

4. *Grounds or reasons of decisions*. The grounds or reasons upon which a court renders a judgment, are not part of the judgment, and are not *res adjudicata*, and they cannot be made the basis of a further proceeding; what the court adjudges or orders, and not the reason therefor, is *res adjudicata*; therefore, the judgment of a bankrupt court, allowing a claim of one firm to be proven against another, both firms being composed of the same members, is an adjudication that such claim is a proper one to receive a dividend; but it is not a judgment that the claim extends beyond that, though the reasoning of the judge rendering the judgment does so extend it; *Buckner & Stanton v. Calcote*, 6 C. 432.

5. *Same: Judgment in rem*. Such a judgment is also a mere judgment *in rem*, and when the dividend is paid, it becomes *functus officio*, and cannot, therefore, be made the basis of another proceeding in another court; *Ib*.

6. *Extent of the rule in the High Court*. Whatever is necessarily settled by the High Court, in determining the propriety of the judgment under review, or in settling the principles of the case for further proceedings in the court below, is *res adjudicata*, and final and conclusive between the parties; *Stewart v. Stebbins*, 1 G. 66. See on this subject, HIGH COURT, 183, 184, 185, 186, 26.

7. *Decisions at law: Binding in equity and e converso*. Where the construction of a marriage agreement, and the rights arising under it have been settled in a suit at law, the same subject cannot be litigated again in equity between the same parties; *Hooke v. Wood*, 2 H. 867; and so when a bill to foreclose has been filed by a mortgagee, and dismissed on its merits, this is a bar to an action

of ejectment by the mortgagee for the mortgaged premises; for the decree dismissing the bill to foreclosure, is in effect a discharge of the mortgage; *Hodge v. Mitchell*, 5 C. 560. And so a party cannot get relief in equity against a judgment at law, upon the ground that it was obtained by the fraud of his antagonist, if he made a motion for a new trial on that ground, and it was adjudged insufficient or unsupported by the evidence; in such a case, the judgment of the court on the motion for a new trial, is conclusive; *Moody v. Harper*, 9 G. 599.

8. *The exception arising from incompetency of the first court*. A judgment is only conclusive between the parties, when it is rendered in a suit competent to decide the merits. A court of law is incompetent to correct a mistake in a writing. Hence, if the vendee in a title bond defend successfully an action for the purchase money, on the ground that the vendor has no title to the land, as described in the title bond; that judgment is no bar to a bill in equity, by the vendor to correct a mistake in the description of the land, and to enforce specific performance; *Mosbey v. Wall*, 1 C. 81 (citing *Agnew v. McElroy*, *ante*, 1).

9. *The exception from incompetency of pleadings*. A judgment on a pleading which does not go to the foundation of the action, is no bar to another suit. Hence, where, in an action of replevin, the judgment was for defendant on the statute of limitations of one year, which bars that action, it is no bar to a subsequent action of trover for the conversion of the same property. The judgment in the first action was not on a plea which went to the foundation, but only to the form of the action; *Johnson v. White*, 13 S. & M. 584. See ATTORNEY AT LAW, 35.

10. *Exceptions where defendant has a temporary right not expired at time of first judgment, or plaintiff's right not then perfect*. An administrator brought an action of replevin to recover slaves of his intestate, and the defendant set up as a defence, that he held, under an agreement with the intestate, that he should keep the slaves until their hire and labor should pay a debt due by the intestate to him; and the jury found for the defendant: *Held*, that the judgment did not preclude the administrator from proceeding in chancery to have the amount due ascertained, and to redeem the slaves; *Fisher v. Leach*, 10 S. & M. 313. See FORMER RECOVERY, 1.

11. *Exception from incompetency of action*. An attorney at law is not liable to be proceeded against by motion, for neglect and breach of duty in dismissing his client's cause, and receiving claims on third persons in payment; and a judgment in his favor on such a motion, is no bar to a subsequent action against him for the same matter; *Coopwood v. Baldwin*, 3 C. 129.

12. *New arguments and new reasons no ground for new suit*. A party will not be permitted to relitigate a matter once adjudicated, by merely presenting new arguments

on a state of facts not materially different, in support of a right formerly determined against him; *Moody v. Harper*, 9 G. 599.

13. *Discovery of new matter as an exception.* Where the record in a suit which unsuccessfully attacked the validity of a sale of land, upon the ground that the defendant in the judgment died before the teste of the execution, and the judgment was not revived, disclosed the fact that the purchaser controlled and managed the execution as the agent of the plaintiff, it will be no ground for relitigating this matter in a new bill, that since the determination of the first suit it has been discovered that the attorney purchased for the plaintiff in execution; for the rule as to purchases in such cases applies as strictly against the attorneys as against the parties; *Ib.*

14. *Omission in the judgment of part of the matter sued for as an exception.* In order to make a judgment at law have the effect of a former recovery, it is necessary not only that the second suit should be founded on the same cause of action embraced in the former suit, but the cause of action must also have been embraced in the first judgment. Hence, if the former suit was on three notes, and, by mistake in entering the judgment, only one of the notes was embraced in it, this may be shown in a second suit on the two omitted notes, and the former judgment will be no bar to such recovery; *Dunlap v. Edwards*, 7 C. 41. *Sed vide ante*, 2, and *post*, 19.

15. *Res adjudicata in trials for right of property.* If a plaintiff in an execution which has been levied on property, and the property claimed by a third person, fail to make up and tender an issue to try the right to the property, as the statute directs, and the court thereupon enter judgment, discharging the claimant from liability on his bond, this is a conclusive bar to the right to levy another execution from the same judgment on the property so claimed, even though other creditors of the same party have levied on the same property, and subjected it to the debts of the defendant in execution; *Martin v. Lofland*, 10 S. & M. 317.

16. *Same.* A judgment against the title of the claimant, in a proceeding for the trial of the right to property levied on under execution, is conclusive against the claimant's title, in a contest between him and a person who holds the property in virtue of a sale made in pursuance of that judgment. And this is so, though the purchaser bought at a sale made under a *distringas* to enforce the judgment against the claimant; for if it be conceded that the sheriff had no power to sell under that writ, yet the judgment is a conclusive determination against the claimant's right, and he cannot afterwards maintain trover against the purchaser; *Shirley v. Fearn*, 4 G. 653.

17. *Decisions of Probate Court on report of referees.* The decision of the Probate Court, confirming the report of referees to whom, under the statute, a contested claim against an insolvent estate had been referred,

is *res adjudicata*, and hence, in an action against the administrator, on his bond, for a refusal to pay a claim so allowed, it will be incompetent for him to impeach the validity of the debt; *Shropshire v. Probate Judge*, 4 H. 142.

18. *Res adjudicata in Probate Court: Final account.* If in a plenary proceeding by the heirs, or one of them, against the administrator, for a distribution of the estate, the accounts of the administrator be litigated, and a decree rendered, settling the contested items, and ascertaining and fixing a balance due for distribution, it will not be competent for the administrator, afterwards, on making his final account, to claim credit for items then settled against him, nor to demand allowance for credits which then existed in his favor, and which he might then have presented and had allowed; *Cole v. Leak*, 2 G. 131.

19. *Plea of res adjudicata.* In such a case, a plea of *res adjudicata* interposed to the final account, is not good as a technical bar to the account, but it is valid as an exception to such items in it as were settled, or might have been settled in the former proceeding; *Ib.*; see *ante*, 2.

20. *Same.* A guardian who had made his final settlement, and been discharged, sued the ward for board, clothing, &c., furnished while he was guardian, and it was shown in defence, that the guardian had applied for a credit therefor in his final account, and that the claim had been rejected because there had been no previous order of the court directing the expenditure to be made: *Held*, that the decision of the Probate Court was final, until reversed, and the action could not be maintained; *McKee v. Whitten*, 3 C. 31.

21. *Form of plea.* It is a good plea in bar to an action, "that the defendant had been sued in the United States Circuit Court, for the Southern District of Mississippi, on the same cause of action, and such proceedings were had that the defendant was discharged from liability thereon;" *Shields v. Taylor*, 13 S. & M. 127.

22. *When plea good in form: Plea of nul tiel record.* If the plea of *res adjudicata* be good in form, and plaintiff wishes to deny the force and effect of the former judgment, he should reply *nul tiel record*; *Ib.*

32. *What parties bound by.* Where a substantial right is claimed in behalf of a party suing in chancery conjointly with another, such party cannot be considered merely as a nominal complainant, and he will be concluded by the adjudication in that case; *Moody v. Harper*, 9 G. 599.

See *BILLS OF EXCHANGE*, 167.

33. *Parol evidence admissible to show real parties.* It is competent to show by parol evidence who were real parties in interest in a former suit, so as to conclude them by the judgment then rendered; *Shirley v. Fearn*, 4 G. 653.

34. *Res adjudicata: When the issue in second suit is different from the first.* See *Field v. Weir*, 6 C. 56, digested in *ACTION*, 3.

35. *Retraxit as a bar.* See *RETRAXIT*.

36. *Construction of will by a foreign tribunal.* The construction of a will made by a court in the jurisdiction in which the testator was domiciled at the time of his death cannot be pleaded in bar of the decision of this court on the same will made at a former term, unless the title of the persons entitled to the property bequeathed by it, has been perfected by their taking possession of the property under the decision of the foreign tribunal; *Bridgeforth v. Gray*, 10 G. 136.

37. *Statute allowing a year after reversal, in which to commence a new action construed.* If upon reversal by this court of a judgment rendered in the Circuit Court for a plaintiff, a judgment be here entered for defendant on a verdict which had been given for him in the court below, the judgment so entered is a final and conclusive bar to another suit for the same cause of action; and the statute which allows a plaintiff one year after the reversal in this court of a judgment rendered in his favor in the Circuit Court, in which to institute a new action, does not apply; *Wulkes v. Coopwood*, 10 G. 348.

38. *Two pending suits for same cause of action.* See ACTION, §4, 36.

Rescission.

See VENDOR AND VENDEE, 116 to 203. CONTRACTS, 84. CHANCERY, sub-division Rescission of Contracts.

Res Gestæ.

See EVIDENCE. CRIMINAL LAW, sub-division Evidence.

Retailing.

See CRIMINAL LAW.

Retrazit.

1. *Is a good plea.* The special plea of *retrazit* is recognized under the practice in this State, and it is, therefore, error to strike out such a plea and treat it as a nullity, merely because it is defective in setting out facts which constitute a dismissal of a former suit on the same cause of action, and not a *retrazit*; *Williams v. Northern Bank*, 7 S. & M. 28.

2. *Nolle prosequi not a retrazit.* In early times, the nature and effect of a *nolle prosequi*, was not well understood, and in some cases it was considered as a *retrazit*, operating as a full release of that cause of action; in later cases, it was considered a mere agreement not to prosecute that suit; and this last is the universal rule now; *Coffman v. Brown*, 7 S. & M. 125.

3. *What is a retrazit?* In a *retrazit*, a plaintiff, not only as in case of a *nolle prosequi*, abandons his cause, but he goes further, and admits on the record that he has no cause of action; and it is this admission which constitutes the bar to another suit; *Id.*

4. *Plea of: Case in judgment.* A plea, "that a suit had been previously brought for

the same cause of action, in which the plaintiff, in his own proper person, came into court and confessed that he would not prosecute his said suit against the defendant, but from the same altogether withdrew himself, whereby it was considered by the court that the plaintiff should take nothing, and that the defendant go without day," &c., does not show a *retrazit*; *Id.*

Revivor.

See EXECUTORS AND ADMINISTRATORS, 332, et seq. SCIRE FACIAS. CHANCERY, sub-division Revivor. HIGH COURT, 172 to 174a.

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I. The Necessity for Revivor, and what may be Revived.

1. *Record must show necessity for revivor.* To authorize the revivor of a suit in the name of another party than the plaintiff or defendant, the record must show that it is legally impossible for the plaintiff to further maintain the action, and that the person in whose name the revivor is made, is entitled to have it so revived. Hence, where a suit was commenced by a bank, a revivor in the name of trustees, without the record showing a dissolution of the bank and an appointment of the trustees, will be error; *Clifton v. Galbraith*, 1 C. 292.

2. *Revivor where no new party is introduced.* A *scire facias* will not lie to revive a judgment between the original parties thereto, except when there has been a failure to issue an execution for a year and a day from the date of the judgment; it will not lie to revive as between the original parties, merely because an execution has issued and been levied on personalty, and there does not appear to be any legal abatement of the levy; *Locke v. Brady*, 1 G. 21.

3. *Party reviving must have an interest.* By no species of amendment can a suit be revived in the name of a party having no interest in it. Where, therefore, a suit was pending in the name of a bank at the time of its dissolution, but the note on which the suit was brought had been by deed assigned by the bank for the benefit of creditors, an application to revive in the name of the trustees of the bank was refused, as the trustees had no interest in the note because of the assignment; *Grand Gulf B'k v. Wood*, 12 S. & M. 432.

4. *Revivor at common law.* By the common law, when the plaintiff (if a natural person) died pending the suit, it abated, and there could be no revivor in the name of his executors. And by the common law, where the plaintiff was a corporation, and it was dissolved; that also, was an end of the suit, since all the debts due to and by a corporation were extinguished by its dissolution; *Torry v. Robertson*, 2 C. 192.

5. *Revivor of suits by corporations under our statutes.* By the statute (H. C. 841,

§ 47) it was provided, that where either party, plaintiff or defendant, shall die before final judgment, the executor or administrator of the deceased party, shall have full power (in case the cause of action survives) to prosecute or defend such action to final judgment. The statute applies only to natural persons and not to corporations. And this is so of the statute (H. C. 842) which provides for the discontinuance of the suit upon the death of the plaintiff, in case his heir, &c., administrator, &c., do not cause revivor to be made by the second term after the death of the plaintiff is suggested; *Ib.*

6. *Same: Quo Warranto Act of 1843.* The *Quo Warranto* Act of 1843, though it gives the trustees appointed for the bank, upon the rendition of the judgment of forfeiture against it, the power to sue for and collect the debts due to the bank, does not give the right to have suits pending in the name of the bank revived in the name of the trustees; and such right does not exist under the statutes of the State, or by the common law; *Ib.*

7. *Same: Cases criticised and explained.* The decisions of the High Court in *Nevitt v. Bank of Port Gibson*, 6 S. & M. 513; the *Commercial Bank of Natchez v. Chambers*, 8 id. 9. and *Chew v. Peale*, 12 id. 700. do not conflict with the foregoing. In the first and second cases, a revivor of the writ of error was allowed, the plaintiff below having been dissolved after final judgment, and pending the writ of error, and by the common law appeals and writs of error did not abate by the death of either party after the assignment of errors. The last case was a revivor, in the name of the trustee, of a final judgment, and not of a pending suit; *Ib.*

8. *Necessity for revivor of judgments.* If the defendant die after judgment and before the issuance of an execution, the same should be revived before execution issued; and so if an execution be issued and returned without a levy, and the defendant then die, there should be revivor before the issuance of an *alias*. And if an execution be issued and be *teste* after the defendant's death, it will, on motion, be quashed. But if the judgment be against several, and one die, execution should be issued against all, but ought only to be levied on the property of the survivors; *Davis v. Helm*, 3 S. & M. 17. But such execution issued without revivor is not void. See *Execution*, 82, 16.

9. *No revivor necessary if death occur after execution issued.* But if, after the execution is issued, and before levy, the defendant dies, no revivor of the judgment is necessary, but execution may be perfected forthwith against his personal representatives; *Thompson v. Ross*, 4 C. 198.

10. *Revivor necessary after a year and a day.* Where a year and a day have elapsed after the rendition of a judgment without the issuance of an execution, a revivor is necessary; *Abbott v. Hackman*, 2 S. & M. 510; *Reeves v. Burnham*, 3 H. 25. But

an execution issued without such revivor is not void; *Mitchell v. Evans*, 5 H. 543.

11. *Revivor in name of public trustee.* A judgment rendered in favor of a public trustee, may be revived by *sci. fa.* in the name of his successor when appointed; *Matthews v. Mosby*, 13 S. & M. 422.

12. *Revivor of void and erroneous judgments.* A void judgment cannot be revived, but an erroneous judgment can; *Ib.*

13. *Defences to revivor.* No matter, which could have been urged merely as a defence against the rendition of a judgment, can be urged against its revivor; *Matthews v. Mosby*, 13 S. & M. 422; *Person v. Valentine*, Id. 551; *Anderson v. Williams*, 2 C. 684.

The only pleas which can be interposed against a revivor, are such as set up matter subsequent to the judgment, such as discharge, payment, &c.; *Langston v. Abney*, 43 M. 161.

If process be served by a sheriff who is interested, it is illegal and may be objected to; but if not objected to by the defendant, and judgment be rendered against him, his administrator cannot object to it, in answer to a *sci. fa.* to revive; *McLeod v. Harper*, 43 M. 42.

13a. *Revivor against heirs.* There can be no revivor against the heirs of a judgment debtor, unless real assets have descended to them, which are subject to the judgment. If the land descended is not liable, there should be no revivor; *Langston v. Abney*, 43 M. 161.

II. Revivor of Pending Suits.

See *ante*, 4, 5, 6, 7.

14. *Sci. fa. to revive pending suits, a statutory remedy.* At common law, all personal actions abated by the death of either party before final judgment. *Scire facias* is a remedy at common law to revive judgments, but not pending suits; and hence, it will issue only to revive pending suits, in cases provided by statute; *Portevant v. Pendleton's Ex'or*, 1 C. 25.

15. *Same.* The statute (H. C. 672), which declares that suits commenced by a decedent in his lifetime, shall survive for and against his executor or administrator; and the statute (H. C. 841, § 47) which gives the *sci. fa.* remedy for and against the executor and administrator, heir or devisee of plaintiff or defendant, dying pending an action, do not embrace the case of a suit brought against an administrator originally, and who dies before judgment. Such an action will abate, as the statute gives the *sci. fa.* remedy only against the representatives of the deceased party, and the administrator *de bonis non* is not the representative of a deceased administrator in chief. But this is remedied by the Act of 1846; *Portevant v. Pendleton's Ex'or*, *supra*. But the statute (H. C. 841, § 47) only gives the remedy where the suit is pending at the death of a party; a suit is not pending till process is served; and hence, when the defendant dies after suit commenced,

but before service of process, there can be no revivor; *Allen v. Mandeville*, 4 C. 397.

16. *Against whom revivor is made.* Where an action is brought against an administrator, and he dies, revivor should be against his successor, and not against his administrator or executor; and if there be two administrators sued, and one die, the suit should progress to judgment against the other as survivor; *Hicks v. Harris*, 4 C. 420.

17. *Original plea good after revivor.* Where a party defendant who has pleaded to the action, dies during the progress of the suit, and his administrator is brought in by *scire facias*, the plea filed during the lifetime of the intestate will be the plea of the administrator, if he omit to file a plea to the *scire facias*; *Woodhouse v. Lee*, 6 S. & M. 161.

18. *Sci. fa. necessary: Waiver.* The regular mode of reviving a suit (or judgment) in favor of, or against a new party, is by *scire facias*; but if a party seeking to revive in his name, proceed by motion, and the defendant appear and contest his right, to have revivor, this appearance will be a waiver of the *sci. fa.*, and the revivor may be made, if there be no other obstacle to it; and this rule applies to revivors in the name of the trustees of a dissolved bank, under the Act of 1843; *Chew v. Peale*, 12 S. & M. 700. And so an administrator may appear voluntarily in court, and consent that a revivor may be made against him; *McKey v. Torrey*, 6 C. 78. See *SCIRE FACIAS*, 12a.

19. *Failure to revive for two terms.* An action is not discontinued *per se*, by the failure to revive for two terms after the death of a party has been suggested, unless an order be entered to that effect. The failure of a party to have such order entered, is a waiver of the discontinuance, if he go to trial on the merits, without complaint on that subject; *McKey v. Torrey*, 6 C. 78.

III. Sales under Execution without Revivor.

20. *Sale of personally without revivor.* A sale of personally under execution without revivor is good; and the purchaser will be protected in his purchase; *Mitchell v. Evans*, 5 H. 548 (citing *Smith v. Winston*, 2 H. 601); S. P., *Harrington v. O'Reilly*, 9 S. & M. 216. But before sale made, the execution is under the power of the court, and will be quashed; *Harrington v. O'Reilly*, *supra*. See *EXECUTION*, 82, 89, 93, 17.

21. *Sale of realty without revivor.* A sale of realty without revivor, under an execution issued and tested after the defendant's death, is not void, but only voidable, and is good until regularly set aside, which cannot be done in a collateral proceeding, but only in a direct proceeding by the heir for that purpose; *Shelton v. Hamilton*, 1 C. 496 (citing *Smith v. Winston*, 2 H. 601; *Drake v. Collins*, 5 H. 253; *Harrington v. O'Reilly*, 9 S. & M. 216); S. P., *Hodge v. Mitchell*, 5 C. 560.

The sale will be set aside against a purchaser having notice of the death of the defendant at the instance of an infant heir; but the heir will be compelled to refund the purchase money if the judgment were a lien on the land; *Cook v. Tumbs*, 7 G. 685.

But in *Harper v. Hill*, 6 G. 63, the court refused to set aside at the instance of the heirs, a sale of realty made without revivor, upon the ground that it did not appear that any injustice had been done them, the judgment being unsatisfied and a valid lien on the land. And it was further announced that the fact that a sale was made under an execution which was voidable, of itself constituted no independent ground for relief, and that in addition it must appear that some injustice was done.

A sale under an execution issued and tested after the death of the plaintiff and without revivor, is not void, nor is it voidable at the instance of strangers to the judgment. Whether it would be voidable at the instance of the defendant: *Quere?* It seems that it would not; *Hughes v. Wilkinson*, 8 G. 481.

See *EXECUTION*, 16.

22. *When revivor against heirs unnecessary.* When a new party is to be benefited or charged by the execution of a judgment, a *scire facias* is necessary to make him a party; but no other need be made a party. Hence, the heir, after a condemnation and sale of realty to pay debts, being no longer interested in it, need not be made a party to a judgment rendered against the ancestor in his lifetime, in order to make a valid sale of it under that execution; but in such case the purchaser at the administrator's sale being *terre tenant*, ought to be made a party by *scire facias*. And a sale made without revivor against either heir or *terre tenant*, is not void, but only voidable; *Smith v. Winston*, 2 H. 601.

23. *Sale by decree in chancery.* Where the ancestor against whom a judgment at law was rendered, dies, having an equitable interest in the land, which is not subject to sale under execution, the plaintiff may proceed against the heirs to have the land applied to his judgment without revivor. The defendants to such a bill can plead any defence which would be good against a *scire facias*; *Ferguson's Heirs v. Crowson*, 3 C. 430.

24. *The remedy for issuing execution without revivor.* If execution be issued in the name of the administrator upon a judgment rendered in favor of the intestate, without revivor, it is no ground for relief in a court of equity. The error can be corrected in a court of common law, by motion to quash the execution, or by writ of error *coram nobis* with *supersedeas*; *Ammons v. Whitehead*, 2 G. 99.

IV. Miscellaneous.

25. *Form of judgment of revivor.* An entry on the minutes of the court, containing a suggestion of the plaintiff's death, and ordering "that the cause be revived" in the

name of the executor, "and that *scire facias* issue to that effect," is not a revivor of the suit in the name of the executor, and if no step be taken to carry out said order, by the issuance of a *scire facias*, a subsequent revival of the suit in the name of the devisee of the plaintiff, will not be effected by reason of the previous order; *Morris v. Henderson*, 8 G. 492.

See *SCIRE FACIAS*, 26.

26. *Same*. The following entry in the minutes of the court, viz.: "Death of plaintiff suggested, and leave given to revive in the name of his legal representatives when made known, which is accordingly done in the names of J. W. and W. L.," together with the recognition of J. W. and W. L. as plaintiffs in an amended declaration, and in all other subsequent proceedings in the cause up to and including final judgment in the court below, is such a recognition of the right of J. W. and W. L. to represent the deceased plaintiff, as will estop the defendants from objecting thereto on writ of error to the High Court; *Lamar v. Williams*, 10 G. 342.

And so when the record showed that the death of the plaintiff was suggested, and "the cause revived in the name of F., as administrator, &c., whereupon came the parties, and being ready for trial," &c., the revivor, though informal, is good—no objection having been made to it; *DeFord v. Furniss*, 43 M. 132.

27. *Same: Proof of revival*. The record of a judgment rendered in the Circuit Court, recited "that it appeared to the satisfaction of the court that the cause had been duly and properly revived against M. and C., administrators of J. M., in the High Court of Errors and Appeals, and by the order thereof, and that said administrators had thereby due notice of the pendency of this suit," and thereupon ordered it to be revived against them: *Held*, that this order was sufficient evidence that the revival had been properly made; *Cannon v. Cooper*, 10 G. 784.

28. *Judgment is an award of execution*. The office of a *scire facias* to revive a judgment is to have execution of that judgment; and a judgment of revivor is an award of execution of the original judgment, and not a judgment in *numero*; and hence, if the *scire facias* and judgment thereon be void, they will not have the effect to impair the force of the original judgment, but all subsequent proceedings in execution of the original judgment will have the same legal validity and effect as if no *scire facias* had been sued out or judgment of revivor rendered; *Hughes v. Wilkinson*, 8 G. 482 (citing *Locke v. Brady*, 1 G. 21; *Vick v. Chewning*, 2 id. 201). A judgment *quod recuperet* is erroneous; *Locke v. Brady*, *supra*; *S. P.*, *Vick v. Chewning*, *supra*.

29. *Revivor does not preclude proof of prior payment*. A judgment of revivor does not deprive the defendant of his right to prove prior satisfaction of the judgment; *Anderson v. Williams*, 2 C. 684.

30. *Revivor in High Court good in court*

below. A revivor of a suit in the High Court by or against an administrator, is sufficient for all subsequent proceedings in the court below without any new revivor in that court; *Cannon v. Cooper*, 10 G. 784.

31. *For revivor in High Court*, see HIGH COURT, 172 to 174a.

Rivers.

1. *The Mississippi river: Riparian rights*. The Act of Congress, establishing the Mississippi river as the western boundary of the Mississippi Territory, and adopting the common law for the government of the territory, fixed the middle of the river as the true boundary line of the State, and made the common law the criterion by which the riparian rights on the eastern bank of the river were to be determined; *Morgan v. Reading*, 3 S. & M. 366.

2. *Meaning of "navigable river."* The term "navigable river," in technical language, only applies to rivers in which the tide ebbs and flows, and only to that part of such rivers, in which there are such ebb and flow; *Ib.*; *S. P.*, *Steamer Magnolia v. Marshall*, *post*, 9. *et seq.*

3. *Owner of bank of "navigable river."* By the common law, the banks of a "navigable river," like the shores of the sea between high and low water mark, belong to the king, for the benefit of the public—the boundary of the riparian owner stopping at high water mark. But the banks and beds of fresh water rivers, though in fact capable of being navigated—as the Thames above the ebb and flow of the tide—belonged to riparian owners, and the boundary between the owners of the opposite banks, was the middle thread of the river; *Ib.*

4. *Same: Easement of public*. Though, by the common law, the riparian proprietors are the owners of all fresh water rivers, yet if they in fact be navigable, the public have an easement to use them for navigation. But this easement extends only to the use of the river itself, and not to the use of the banks, which are private property, and subject to the exclusive use of the owner. And these rules apply to the Mississippi river, above the ebb and flow of the tide; *Ib.*

5. *Same: Acts of Congress do not affect riparian owners' rights*. The various acts of Congress, which have secured the free navigation of the Mississippi river, do not alter the rules of the common law, in relation to the rights of riparian proprietors, except perhaps, navigators on that river, may, in case of necessity, moor to the bank and fasten their vessels to the trees thereon. And Judge Clayton, thought they might land for the necessary purposes of navigation, as for lading and unlading their vessels; but, the court on this point say, that in the acts of Congress aforesaid, there is no express grant of the use of the banks, and that a grant would not be inferred, beyond the use absolutely necessary for the navigation of the river; *Ib.*

6. *Right of owner to charge vessels for landing.* Where the owner of the bank of the Mississippi river, published his terms for the use of his land by navigators, wishing to moor their vessels there, and a navigator with notice of the terms thus published, used the bank above low water mark, it was held that the navigator was liable to pay therefor, according to the terms thus published; *Ib.*

7. *Extent of right of owner.* Whether the exclusive right of the owner of the bank, extends to the middle of the river, or only to low water mark; *Quære? Ib.*

8. *As to power of State to divert waters of a navigable stream, and rights of riparian owners in this respect, see Commissioners of Homochitta River v. Withers, 7 C. 21, digested in CONSTITUTIONAL LAW, 21, 22; that case also criticises the foregoing case.*

9. *Meaning of "navigable river."* The term "navigable," by the common law, has reference only to such waters as were by the law free to the commerce and navigation of all nations, and not to the capacity of a river or other water for navigation; and hence, "navigable river," means only that part of a fresh water stream debouching into the sea, in which the tide ebbs and flows; *Steamer Magnolia v. Marshall, 10 G. 110.*

10. *Rights of riparian owners in fresh water streams.* The rules of the common law which secured the property of the shores of the sea and of navigable rivers to the king, for the benefit of the public, were never applied to fresh water streams, though capable of navigation. The soil under these streams belong to the riparian proprietors, and not to the crown; this right, however, is subject to an easement in the public, to navigate such streams as were in fact navigable; *Ib.*

11. *Extent of the public's right of navigation.* The right of the public to navigate a fresh water stream capable of navigation, does not deprive the owner of the shore between high and low water mark, of his exclusive right and dominion over it; nor secure to the navigator the right to land his vessel and use the shore, for the purpose of taking on or discharging a cargo; nor does it secure to the public the right to approach the stream over the land of the riparian proprietor, against his consent; *Ib.*

12. *Right of owner to charge for use of his shore.* The owner of the shore of a fresh water river, capable of navigation, has the right to charge such sum as he sees proper to navigators, for using his shore in lading and unlading their vessels, if he give notice of the charge before such use is made of his property; *Ib.*

13. *The Mississippi not a navigable river.* The Mississippi river above tide water is not a "navigable" stream in the technical sense of that word, and is in all respects subject to the rules of the common law regulating the rights of the public and riparian proprietors in fresh water streams capable of being navigated; *Ib.*

14. *Grant conveys to middle of river.* A grant of land bounded "by" or "on" a fresh water stream, whether in fact capable of navigation or not, conveys the soil, *usque ad medium filum aquæ*, and of course conveys the shore between high and low water mark; *Ib.*

Roads, Highways, and Streets.

1. *Authority of County Court to lay out roads.* The authority of the County Court to lay out public roads is special and limited, and must be pursued strictly as given by the statute, or else all its acts are void; and hence, a jury must lay out the road in accordance with the statute, or else the road will be illegal, and the overseer entering on land to work the road will be a trespasser; *Stockett v. Nicholson, W. 75.*

2. *As to jurisdiction and proceedings of Board of Police in laying out new roads, see BOARD OF POLICE, 11.*

3. *Discontinuance of public road.* A public road may be discontinued, without notice to individuals, and without the intervention of a jury. And in such case, the owner of the soil on which the road was located, is restored to the use of the road bed, though he may have received compensation therefor; *Nicholson v. Stockett, W. 67.*

4. *Changing public road.* In turning, altering or changing a public road, a jury of inquest is essential, and perhaps also notice to the owner of the soil, on which the new location is to be made; *Ib.*

5. *Liability of contractor to build public bridge for trespass.* A contractor for the building of a public bridge is not liable to the statutory penalty for cutting trees (with which to build the bridge) on the land of another; *Courtney v. Smylie, W. 497.*

6. *Liability of commissioners of public roads to indictment.* The commissioners of public roads are liable to a criminal prosecution for a neglect of duty; *State v. Commissioners, W. 368.*

7. *As to liability of the county for failure to keep public roads and bridges in repair, see COUNTY, 3, 4.*

8. *Right of overseer of road to sue for obstruction to his road.* An overseer of a public road cannot, under the statute (H. & H. 450, § 2, and p. 453, § 41), maintain an action in his own name against a person obstructing the road, for the cost of removing the obstruction, and for the penalty imposed by the statute, until he has first reported the facts to the Board of Police, and they have entered judgment against the offender; *Harriston v. Francher, 7 S. & M. 249.*

9. *Liability of owner of slaves for a failure to work on road.* The owner of slaves, who is absent from home, leaving them in possession and under the management of his overseer, is not liable to the statutory penalty imposed for a failure to work the slaves on a public road, when the notice to work was given to the overseer, and the owner had no

knowledge of it till after the failure to work had occurred; *Cocke v. Board of Police of Copiah Co.*, 9 G. 340.

10. *Test of whether a road is public or not.* By the constitution and laws of this State, "full jurisdiction over roads, highways," &c., is vested in the Board of County Police; and they are required, and furnished with ample means, to keep the public roads in repair. The liability of the board to keep a road in repair or not, is, therefore, a good test to determine whether it is a public or private road; *Tegarden v. McBean*, 4 G. 283.

11. *Dedication of road to the public.* The permission of a proprietor, that a part of his land, not situated in a city or town, may be appropriated as a public road, and the use of it by the public for a shorter period than is necessary to create a title by prescription, if it be not adopted as a highway by the Board of Police, does not constitute such a dedication as will vest the absolute right to it in the public, and divest the owner of the land of his right to resume the use of it and obstruct travel over it at pleasure. Such interrupted use for six years will not establish the right of the public to it by prescription; *Ib*.

12. *Urban easements: Dedication of streets: Deed not necessary.* A deed or written grant is not required to establish a dedication of commons or highways to the public use; *Vick v. Mayor, &c. of Vicksburg*, 1 H. 379. If the owners of urban property lay off a street through the same, and set it apart as a highway, and it is so used by the public, it is a dedication of the street to public use; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374. And so when the owners of land have laid it out into lots, with streets and avenues intersecting the same, and have sold lots with reference to a plot so laid off, it is too late for them to assume a general and unlimited control over the property thus dedicated to the public use. But the mere intention of the proprietor cannot amount to a dedication; *Vick v. Mayor, &c., supra*.

13. *Same.* The acts of a proprietor, within the limits of a city or village of established boundaries, and peopled with inhabitants, by which a dedication may be established, must be either in themselves, or from the relation of the parties, of an open, palpable, deliberate and public character. The dedication, which is considered to rest on implication, such as assent and user, sale at increased price, &c., requires that the circumstances detailed in proof, which evince the appropriation, should be of the same kind, and absolutely inconsistent, according to the rules of law, and the obligations of good faith, with any other supposition; *Vick v. Mayor, &c.*, 1 H. 379.

14. *Grantee in dedications.* The whole doctrine of contracts and grants, is based upon the idea of parties capable of contracting; and although in reference to the public and their claim for easements in land, a looser rule has been adopted, yet the relaxation is not considered to go to the extent that there can be a dedication or grant without some party being interested in it besides the

grantor. Parties are necessary to a dedication as well as a grant; but there need not be what is technically called a person to take as grantee; the public may be the grantor; *Ib*.

15. *Dedication a question for the jury.* Whether a street in a city or town has been dedicated by the owner of the soil to the use of the public or not, is a mixed question of law and fact to be determined by a jury, under the direction of the court. The law will not presume a dedication from the public use alone, where it has continued for a shorter period than ten years, but the jury may infer such dedication from a use by the public of three or four years, without prohibition, or any visible sign that the owner means to preserve his private rights; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374.

16. *Title of streets.* The title to the streets of a city or town is vested in the corporation; and the Legislature has no power to grant a right of way to a railroad company over them, without the consent of the corporation, or without providing for compensation to be paid to the corporation. And the corporation of a city or town has the power for the protection of its citizens and their property, to regulate the mode of propelling railroad cars in its limits, and to prescribe the rate of speed at which they shall run; *Donnager's Case*, 8 S. & M. 649.

17. *Private right of way.* A right of way is a mere incorporeal hereditament, of which actual and visible possession, requisite in law to constitute notice, is not predicable; hence, the use as a passway of an unenclosed alley in a city, by one owning an adjoining lot, is not notice to the world that the party so using it claims an exclusive title to the alley, if it be so situated, that the occupants of other adjacent lots might also use it; *Gordon v. Sizer*, 10 G. 805.

18. *Judgment in ejectment for right of way.* If a person owning a right of way in common with the owner of the fee, stop up the way, and appropriate it exclusively to his own use, the owner of the fee may recover possession by ejectment, but the recovery will not interfere with the defendant's right to use the way according to his title; *Ib*.

Sales.

See WARRANTY.

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I. When the Agreement is a Complete Sale or only a Contract to convey.

1. *Rule at common law: Sale complete upon an agreement of present sale.* When the terms of the sale are agreed on, and the bargain is struck, and everything that the

seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery; and the property and risk of accident is in the buyer: *Stamps v. Bush*, 7 H. 255.

A contract of sale and purchase is an agreement for the conveyance of property from one to another, in consideration of payment made, or intended to be made. Where such a contract, for a specific commodity in esse, and susceptible of an immediate delivery, is made, the property is immediately changed though no delivery has taken place. The 17th section, ch. 3, 29 Charles II., which makes a delivery essential in case of a sale, is not in force in this State; but the rule of the common law, which completed the sale as soon as the terms were agreed on, is in force here; *Ingersoll v. Kendall*, 13 S. & M. 611; *S. P., Jordan v. Harris*, 2 G. 257; *Garland v. Stewart*, 2 G. 314; *Smith v. Nevitt*, W. 370.

2. *Same: Instances.* B. went to the house of S. to collect a bill of exchange. S. agreed to pay in cotton at a named price, and B. agreed to receive it. The parties went to S.'s gin house, and had seventy-three bales of cotton separated and removed from the other cotton of S. Those bales thus separated, were then weighed, and their value calculated according to the price agreed on; and it was ascertained that their value amounted to a sum, only \$4.12 less than the debt due on the bill of exchange, and B. then acknowledged that he was paid in full except that sum. After all this, and as the parties were about to leave the gin house, S. directed his overseer to have the cotton hauled to the river, on which the plantation was situated; but it did not appear that the transportation was a part of the contract of sale. The cotton was destroyed that night at the gin house by fire: *Held*, that the sale was completed, and there was a constructive, if not actual delivery, of the cotton; and it was a good payment on the bill of exchange, to the estimated value of the cotton; *Stamps v. Bush*, 7 H. 255. See post. 10.

3. *Same.* In the foregoing case, S., after the fire, said it was his loss, and so did B. About three months afterward, S. gave a bill to B. for \$1500, in part payment of his original debt, but it was not paid: *Held*, that these subsequent declarations and conduct of the parties were but their opinions of the law of the contract, and could not alter its legal effect, they not being sufficient to amount to a new contract nor to discharge the old one; *Ib.*

4. *Same: Instance of sale without weighing, &c.* Y., having a lot of seed cotton at the gin of one S., sold the same to J., at a stipulated price per pound, the weight to be ascertained after the cotton was ginned. J. gave Y. \$10 in cash, and agreed to credit the balance of the price on a debt due by Y. to him. Y. directed S. to deliver the cotton to J., who immediately furnished the bagging and rope with which to bale it. After this, and before the cotton was ginned and weighed, an attachment against Y. was levied on the

cotton. In a contest between J. and the attaching creditor as to the right to the cotton, it was held, that the sale was complete, and the title to the cotton was thereby vested in J.

5. *Sale complete where no right of possession is in vendee: Case in judgment.* The sale is complete according to the rule stated in 1, ante, in cases where the seller has done everything to complete the bargain, which has been fully and finally agreed on, even in cases where the right to the possession has not been acquired by the buyer, owing to his failure to comply with his part of the contract. Thus, where S. & Y. proposed to G. to sell him an unsound slave at a reduced price, to be paid for by the draft of G. on a third person, and accepted by the drawee, which draft was to be payable in twelve months, to which G. assented. The slave being too unwell to be removed at that time, S. and Y. agreed that she might remain with them until she sufficiently recovered to be carried to the vendee. The slave afterward died before she was delivered, and without G. having given his draft as agreed on; it was held that the sale was complete, and that G. was liable for the purchase money; *Garland v. Stewart*, 2 G. 314.

6. *Possession remaining with vendor as bailee.* A bargain was made for the sale of a gin-stand, and a price agreed on and paid. The vendor was ready to deliver, but the vendee was not ready to receive, and the gin-stand remained with the vendor by mutual consent, and was destroyed by fire: *Held*, that the sale was complete and the loss was the purchaser's; *Smith v. Nevitt*, W. 370.

7. *Sale complete on delivery, though written title made afterward.* The title to slaves is vested in the purchaser upon payment of the purchase money, and the delivery of possession to him, though the bill of sale may not be executed till afterward; *Fatheree v. Fletcher*, 2 G. 265.

7a. *Covenant to transfer a specific article in futuro.* A covenant to transfer and convey the "right and title to a slave when" a certain thing should be done—as an agreement by a client to convey a named slave to his attorney, in case he should succeed in gaining his suit—does not vest a present title in the covenantee to the slave. It is a mere agreement to convey in futuro upon the happening of a particular event, and the covenantee cannot maintain detinue for the slave against a bona fide purchaser from the covenantor. And if, in such a case, the slave, at the time the covenant was made, was under levy by attachment, and the covenantor, who claimed the slave, and the defendant in attachment, without fraud, unite in conveying the slave to the plaintiff in attachment, that title, commencing on a lien existing when the covenant was made, is superior to any interest in the covenantee; *Peck v. Webber*, 7 H. 658.

7b. *Vendee necessary to a sale.* If an answer in chancery state that the respondent has no interest in the subject; that he has

made a sale of it to —, and if that be the only evidence of the sale, the court may treat the sale as void, as no sale can be made unless there be a vendee; and the answer is to be understood as stating that the sale was made without a vendee; *Dennistoun v. Potts*, 4 O. 13. See *post*, 29, 30, for further decisions on completion of sales.

II. The Statute of 1857, requiring Delivery or Writing, and Sales under it.

8. *The statute, art 4, p. 359, Rev. Code of 1857.* The act provides that, "No contract for the sale of any slaves, personal property, goods, wares and merchandise, for the price of fifty dollars or upwards, shall be allowed to be good and valid, except the buyer shall receive the slaves, or part of the personal property, goods, wares and merchandise, or shall actually pay or secure the purchase money or part thereof, or, unless some note or memorandum in writing of the bargain be made and signed by the party to be charged, by such contract, or his agent thereunto lawfully authorized."

9. *Necessity for writing, or delivery, &c.* To constitute a sale (where the value of the articles exceed \$50), there must be a delivery of the whole, or a part of the articles sold, or there must be a memorandum of the contract in writing, and signed by the vendor or his agent; *Daniel v. Frazer*, 40 M. 507.

10. *Sale complete after delivery, though vendor agree to transport the goods, &c.* A sale is complete when the purchase money is paid, and the property sold placed in possession, or under the control of the purchaser, and out of the actual possession of the seller, notwithstanding an agreement on the part of the latter (in a case of a sale of inanimate property) to "deliver" the property at a certain place when requested by the vendee. In such case the agreement to "deliver" will be construed to mean an agreement to "transport" merely. And the vendor will not be liable for a loss of the property after the sale, and before transportation. If after the sale, the vendor become the depository of the goods without hire, he will be liable only for gross negligence, in case of loss; *McKay v. Hamblin*, 40 M. 472. And so if the purchase money be paid the sale is complete, though the seller retain possession as the bailee of vendee; *Beauchamp v. Comfort*, 42 M. 94. See *ante*, 2.

11. *Special contract: Agreement for delivery: Case in judgment.* The seller brought an action for the price of cotton which he had sold by the following writing: "I have sold to C. W., 200 bales of cotton, at 13c. per lb., which I am to deliver at Canton, by his paying me an additional amount of \$4 per bale, said cotton to be at my risk until I deliver it at Canton, and to be delivered by this day week. This 21st September, 1863, unavoidable accidents excepted. Signed, J. F. Scott." The cotton was burned on the day of sale, but after the sale, by the Confederate States authorities: *Held*, that the seller

was not entitled to recover, until there was a delivery of the cotton; *Scott v. Wood*, 41 M. 661.

11a. *Sale when possession is in a third party.* A sale of specific chattels at the time in possession of a third person, and where the purchase money is paid, is complete, though the possession be not changed; *Cassell v. Backrack*, 42 M. 56.

11b. *Sale where title is made to another.* A sale of a chattel is complete when the seller by agreement makes title to a third person as his indemnity, as security for the purchaser, the use and possession of the chattel being with the purchaser; *Blewett v. Evans*, 42 M. 804.

III. Sale of a part of Property in Bulk.

12. *Not complete till separation.* Where any act remains to be done by the vendor in order to ascertain the value, quantity, or quality of the goods sold, the sale is not complete; and hence, if the sale be of liquor, or other goods in bulk, the sale is not consummated until the part sold is measured and separated from the remaining goods of the vendor; but if there be a partial measurement and separation, and a delivery to, and acceptance by, the purchaser of the part so separated, the sale is complete as to that part; *Thomas' Case*, 8 G. 353.

13. *Same: Case in judgment.* If there be a contract for the sale of a gallon of vinous or spirituous liquors, but a measurement and delivery of a part only, the transaction is a sale in a less quantity than a gallon, and will subject the unlicensed vendor to the penalty of retailing in less quantities than one gallon; *Ib.*

14. *Same.* Where goods, part of an entire bulk, are sold, the contract is incomplete, and no property passes, if such part be not separated and distinguished from the bulk. Until the parties are agreed as to the specific identical goods, the contract can be no more than an agreement to supply goods answering that description, out of the entire bulk, it is clear that the vendee has no property in any particular part of the goods, more than another, until it is ascertained by separation, which is the part sold, and in such case, no property in the goods passing by the contract of sale; the vendor may afterwards lawfully sell and convey good title to the entire bulk; *Baldwin v. McKay*, 41 M. 358 (citing *Thomas' Case, supra*).

15. *Same.* And this rule applies wherever there is a sale of so much of an entire bulk; both parties understanding that the bulk contains more than the amount sold, though it turn out afterwards, that the entire bulk was no more than was sold, or was even less; for the contract must be determined by the understanding of the parties, at the time it was made; *Ib.*

16. *Sale in bulk: Purchaser causing de-*

struction of the bulk. B., in 1863, bought seventy-five bales of cotton in a lot of ninety-one bales. The seventy-five bales were not separated from the others, and B. took from the seller an obligation to deliver the cotton at a day and place named, and he endorsed on the obligation that if the cotton were burned either by the United States or Confederate States military authorities, it should be his loss. By his conduct in violating the policy of the Confederate States, their military authorities gave orders to burn all B.'s cotton; and in pursuance thereof, a Confederate States military officer rolled out seventy-five bales from the lot of ninety-one, as B.'s property, and burned it. B. afterwards came with a United States military force, and seized the remaining sixteen bales of cotton, and then sued for the whole lot of seventy-five bales: *Held*, that by his conduct he caused the destruction of part of the lot, and he had carried off the remainder, and he had thereby put it out of the power of the vendor to comply with his contract, and he could not therefore recover; *Scott v. Billgerry*, 40 M. 119.

IV. Bona Fide Purchaser for Value of a Chattel.

See CHANCERY, sub-division Bona Fide Purchaser.

17. *Payment of antecedent debt as a valuable consideration.* Whether a sale made in payment of an antecedent debt due from the seller to the purchaser, constitutes the latter a purchaser for a valuable consideration; *Quere?* *Harmon v. Short*, 8 S. & M. 433. See *Upshaw v. Hargrove*, 6 S. & M. 286, where it is held that the purchaser, in order to claim the protection of a *bona fide* purchaser for value, must have advanced some new consideration, or relinquished some security for a pre-existing debt.

See BILLS OF EXCHANGE, &c., 12, 124, 146, 233.

18. *Same: Case in judgment.* R. mortgaged a slave to H., but the mortgage was not recorded; R., afterwards, whilst the slave was still in possession of his agent, executed an absolute bill of sale of the slave to S in payment of a debt he owed S. and for the note of S. for the excess of the price of the slave over S.'s debt, and he gave S. an order on his agent for the slave; and after these papers were executed, S. gave R. a paper allowing him to "redeem" the slave by his paying back the purchase money in a specified time. When the order was presented to the agent, the slave was still in his possession, but on the succeeding night he escaped into the possession of H., the mortgagee: *Held*, 1st. That the transaction was a conditional sale and not a mortgage. 2d. That if considered as a mortgage, S. was still entitled to possession. 3d. That he was entitled to recover; *Harmon v. Short*, 8 S. & M. 433.

19. *As to protection afforded bona fide purchasers for value.* It seems the doctrine that protects *bona fide* purchasers without notice, does not apply to sales of personalty;

Hill v. Anderson, 5 S. & M. 216. A vendor can convey no title if he has none, and the vendor cannot set up want of notice against the claim of the real owner, having the legal title; *Hull v. Clark*, 14 S. & M. 187 (citing *Buller v. Hicks*, 11 S. & M. 78, 86).

20. *Purchaser of legal title protected.* Relief will not be granted in equity against a *bona fide* purchaser for value, without notice of complainant's equity. And such purchaser may protect himself under a *bona fide* purchase made by the person who sold to him. A *bona fide* purchaser can convey a good title to one having notice; *Lusk v. McNamee*, 2 C. 58; S. P., *Wyse v. Dandridge*, 6 G. 672; *Kilcrease v. Lum*, 7 G. 569.

21. *Purchaser of stolen property, &c.* Where a party obtains possession of goods by felony or chance, or as a simple bailee, he has no title, and can confer none by sale to a *bona fide* purchaser but if he obtain possession by a fraudulent purchase, then he has title; which is not absolutely void, but only voidable; and if he then sell to a *bona fide* purchaser, the latter gets a good title; *Lee v. Portwood*, 41 M. 109.

V. Conditional Sale.

See CONDITIONAL SALE. MORTGAGE, 13, 14. *Ante*, 18.

22. *Sale on conditions not complied with.* A sale was made to a *femme covert*, of certain slaves, which the seller had purchased at a sale under execution against the husband. The sale was made upon the condition that it was not to be binding, in case a suit then pending to set aside the purchase at execution sale as fraudulent, should go against the seller. This suit was decided against him; but the husband and wife retained possession of the slaves for several years afterwards, and until their death, and they were more valuable than the purchase money. The seller then filed his bill against the legal representatives of the husband and wife, to enforce his mortgage for the purchase money on the slaves, alleging that after the suit was decided against him, he elected to pay the value of the slaves, and permitted the wife to keep them: *Held*, that the above circumstances, coupled with the failure of the legal representatives of the husband and wife to deny the agreement as alleged in the bill, was sufficient evidence to show that the sale was to stand, notwithstanding the loss by the seller, of the suit; *Armstrong v. Stovall*, 4 C. 275.

VI. Conversion of Absolute Sale into a Mortgage.

23. See MORTGAGE, 7 to 12.

VII. Stoppage in Transitu, and Retaining for Price.

24. *Right to retain where purchaser has become insolvent.* As a general rule, where personal property is sold on a credit, the vendee acquires the right of property and the right

of possession, unless there be some agreement to the contrary; but if, before delivery of possession, the vendee become insolvent, or if being insolvent at the time of the sale, and that was unknown to the vendor, and he discover it before delivery, the vendee may protect himself, if payment has not been made when the credit expired, by retaining possession of the property. And the fact that collateral security in the shape of promissory notes on third persons, was received to secure the purchase money, will not change the rule; *Hunter v. Talbot*, 3 S. & M. 754.

25. *Retention where possession remains till expiration of credit.* If the purchaser allow the goods to remain with the seller till the expiration of the credit, the seller may retain possession till payment, nor is he bound to deliver them before he can enforce collection of the price by suit; *Ingersoll v. Kendall*, 13 S. & M. 611.

VIII. Miscellaneous.

26. *Power to resell: Where vendee refuses to complete the purchase.* If the vendee at an administrator's sale (or at an auction sale), refuse to complete the purchase by giving bond and security, as required by the terms of the sale, the administrator may resell and hold the purchaser responsible for the diminution in price brought by the property on a resale. And in such case the seller is not bound to delay bringing his suit for the recovery of the loss, until the expiration of the credit; for the action is not on the contract of the purchase, but for damages occasioned by the failure of the vendee to complete the purchase; *Mount v. Brown*, 4 G. 566.

27. *Action for price where vendor refuses to complete the purchase.* The defendant purchased goods of the plaintiff, to be delivered at a future day, when, by the terms of the sale, he was to give his promissory note, due after date, for the price; the defendant, without any just cause, refused to accept the goods when they were delivered: *Held*, that it was unnecessary, in order to give the plaintiff a right of action on the agreement that he should demand of the defendant his note; *Crawford v. Avery*, 6 G. 205.

28. *Same.* Where the purchaser agrees to give, by a specified time, his note due at a future day for the price of the goods, and he fails and refuses to do so, the seller may, before the time when the note would mature, bring his special action on the case for damages for the breach of the contract in not giving the note; but he cannot sue *in assumpsit* for goods sold and delivered until after the expiration of the credit agreed to be given; *Ib.*

29. *Sale by manufacturer.* If a manufacturer complete an article ordered by the purchaser according to the terms of the contract and by the time agreed on, and have it then ready for delivery; and set it apart for the purchaser, he can recover the price therefor, without an offer to deliver, if the purchaser have notice of its readiness and completion,

and make no objection; *McIntyre v. Kline*, 1 G. 361.

30. *Sale on agreement to deliver in future.* The defendant promised to accept and pay for a gin to be delivered to him on a specified day by the plaintiff, "if it should perform well when put in operation according to the directions accompanying the same;" and the plaintiff, without ever having bound himself to deliver the gin, did, however, deliver it with directions for running it, at the time specified, and the defendant then refused to accept it without any legal excuse therefor: *Held*, that the plaintiff was entitled to recover for the price of the gin; *Crawford v. Avery*, 6 G. 205.

31. *Purchase at execution sale for the benefit of the debtor.* It is lawful for a debtor whose property is about to be sold under execution, or deed in trust, to contract with another to become the purchaser at the sale, and to allow the debtor the privilege of redemption; and such an agreement when made on lawful consideration, will be enforced; *Downey v. Burnett*, 5 C. 409. And so is an agreement that the purchaser will purchase for the benefit of the debtor; *Soggins v. Heard*, 2 G. 426.

32. *Purchaser resisting payment of price for defect in title.* The purchaser of personal property who has been put in possession cannot resist payment of the purchase money on the ground of a want of title without a previous eviction, except in cases of fraud; *Ware v. Houghton*, 41 M. 370; S. P., *Storm v. Smith*, 43 M. 499.

33. *Same: Must return the property.* And where the purchaser has the right to avoid the sale for any cause, he cannot do so without a return or an offer to return the property, so as to put the vendor in *statu quo*; *Ib.*

34. *Verbal sale of slave in Louisiana.* By the law of Louisiana, if the party against whom a verbal sale of a slave or immovable property is sought to be enforced, fail to except in the court of the first instance to testimonial proof establishing it, he will be considered as waiving his objections to the invalidity of the contract which is not absolutely null, but only voidable at the election of the parties. And this rule will be enforced in this State; *Fox v. Matthews*, 4 G. 433.

See EXECUTOR AND ADMINISTRATOR, subdivision Sales of Personality.

Sales of Judgments to Pay Costs.

1. *Constitutionality of the act.* Whether the act providing for the sale of judgments to pay costs, is constitutional; and whether a valid order of sale can be made without notice to the plaintiff; *Quære?* *Lee v. Boykin*, 13 S. & M. 528. Whether the legislature has power to give to a defendant in a judgment the power to buy it without the plaintiff's consent for a less amount than is due upon it; *Quære?* *Buckingham v. Riggs*, 5 C. 751.

If the law be unconstitutional, its validity can not be set up by a purchaser of the judgment to defeat the owner's right of re-

demption and his right to recover the money which the purchaser had collected on it; *Harmon v. Barstow*, 1 C. 276.

2. *Sale without notice.* Whether the statute authorizing a sale of judgments to pay costs, authorizes a sale without notice to a non-resident creditor; *Quære? Buckingham v. Riggs* 5 C. 751.

3. *Judgment ordering the sale.* No order for the sale of a judgment to pay costs can be made until the second term of the court after the rendition of the judgment. This rule applies to cases where the plaintiff is a non-resident as well as where he is a resident of the State; *Queen v. Vick*, 6 C. 662.

An order to sell without a return of *nulla bona* on the execution, is void; *Cook v. Armstrong*, 3 C. 63.

4. *Sale where forthcoming bond has been taken.* Where a forthcoming bond has been given and forfeited, this being a satisfaction of the original judgment, a sale of the original for costs is void, and conveys to the purchaser no interest in the judgment on the forthcoming bond; *Cook v. Armstrong*, *supra*.

5. *Title vested by sale.* The sale of a judgment to pay costs under a valid order for that purpose, vests in the purchaser the absolute right to collect and satisfy it until it is redeemed by the plaintiff, notwithstanding the right of the plaintiff to redeem within two years from the date of the sale. And if satisfaction be made within two years before redemption, or an offer to redeem, it will be good, and the plaintiff's remedy in such case, is to sue the purchaser for the money so collected, in an action for money had and received to plaintiff's use; *Gholson v. Hatter*, 4 C. 240. And it is no answer to such an action where the tender was made before payment, that the defendant in the judgment had notice of the tender, and therefore paid the plaintiff in his own wrong; *Legard v. Gholson*, 2 C. 691. See *post*, 6.

6. *Redemption: Remedy for refusal of purchaser, &c.* Where a plaintiff whose judgment has been sold for costs tenders to the purchaser the amount of his bid and interest, within the time prescribed by the statute, he is entitled to be re-invested with the title to his judgment, and to have the money which the purchaser has collected from the debtor; and if the purchaser refuse the tender and to refund the purchase money, the plaintiff may maintain a bill in equity to establish his right to the judgment and to recover the money which has been collected; *Harmon v. Barstow*, 1 C. 276. See *ante*, 5.

7. *Tender by unauthorized agent.* And it is not necessary that the tender be made by a party, antecedently authorized by the plaintiff to make it; if he adopt the act of the agent afterwards, and bring a suit to enforce the right thereby acquired, it is sufficient; *Harmon v. Barstow*, 1 C. 276.

8. *Redemption, where the defendant in the judgment is purchaser.* By the act, authorizing a sale of judgments to pay the costs due thereon, if the defendant become the pur-

chaser of the judgment against himself, the judgment is thereby extinguished, and there is no redemption, as in cases of purchases by other parties. But, by the 12th section of that act, the plaintiff in a judgment so sold, and purchased by the defendant, may, at any time within three years from the date of the sale, sue out a *scire facias* against the defendant, and, if he show on trial of the same, that the defendant had any other estate or effects at the time of the sale, other than what he paid for the purchase of the judgment, the sale will be vacated, and the lien revived; *Lee v. Boykin*, 13 S. & M. 528.

9. *Same: Power of defendant to purchase, and his duty in that respect.* Whether the Legislature can confer on the defendant, the power to purchase the judgment absolutely, for a sum less than is due on the judgment; *Quære?* But, conceding the power, yet the rigorous operation of the statute, requires that a defendant in a judgment, claiming as a purchaser, should have done nothing in acquiring the right, inconsistent with the principles of equity and good conscience. If he can be protected in his purchase at all, it must be as an unfortunate debtor, without the means to render that full justice to his creditor, to which the creditor was entitled; and he must have become the purchaser at a fair public sale. Hence, if the defendant interfere at the sale, to prevent competition in the bidding; or it seems if he were possessed of ample means to pay the debt, and he concealed them in violation of his duty, the sale to him will be void; *Buckingham v. Riggs*, 5 C. 751.

10. *As to liability of circuit clerk, for cost of advertising judgment for sale, see CIRCUIT CLERK, 11.*

School Lands, Trustees, &c.

I. Title and Leasing of Sixteenth Sections.

1. *Title to.* The right and title to the sixteenth sections, reserved from sale in Mississippi Territory, by the Act of Congress of 1803, were not vested by that act, or any subsequent acts of Congress, prior to the Act of 19th May, 1852, either in the State or the inhabitants of the townships, but remained in the United States; *Hester v. Crisler*, 7 G. 681 (decided in 1859).

2. *Ratification of sales.* By Act of Congress of the 19th May, 1852 (amended by the Act of 3d March, 1857), the sale of all sixteenth sections theretofore made in this State by authority of the Legislature, were ratified and confirmed, and authority given to the State to sell all those remaining unsold, with the consent of the inhabitants of the townships; a sale, therefore, of sixteenth sections, made prior to that act, though in violation of the State law (but subsequently ratified by an act of the Legislature), is ratified and confirmed by the aforesaid act of Congress, and vests a good title in the purchaser; *Hester v. Crisler*, 7 G. 681.

3. *School lands trust property for the town-*

ship. School lands are trust property, for the benefit of the whole township in which they are situated, and the Legislature has no power to divert them from that purpose; *Morton v. Grenada Academy*, 8 S. & M. 773.

The act of Congress, donating the sixteenth sections, intended them to be employed for the benefit of those who are to be educated, and residing in the township in which the school lands respectively lie; and hence, children of the age to be educated, residing in a particular township, are entitled to have their share of the school fund, arising from the sixteenth section in that township, whether the school to which they go is situated in that township or an adjoining one; *Bishop v. McDonald*, 5 C. 371.

4. *Irregular lease.* If an irregularity be committed in leasing school lands, and the lessee know of such irregularity, and without any assurance of title or fraud by the trustees, he give his note for the purchase money, and take the risk, he can get no relief from the bargain; *Cole v. Harmon*, 8 S. & M. 562.

5. *Notice of the leasing.* A notice of six weeks is necessary for the leasing of school lands for ninety-nine years, but not where the leasing is for a shorter time; *Ib.*

6. *Leasing by Board of Police: Duty of lessee to preserve evidence of compliance with the law.* By the Act of 1833, it was provided, that the trustees of school lands might lease them for ninety-nine years; and it was also provided, that in townships where there were not sufficient inhabitants to elect a board of trustees, the Board of Police of the county should make the lease on the same terms that the board of trustees were authorized to make leases: *Held*, that the statute did not confer on the Board of Police jurisdiction as a court over the matter, but conferred on them a special and limited authority and duty, and that a lease made by them would be good, if being made in the same way by the trustees, it would be good; and that it was not necessary that the minutes of the Board of Police should show that the law was complied with in making the lease, but that this might be shown by parol, just as if the lease had been made by the trustees. And that the making of a lease being the exercise of a naked statutory authority, it was incumbent on the lessee to preserve evidence that all the prerequisites of the law to a valid lease, were complied with. This is the rule under the Act of 1833, which did not direct or provide for the recording of the transactions of school trustees in making leases; *Phillips v. Burrus*, 13 S. & M. 31.

7. *Same: The requisites for the lease.* The Act of 1833 prescribes the requisites necessary to constitute a good lease, of sixteenth sections, all of which must be complied with. These prerequisites are as follow: 1. The request of a majority of the heads of families in the township, minors not excepted. 2. Six weeks' notice by advertisement in a newspaper, or if there is no newspaper

printed in the county, then by posting up notices in three public places; and 3d. an actual leasing at the time and place specified, to the highest bidder. 4. Where the lease is made by the Board of Police, then also that there were not sufficient population in the township to elect trustees; *Ib.*

See *post*, 10.

II. The Trustees, their Appointment and Qualification, Powers and Duties.

8. *Power of Legislature to substitute other trustees.* Whether the Legislature can substitute other school trustees for a township, in the place of those who have been appointed under the general law; *Quære?* *Morton v. Grenada Academy*, 8 S. & M. 773.

9. *Acts of board without oath on bond are good.* See *OFFICE and OFFICERS*, 10. 11; with improper oath and bond, see same title, 12 to 20.

10. *Trustees are a corporation.* Trustees of the school lands are a quasi corporation, and as such may sue individual members of the board, though the defendants' names appear also as plaintiffs; *Curmichael v. Trustees, &c.*, 3 H. 84; *S. P. Connell v. Woodward*, 5 H. 665.

11. *Power to lease.* The right of school trustees to lease the school lands has been so long acquiesced in, that the courts will not now question it; *Connell v. Woodward*, 5 H. 665.

12. *Their powers are statutory.* Trustees of the school lands have no power, as such, except when conferred by statute, to employ teachers of public schools, and to make their salaries a charge on the school funds; *Beeks v. Fooshee*, 3 C. 55.

13. *Loan of school funds: The security.* The school trustees are required by statute to loan the school funds on personal security, and if they fail to do so, and select other security, they will be liable, if the debt be actually lost, notwithstanding they show that the security was ample when they took it; *Lindsey v. Marshall*, 12 S. & M. 587.

14. *Same: Liability where funds are in the hands of the treasurer.* Under the statute of this State, the funds paid over to the board of school trustees, go into the hands of their treasurer, and when they so place the funds, having first taken bond and security from the treasurer, they are not liable for any misappropriation of the funds by him; he alone is responsible therefor, and this liability extends in favor of the successors of that board which made the appointment; *Ib.*

15. *Liability for allowing d. b. to be barred by statute of limitations.* The trustees are liable on their official bond for their omission of duty, in allowing a note belonging to the township to become barred by the statute of limitations, and they are so liable whether their neglect was wilful or not; *Marshall v. Hamilton*, 41 M. 229.

16. *Same.* But if, in a suit against them for such neglect, it be merely alleged that

they (the trustees), brought suit on the note, and the maker defended it successfully, on the ground that it was barred by the statute of limitations, without any averment that judgment was rendered against the trustees in that suit, or without pleading the judgment as an estoppel, they may plead that the note was not barred, and try that issue in the suit against them; *Ib.*

III. Miscellaneous.

17. *Art of 1848, allowing clerk to issue execution on notes for school fund.* By the Act of 1848 (H. C. 239), it is enacted "That all notes given for the purchase or lease of any school lands, or for money loaned by the school trustees, &c., shall be recorded by the clerk of the Circuit Court of the county in which the said trustees reside; and when said notes are due, if not punctually paid, the said clerk shall issue execution thereon." *Held*, that if the statute be constitutional, no such execution can issue, unless the note were filed with the clerk, and recorded before it fell due; and unless on the day it fell due, the clerk made on it an endorsement of non-payment; *Matthews v. Parker*, 5 C. 642.

18. *County treasurer of Tippah county.* The county treasurer of Tippah county, is not prohibited by the Act of 4th March, 1848 (local), from loaning the school fund, belonging to that county; *Murray v. Smith*, 6 C. 31.

19. *Ejectment by trustees.* Ejectment may be maintained by trustees of school lands, in the name of their president, to recover the school lands in the adverse possession of another; *Windham v. Chisholm*, 6 G. 531.

20. *Powers of Board of Police to buy land under Act of 1854.* Where a statute imposes a duty or gives a right, it also by implication confers the necessary powers to make the right available, or to discharge the duty; and hence, the Act of 1854, ch. 345, and of 1856, ch. 27, which directs that the Board of Police should take deeds of trust on real estate, from the borrowers of the common school fund, give them the power to make this right available by purchasing the land, when sold for the payment of the debts due to the school fund, and to resell the same, for the collection of the debt; *Gaines v. Faris*, 10 G. 403.

See *BANKS*, 79.

21. *Same.* These acts are merely directory in requiring deeds of trust to be taken, and impose a plain duty on the board to take them; but they do not make void a note given for such loan, though not thus secured; *Ib.*

Scire Facias.

See *REVIVOR, EXECUTOR AND ADMINISTRATOR*, 332, *et seq.*

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I. Office, Nature and Form of Scire Facias.

1. *Office of: Form of judgment.* The office of a *scire facias*, is to revive and have execution of a judgment; and a judgment of revivor is an award of execution of the original judgment, and not a judgment in *numero*; and hence, if the *scire facias* and revivor be void, they will not destroy or impair the original judgment; but all subsequent proceedings in execution of the original judgment, will have the same validity as if no *scire facias* had been issued, or judgment of revivor entered; *Hughes v. Wilkinson*, 8 G. 482.

See *REVIVOR*, 28.

2. *Scire facias as a remedy at common law, as to pending suits and under our statutes.* See *REVIVOR*, 14, 15, 17, 18, 19.

3. *Scire facias to revive suits in favor of dissolved bank.* See *REVIVOR*, 4, 5, 6, 7.

4. *Nature of sci. fa. to revive pending suit.* A *scire facias* to revive a pending suit against the administrator of a deceased defendant, is but process to bring the administrator into court to defend the original suit, and he need not plead to the *sci. fa.* at all, if he cannot defend it. And the plea to the original action, filed by the intestate in his lifetime, will be the plea of the administrator, if he file no other; *Woodhouse v. Lee*, 6 S. S. & M. 161.

5. *Scire facias not an action, &c.* A *scire facias* to revive a pending suit, is not such an action as is embraced in the statute prohibiting suits against executors and administrators for nine months after their qualification or appointment; *Breckenridge v. Mellon*, 1 H. 273.

6. *Sci. fa. to revive a judgment.* But a *sci. fa.* to revive a judgment against an executor, &c., is so far in the nature of an original action against him, that he can make his defence thereto by plea; *Sims v. Nash*, 1 H. 271. But he can plead nothing in bar of the *scire facias* which would have been a defence to the recovery of the judgment and no more; *Matthews v. Mosby*, 13 S. & M. 422; *Person v. Valentine*, 13 S. & M. 551; *Peale v. Bolton*, 2 C. 630; *Langston v. Abney* 43 M. 161. Revivor does not preclude proof of payment of a judgment made before revivor; *Peale v. Bolton*, 2 C. 630.

7. *Sci. fa. issued without authority of law.* Where a *scire facias* is issued without authority of law, the defendant may, after plea, and verdict, and judgment against him, and at the same term at which the judgment is rendered, move to quash the *scire facias*; *Locke v. Brady*, 1 G. 21.

8. *Contents of sci. fa.* A *scire facias* to revive a judgment is in the nature of an action on the judgment, as to the parties sought to be charged by it, and should contain sufficient certainty to enable the court to give judgment. It should show clearly the character of the defendant and the mode in which the duty to discharge the judgment devolved on him; *Pickett v. Pickett*, 1 H. 267.

9. *Same: Statement of the lien.* It is not necessary to set forth in the *scire facias* to

revive a judgment, that the judgment has been enrolled. The want of the enrolment of the judgment, if material at all, should be set up by way of defence; *Com'l B'k of Manchester v. Kendall*, 13 S. & M. 278.

10. *Same*: *Statement of description of the land of ancestor*. The *scire facias* to revive a judgment against the heirs of the defendant, should either contain a description of the land sought to be condemned, or the return of the sheriff on it should contain such a description. But a failure in both these respects will not justify a quashal of the *scire facias*, for the court will either permit the sheriff to amend, or issue a new writ; *Com'l B'k of Manchester v. Kendall*, *supra*; S. P., *Hughes v. Wilkinson*, 6 C. 600.

11. *Same*: *Form of sci. fa. against terre tenants*. A *scire facias* against terre tenants may be either general against all the terre tenants, or against certain named parties as terre tenants; and though it is necessary that all be summoned, it is not necessary that they be named in the *sci. fa.*, and it seems the same rule is applicable to the heirs; *Hughes v. Wilkinson*, *supra*.

11a. *Is a pleading*. A *scire facias* on a judgment *nisi* is to be regarded as a declaration as well as process, and is amendable, as other pleadings; *Curry's Case*, 10 G. 511.

II. When Scire Facias Necessary, and when a Proper Remedy.

12. *Necessary when new parties are to be made to the judgment*. When a new party is to be benefited or charged by the execution of a judgment, a *scire facias* is necessary to make him a party; but no one who is not to be benefited or charged by the execution of a judgment, need be made a party by *sci. fa.*; and hence, the heir, after a condemnation and sale of the realty of the ancestor, to pay debts, being no longer interested in it, need not be made a party by *sci. fa.* to a judgment rendered against the ancestor in his lifetime, in order to the making of a valid sale of the realty under that judgment. But in such case the purchaser at the executor's sale, being a terre tenant, ought to be made a party by *scire facias*; *Smith v. Winston*, 2 H. 601.

12a. *No sci. fa. necessary to revive in name of administrator de bonis non*. The statute, Rev. Code of 1857, p. 456, art. 124, provides that if any executor, &c., should die, resign, or be removed before final settlement, actions commenced by or against him, shall not for that reason abate, but the same may be prosecuted by or against his successor, "who may come in and make himself a party to suits or actions commenced by or against his predecessor, by proper suggestion, or if he fail to do so, he may be brought in by the opposite party, by *scire facias*. And all judgments recovered by or against an executor or administrator who has died, resigned, or been removed, may be revived for or against his successor in the same way." Under the statute, a judgment recovered by the first ad-

ministrator may be revived in the name of his successor, by motion and suggestion, without any *scire facias*; *Dibble v. Norton*, 44 M. 158.

13. *Same*. And, unless there be new parties, a *scire facias* is not only unnecessary, but improper. It will not lie to revive a judgment as between the original parties, except where there has been a failure to issue execution for a year and a day after the rendition of the judgment. It is no reason for issuing a *scire facias* as between the original parties, that there has been a levy on personality which does not appear to have been disposed of; *Locke v. Brady*, 1 G. 21.

14. *No scire facias against heir to revive judgment against executor*. A *scire facias* will not lie against the heir or devisee to revive a judgment which was originally rendered against the executor; where there is no judgment against the ancestor in his lifetime, his realty can only be reached by his creditors through a proceeding in the Probate Court; *Foster v. Sumner*, 3 S. & M. 606.

15. *Administrator of deceased partner not entitled to*. The administrator of a deceased partner has no right to enforce the collection of a judgment in favor of the surviving partner; and if the latter die, and the administrator of the first deceased partner attempt to revive the judgment in his name, he will be a mere intruder; *Copes v. Fultz*, 1 S. & M. 623.

16. *Revivor of void judgment*. A void judgment cannot be revived by *scire facias*, but a judgment merely erroneous can; *Matthews v. Mosby*, 13 S. & M. 422. See ante, 6.

17. *Scire facias for a devastavit*. A *scire facias* is a proper remedy to obtain an award of execution *de bonis propriis* on a judgment rendered against an administrator, upon the ground that the administrator has been guilty of a *devastavit*. In such cases, however, judgment final, by default, cannot be taken for want of a plea to the *scire facias*; there must be a writ of inquiry and proof of the *devastavit*; *Sims v. Nash*, 1 H. 271.

See EXECUTOR AND ADMINISTRATOR, 118, 119.

18. *Scire facias where defendant's estate is insolvent*. A *scire facias* against the heir is a proper remedy to subject lands of the ancestor to the payment of a judgment rendered against him in his lifetime. And it is no answer to the *scire facias* that the estate had been declared insolvent before its issuance, as such declaration does not affect a lien created in the lifetime of the decedent; *Com'l B'k of Manchester v. Kendall*, 13 S. & M. 278.

III. Variance between Scire Facias and Former Proceedings.

19. *Sci. fa. must correspond with judgment nisi*. A *scire facias* to enforce a judgment *nisi* must recite the judgment correctly. Hence, if the judgment *nisi* be for a default in failing to appear and answer the indictment, and the *sci. fa.* recite a judgment *nisi* for a default after conviction in failing to

appear and receive sentence, the variance will be fatal; *Bridges' Case*, 2 C. 153.

The *sci. fa.* must correspond with the judgment *nisi* in every material respect, and variance between them as to the sum demanded will be fatal, and this objection will not be obviated by the fact that the sum mentioned in the *scire facias* is the same as that mentioned in the recognizance upon the forfeiture of which the judgment *nisi* was rendered; *Ditto's Case*, 1 G. 126.

20. *Same.* A *scire facias* upon a judgment *nisi* is merely process to complete and render final the judgment *nisi*. And if there be a material variance between the *sci. fa.* and judgment *nisi*, it will be error to enter judgment final, though no objections are taken to the sufficiency of the proceedings. Thus, if a judgment be entered against bail for the non-appearance of *Jno. W. Douthit*, as the principal, and he be described in the *sci. fa.* as *Richard B. Douthit*, the variance will be fatal, and a final judgment rendered thereon will be erroneous, and will be reversed in the High Court, and the *scire facias* quashed; *Douthit's Case*, 1 G. 133.

21. *Variance between sci. fa. and the recognizance.* A variance between the recognizance and the *scire facias* issued to enforce a judgment *nisi* on the recognizance, as to the term of the court at which the cognizor was bound to appear, is material, and will be fatal to the validity of the *scire facias*, if objection be properly made by plea, but not otherwise; *Ditto's Case*, 1 G. 126.

IV. Proceedings on Scire Facias.

22. *Joinder of parties.* The administrator and heirs cannot be legally joined in a *scire facias* to revive a judgment rendered against the ancestor and intestate; *Barnes v. Mc-Lemore*, 12 S. & M. 316.

23. *Service of the scire facias.* If there be two administrators, a *sci. fa.* to revive a pending suit should be served on both. Service on one will not authorize a revivor as to both; *Breckenridge v. Mellon*, 1 H. 273. A *scire facias* is to be served and returned in the same manner as a summons; *Davis v. Patty*, 42 M. 509.

Sed vide EXECUTOR AND ADMINISTRATOR, 162.

24. *Same: Discontinuance.* A *scire facias* to revive a judgment rendered against several, should be issued against all the defendants; and, if having been sued out against all, it be discontinued as to part, it is a discontinuance as to all. But there are some exceptions to this rule, as where the defendants sever in their pleas, and one plead a personal discharge on a matter which is a bar as to him only, then the plaintiff may discontinue as to him without affecting his remedy against the others. But even in the first case, if upon entering the discontinuance as to a part, the others do not insist on the entry of the discontinuance as to them, but go to trial on a plea to the merits, the verdict against them will cure the error by statute of jeofails; *McAfee v. Patterson*, 2 S. & M. 593.

25. *Venue of sci. fa.* Whether upon the death of the original defendant, pending the suit, his administrator upon *sci. fa.* to revive can change the venue to the county wherein he is a freeholder and resident; *Quære?* *Neely v. Planters' B'k.* 4 S. & M. 113.

26. *Judgment on sci. fa.* A judgment of revivor against the administrator, should be against the administrator as such, and not personally; *Breckenridge v. Mellon*, 1 H. 273. See REVIVOR, 25.

27. *Judgment by default on.* A judgment by default may be entered on a *sci. fa.* to enforce a judgment *nisi*, although there be a plea filed to the indictment; *Ditto's Case*, 1 G. 126. It should not be entered, however, till the fourth day of the term; *Davis v. Patty*, 42 M. 509.

V. Miscellaneous.

28. *Writ of error to judgment on sci. fa. does not extend to the original judgment.* Where a *sci. fa.* to revive a judgment has been sued out, and a plea of payment filed to it, and a verdict on that plea for the plaintiff, an error or defect in the original judgment cannot be inquired into on a writ of error to the judgment on the *sci. fa.*; *McAfee v. Patterson*, 2 S. & M. 593.

29. *Limitation of sci. fa.* The right to issue a *scire facias* to revive a judgment against the administrator or heirs of the debtor, is barred after the lapse of seven years from the date of its rendition, even in cases where executions have been regularly issued out within seven years, prior to the issuance of the *sci. fa.*; *Vick v. Cheuning's Heirs*, 2 G. 201.

30. *Sci. fa. for balance found for defendant.* A *scire facias* to obtain an award of execution to collect a balance certified by the jury in favor of the defendant, when the latter has pleaded a set-off, may be served on the plaintiff's attorney who managed the case for him, although he was not his attorney of record; *Fisher v. Battaile*, 2 G. 471.

31. *Order of court granting bail no part of the record.* The order of the court admitting a party to bail on an indictment against him, is not a part of the record of the proceeding to enforce the judgment *nisi*, rendered on the forfeiture; and hence, will not be considered on a demurrer to the *scire facias* issued on the judgment *nisi*. The proper mode of making the objection and bringing it before the court, is by plea; *Field's Case*, 10 G. 509; S. P., *Ditto's Case*, 1 G. 126.

32. *Impeachment of return on process.* If process on which the original judgment is founded, be served by the sheriff where he is interested, and no objection be made thereto, the judgment thereon cannot be impeached by the administrator of the defendant when he is brought in by *sci. fa.* to revive the judgment; *McLeod v. Harper*, 43 M. 42.

Sea and Seashore.

1. *Law of nations: Freedom of the seas.* The sea and its arms, by the law of nature

and of nations, are common to all mankind, and are not the subject of exclusive appropriation by any nation, except only such bays, sounds or other arms of the sea, lying wholly within the territory of a nation, whose outlets into the sea are so narrow as to be capable of being defended; *Steamer Magnolia v. Marshall*, 10 G. 109.

2. *Seashore. Ownership of: Right of navigators in.* The shores of the sea between high and low water, belong to the adjacent nation, and are subject to its jurisdiction, yet, they are subject to an easement in favor of the citizens of all nations, which entitles them to the innocent use of the seashore for the purposes of navigation and commerce; *Ib.*

3. *Boundary of grants on the seashore.* The common law of England in favor of commerce and intercourse among mankind, construed grants made by the crown, of land bounded on the sea or its arms, to extend only to high water mark, leaving the right to the shore in the King, for the benefit of the public, and to promote commerce and intercourse among other nations, by securing to them its free and innocent enjoyment; *Ib.*

4. *Right of riparian proprietor.* The right of the owner of land bounded by the sea, extends only to high water mark; all the shore below high water mark belongs to the State, as trustees for the benefit of the public, or may by grant become private property, or the subject of an exclusive private right; and hence, it is no violation of such riparian owners, for the State to grant the exclusive privilege to an individual to erect and keep a public wharf on the seashore adjoining their land; *Martin v. O'Brien*, 5 G. 21.

See CONSTITUTIONAL LAW, 65, 105.

5. *Grant of exclusive right in seashore.* M. was the owner of a public wharf in the town of S., under a license from, and contract with, the corporate authorities, to keep the same in repair till the year 1861. In 1856, his wharf was destroyed by a storm, and he procured a new license, for which he paid \$25, and made a new contract with the town authorities, by which he was authorized to build a new wharf, and was bound to keep it in repair till 1866; and in consideration thereof, the exclusive right to keep a public wharf on the seashore in front of the town, was granted to M. for the period aforesaid; *Held*, that the contract was supported by a valuable consideration, and that his exclusive right to keep a public wharf secured by it, could not be impaired by the grant of another license for the erection of a wharf contrary to the terms of the contract; *Ib.*

Seal.

1. *A scroll is a seal.* The statute (H. & H. 617) declares that any instrument to which the maker shall affix a scroll by way of seal, shall be held as duly sealed. Under this, a scroll at the end of the maker's name, with the word "seal" written in it, makes the instrument a specialty, though there be no words in the body of the instrument indicating an inten-

tion to make it a specialty; *McRaven v. McGuire*, 9 S. & M. 34 overruling *Bonhannon v. Hough*, W. 461, which held that such words in the body of the instrument were necessary.

2. *Same.* And so the word "seal" affixed to the signature of the maker, without any other scroll, is sufficient; and it makes no difference whether that word be written or printed; *Whittington v. Clarke*, 8 S. & M. 480; *Pierce v. Lacy*, 1 C. 193; S. P., *Wanzer v. Barker*, 4 H. 363; *Wright v. Steamer, Vesta*, 3 H. 162; *Hudson v. Poindexter*, 42 M. 304.

3. *That it is not necessary to record or copy the impression of an official seal*, see REGISTRATION, 23.

Seisin.

1. *Constructive seisin sufficient.* Where a decree is rendered in favor of a creditor directing a sale of the lands of which the ancestor died seized, actual seisin is not necessary; it is sufficient, if he had constructive seisin, under an equitable title, which afterwards became perfect in the hands of the heir; *Doe v. Gildart*, 5 H. 606.

See ANCESTOR AND HEIR. EJECTMENT. VENDOR AND VENDER.

Set-off.

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I. What is a good Set-off.

1. The Mutuality Required.

1. *Must be mutual.* A set-off must be mutual, that is between the same parties, or as the statute expresses it, the parties must be "dealing together," otherwise it is not good. Thus, where two are sued on a joint and several debt, a claim due to one of the defendants alone, is not a good set-off; *Bullard v. Dorsey*, 7 S. & M. 9. A demand of one of several defendants against a sole plaintiff, or a demand of all the defendants against one of several plaintiffs, is not a good set-off; but a demand in favor of the defendant, there being only one, or in favor of all, if there be more than one defendant, against the plaintiff and another, is a good set-off, for the plaintiff is severally liable for the debt; *Moody v. Willis*, 41 M. 347.

2. Debts purchased by Debtor against Creditor.

2. *Promissory notes.* It is not necessary, that a promissory note should be endorsed, to enable the holder to tender it as a set-off; *Glass v. Moss*, 1 H. 519. But in all cases, the defendant must show that he purchased the set-off, before the suit was commenced; *Carpew v. Canavan*, 4 H. 370. See post, 16.

3. *Open account.* A defendant may set up as a set-off, an open account against the

plaintiff, which has been transferred to him by mere delivery, and without writing; *Ashby v. Carr*, 40 M. 64 (citing *Phipps v. Shegogg*, 1 G. 241, which allowed such transfer when in writing).

4. *Claim purchased against a decedent.* A claim against a decedent's estate, purchased by a debtor to the estate, after the decedent's death, though done at the request of the administrator, is not a good set-off to an action by the administrator; *Whitehead v. Cade*, 1 H. 95.

And a debt due by the decedent, is not a good set-off to an action against the creditor, for property purchased from the administrator; *Mellen v. Boardman*, 13 S. & M. 100.

5. *Endorsed bill of exchange or note.* The endorsee or holder of a bill of exchange or note, may use it as a set-off to a suit instituted by a prior endorser (who is liable thereon) against him; and this right is not affected by the statute requiring all parties to an endorsed bill or note, to be sued in the same action; *Pease v. Turner*, 3 H. 375.

3. The Nature of the Demand allowed as a Set-off.

6. *Unliquidated damages not allowed.* A claim for unliquidated damages for the conversion of personalty by the plaintiff, cannot be set off to an action for an ascertained sum; *Whitaker v. Robinson*, 8 S. & M. 349.

7. *Price of unsound thing sold as a set-off.* The defendant cannot deny *in toto*, the plaintiff's right of action, and at the same time set up in his answer a substantive and independent cause of action, inconsistent with the plaintiff's claim, and involving the issue of its justice and legality, and which, of itself, amounts to an assertion that the plaintiff's demand is ill-founded; and hence, where the plaintiff brought an action to recover damages, as for a total loss of the chattel, occasioned by a breach of the defendant's warranty of soundness, the latter cannot deny the breach of the warranty, and at the same time demand payment against the plaintiff for the purchase money; *Shewalter v. Ford*, 5 G. 417.

7a. *Damages arising from default of agent as a set-off.* Against an agent for receiving depreciated funds contrary to, or without, instructions, the proper remedy is assumpsit for money had and received; and therefore, the claim of the principal, in such a case, may be pleaded as a set-off against an action on a note against him by the agent; *Mangum v. Ball*, 43 M. 288.

8. *Judgment, and cause of action thereof as set-off.* A judgment rendered by a justice of the peace on a note, is a merger of the note, and the note is then no longer the subject of a plea of set-off, or of a new action; *Standifer v. Bush*, 8 S. & M. 383. But a judgment itself, in favor of the defendant against the plaintiff, is a proper set-off to an action on a contract; *Moody v. Willis*, 41 M. 347.

9. *Court costs.* The costs due officers of courts are liable to be set off against a judgment which they owe to the party against whom they are taxed. And the set-off will be made on motion, when the judgment

against the officers, and the taxation of the costs are in the same court; *Officers of Court v. Bank of Port Gibson*, 4 S. & M. 431.

Whether in such case a party claiming to be the assignee of the costs can make himself a party to the motion, so as to resist the set-off; *Quære?* But if he can, he must produce evidence of the assignment; S. C., 4 S. & M. 431.

10. *Defendant must have present cause of action: Rule.* To constitute a valid set-off at law, there must be a present indebtedness upon contract, express or implied, susceptible of ascertainment in amount; and the defendant must have such a cause of action as would enable him then to maintain an action thereon against the plaintiff; *Kershaw v. Merchants' Bank of N. Y.*, 7 H. 386.

11. *Same: Debt arising from levy on personality of surety.* The levy of an execution on sufficient personal property of the defendant to satisfy it, is a satisfaction of it, unless the levy be afterwards legally removed. And if such levy be made on the property of a surety, it immediately gives him the right to sue the principal for the amount of the judgment; and hence, also to set off the amount against a debt due by him to the principal. And if the levy has been so disposed of as not to be a satisfaction, it is the duty of the principal to show it; *Id.*

12. *Same: Case in judgment.* The acceptor of an inland bill of exchange became the surety of the payee, and on that liability a judgment was rendered against him, and a levy was made on the surety's personalty to an amount sufficient to satisfy the judgment, before he received any notice of the assignment by the payee, of the bill of exchange. The court held that the judgment was *pro tanto* a good set-off in favor of the surety against an action on the bill, the plaintiff not proving that the levy had been removed; *Id.*

II. Set-off where there has been an Assignment of the Debt under the Statute.

13. *For the statute allowing equities between the original parties, to be set up against assignee,* see *BILLS OF EXCHANGE, &c.*, 197.

14. *For construction of this statute in such case.* see *BILLS OF EXCHANGE*, 144 to 155.

15. *Inland bills within the statute.* Inland bills of exchange are within the statute allowing the maker to set up, against the assignee, all lawful set-offs and other defences accruing before notice of the assignment. They are not assignable, except in virtue of that statute, and as they derive their character of assignability from the statute, they must take it with all the incidents and consequences attached to it by the statute; *Kershaw v. Merchants' Bk of N. Y.*, 7 H. 386. As to foreign bills, *contra*, see *BILLS OF EXCHANGE*, 144, *et seq.*

16. *Duty of parties, as to proof of notice of assignment, and acquisition of set-off.* Where a debtor sued by an assignee, pleads, as a set-off, a liability of the assignor, which he claims to have purchased, he must show

that he was the owner of it at the time his debt was assigned to the plaintiff, or at the time he received notice of the assignment. In such a case, the plaintiff must show the date of the assignment to him; and where there is no other proof on this point, the commencement of the action will be considered notice of the assignment. And this rule is the same, whether the suit is brought in the name of the assignee, or in the name of the assignor, for the use of the assignee; and in that case, the defendant must show he purchased the set-off before the commencement of the suit; *Northern Bk of Miss. v. Kyle*, 7 H. 360; *S. P., Kershaw v. Bk of N. Y.*, 7 H. 386; *Freeland v. Mann*, 1 S. & M. 531. And in this last case it was held, that if the suit was commenced on the same day with the acquisition of the set-off, it was incumbent on the defendant to show that he procured the set-off first; see *ante*. 2.

17. *Set-off must exist before notice of assignment.* To constitute a good set-off against a note which has been assigned, the debt against the payee claimed as a set-off must have been held by the defendant before notice of the assignment; *Lake v. Brown*, 7 H. 661.

18. *Set-off where defendant's liability has been attached.* If a debtor acquires a set-off against his creditor before he has notice of attachment proceedings in another State, by which his note in the hands of an agent of the creditor is attached and condemned to be sold, it is good; *Riggs v. Dyche*, 2 S. & M. 606.

19. *Same: Case in judgment.* W. was indebted to the Union Bank of Mississippi by bill of exchange, which was in the hands of the agent of the bank, at Mobile, Alabama, for collection. In April, 1840, an attachment was taken out in Alabama against the bank, by one of its creditors, and her agent at Mobile summoned as a garnishee, and he answered that he held this bill, among others, as the property of the bank. Afterwards, on the 18th October, 1841, the attaching creditor in Alabama filed a bill in chancery against the agent, the bank and W., and such proceedings were had that in April, 1842, a decree was entered ordering a sale of the bill of exchange, and, accordingly, in June, 1842, it was sold, and the plaintiff in this suit became the purchaser. On the 1st October, 1841, the defendant in this suit (W.) tendered to the Union Bank the amount of the bill of exchange in its own notes, which were refused, on the ground that the bill was in Mobile, and the bank officers did not know what had become of it. The plaintiff, the purchaser under the chancery sale in Alabama, brought this action against W., and the defendant pleaded payment, and filed in court notes of the Union Bank sufficient to pay it: *Held*,

1st. That no transfer of the debt of W. to the bank was had, or made under the proceedings at law commenced in Alabama in April, 1840, but that the transfer took place under the proceedings in chancery, which were commenced on 18th October, 1841, and conceding (which is a matter of doubt) that the

publication of notice of that suit was notice to the defendant, W., of the transfer, still the defendant had acquired the set-off and made a tender eighteen days before the chancery suit was commenced.

2d. That proof of the possession and tender of the bank notes on 1st October, 1841, was sufficient to authorize the jury to find that the notes now filed as a set-off, were the same as those then tendered; and.

3d. That the sale and transfer of the bill under judicial proceedings in Alabama were to be allowed no more effect than if W. had been directly summoned as garnishee of the bank; and that as the decree ordering the sale was not made till April, 1842, W. was entitled to the benefit of the statute of this State, passed in February, 1842, securing to the debtors of banks who are garnisheed as such, the right to discharge their indebtedness in the notes of the bank; *Jb*.

20. *Set-off obtained against endorsee, where payee afterwards took up the note.* When the payee in a note endorses it to another and the maker obtains a set-off against the endorsee whilst the note is in his possession, but does not pay the note to the endorsee, or adjust it and the set-off with him, whereby the payee who has endorsed it, is compelled to take up the note in virtue of his endorsement, the set-off thus obtained will not be good against the payee after he has taken up the note. In this case the endorsee was a bank, and the set-off was the notes of the bank, obtained by the maker whilst the note was held by the bank; *Maury v. Jeffers*, 4 S. & M. 87.

III. Pleadings and Practice in Relation to Set-offs.

21. *The technical plea of set-off.* A special plea of set-off is unknown to the common law and the statutes of this State; and if pleaded may be treated as a nullity. The advantage of a set-off may be obtained under a plea of payment with the set-off filed with it; *Houston v. Smith*, 2 S. & M. 597; *Henry v. Hoover*, 6 id. 417; *Anderson v. Burke*, id. 475; *Alliston v. Lindsey*, 12 S. & M. 656; *Bullard v. Dorsey*, 7 S. & M. 9.

But if such null plea be demurred to, the demurrer must be disposed of; *Anderson v. Burke*, 6 S. & M. 475.

See PLEADINGS, 68, 69

22. *Notice of the set-off must be given.* A set-off cannot be proven unless notice of its nature be given in the plea, or in a bill of particulars filed with it. And a plea of payment containing an averment that it is accompanied by a bill of particulars which will be proven as a set-off, is an absolute nullity, unless accompanied by a bill of particulars; *Miller v. Brooks*, 4 S. & M. 175. But a plea of payment, simply, without such averment, is not a nullity, though unaccompanied by a bill of particulars, for under it a plea of actual payment in money may be proven; *Prim v. Kittridge*, W. 390; *Miller v. Brooks*, 4 S. & M. 175.

The notice of the nature of the set-off must be given in the plea, or by bill of particulars filed with it, or no proof can be made in relation to it; *Smith v. Winston*, 2 H. 601; *Curry v. Kurtz*, 4 G. 24. And any evidence of a set-off, the nature and particulars of which are not sufficiently indicated in the bill of particulars filed, so as to give the plaintiff such notice as will enable him to prepare for his defence, would operate to his surprise, and would be inadmissible; *Curry v. Kurtz*, *sup'a*; *S. P. Shogogg v. Phipps*, 1 G. 241. See BILL OF PARTICULARS.

23. *Set-off under general issue with notice.* A set-off may be given in evidence under the general issue if a bill of particulars be filed, but the plea of payment is the more appropriate, a plea of set-off not being allowed; *Alliston v. Lindsay*, 12 S. & M. 656; *Kershaw v. Merchants' Bank of N. Y.*, 7 H. 386.

24. *Set-off must be claimed by defendant.* A set-off cannot be allowed by the jury if none be claimed by the defendant in the pleadings; *Gibson v. Powell*, 5 S. & M. 712.

25. *Pleading partial set-off.* A plea of set-off (if allowable) which professes to answer the whole action, is bad, if the set-off pleaded be less than the debt sued on. In such case, the plea should be for a part defence only, and must confess the balance of the debt, or avoid it by some other matter; *Kershaw v. Merchants' Bank of N. Y.*, 7 H. 386. See PLEADINGS, 91, 92.

IV. Miscellaneous.

26. *Set-off a cross action.* A set-off is in the nature of a cross action, and is not allowable except where an action on that claim is allowable; *Whitehead v. Carle*, 1 H. 95.

27. *Statute of set-off literally construed.* The statute of set-off is founded on equitable principles, and should be liberally construed in favor of the right of set-off; *Kershaw v. Merchants' Bank of N. Y.*, 7 H. 386.

28. *Set-off barred by limitations.* Set-offs are subject to the bar of the statute of limitations, but actual payments are not; *Barnes v. Lloyd*, 1 H. 584.

29. *Instance of disallowance of set-off on the ground that it was paid.* A debtor who owed \$6,800, gave the creditor the note of R. for \$3,000, as collateral security, and with the further agreement that when the note was paid, it should be in full satisfaction of the debt. An agent of R. arranged with the creditor to take up R.'s note, by substituting the agent's acceptance for \$1,000, and R.'s new note for the balance, and thereupon the creditor gave up to the agent the debtor's note for \$6,800, and also R.'s note for \$3,000, which had been left with him by the debtor, and both of these notes the agent delivered to R. The debtor afterwards sued R., who pleaded the note for \$6,800 as a set-off: Held, that the arrangement by which R.'s agent got possession of the note, conferred no title to it on R., but was a virtual satisfaction of it under the agreement between the debtor and creditor, when the note of R. was placed

in the hands of the latter as a collateral security; *Stone v. Buckner*, 12 S. & M. 73.

30. *Bill of exceptions to excluding set-off.* Where exceptions are taken to the exclusion of evidence to prove a set-off, the bill of exceptions should show the items of the set-off filed with the plea, otherwise the High Court will not notice the objection; *Rankin v. Butler*, 2 S. & M. 473.

31. *Set-off withdrawn.* The "words set-off withdrawn," in a record refer, not to the plea of set-off, but to the bill of particulars filed with the plea; *Id*.

32. *Jurisdiction of justice of the peace as to set-offs.* A justice of the peace may entertain jurisdiction of a set-off which is for a sum larger than that fixed by law as the limit of his jurisdiction, if the balance due the defendant after deducting plaintiff's demand, be within his jurisdiction; *Glass v. Moss*, 1 H. 519.

33. *New trial on refusing set-off.* A new trial will not be allowed to the defendant insisting on his right to set-off or pay a debt in bank notes, unless he bring the notes into court; *Kershaw v. Merchants' Bank of N. Y.*, 7 H. 386.

34. *Set-off against claim of a county.* Whether in a suit by the county treasurer for the recovery of school, or three per cent. funds loaned by him at interest, county warrants and the general indebtedness of the county may be pleaded as a set-off; *Quære?* But however this may be, after judgment recovered, a court of chancery will not allow such claims as a set-off; *Cannon v. Gartman*, 43 M. 581.

Sheriff and Sheriff's Sales.

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I. The Sheriff's Bond and Actions on it, and Oath.

1. *Bond payable to the governor.* Whether the official bond of a sheriff payable to the governor and his successors in office, is valid or not; *Quære?* *Paddleford v. Moore*, 3 G. 622.

2. *Pleading the insufficiency of the bond.* A plea to a motion made against the sureties of a sheriff, setting up the invalidity of the bond, upon the ground that it is payable to the governor instead of to the State, should expressly negative the execution of any official bond by them, payable to the State; a simple averment that a certain instrument executed by them on a day named, is void as an official bond, because it is payable to the governor and not to the State, will not do; *Ib.*

3. *The bond must be valid.* In a motion against the sheriff and his sureties for a neglect of his official duty, the bond of the sheriff is matter of inducement and not the foundation of the suit; but, still the parties cannot be made liable, unless the bond be valid; *Ib.*

4. *Liability of sureties to defendant in execution.* In an action on a sheriff's bond, which was conditioned "that he would well and truly execute, and due return make of all process and precepts to him lawfully directed, and pay and satisfy all sums of money by him received, by virtue of any such process or precept, to the person or persons to whom the same are due;" it was assigned as a breach of the condition, "that the sheriff had an execution in his hands against the plaintiff in this action; that the plaintiff had paid the sheriff in depreciated currency, a sum sufficient to satisfy the execution, with the discount on the funds added, and the plaintiff in the execution refused to receive it, and the defendant therein (the present plaintiff) was compelled to pay the execution again, and that the sheriff on due demand made, had failed and refused to pay back to the plaintiff the uncurrent funds he had paid on the execution;" *Held*, on demurrer to the declaration, that the assignment of the breach was bad; that the plaintiff did not come within the condition of the bond, or

in the contemplation of the law, which required its execution; that in making payment of the execution in funds not authorized by law, the defendant (now plaintiff) assumed the risk of the plaintiff's approving it, and that the sureties on the bond were not responsible, though the sheriff was; *Brown v. Mosely*, 11 S. & M. 354.

5. *Declaration on bond: Approval of bond.* In an action on a sheriff's bond, it is not necessary to aver that the chief justice of the County Court administered the official oath to the sheriff, or approved his bond and sureties. Is the endorsement of such approval on the bond, essential to its validity; *Quære?* But the declaration should aver that the money sued for was collected by the sheriff while in office; *Carmichael v. The Governor*, 3 H. 236.

6. *New bond: Approval, &c.* It is doubtful under the legislation in this State, as it existed in 1840, whether the Board of Police or the Probate Court had jurisdiction to give relief to sureties on a sheriff's bond, who petitioned for a release, and that a new bond should be given by the sheriff. But the probate judges at that time were vested with the power of approving the bonds of sheriffs. In that year, a surety on a sheriff's bond, petitioned the Probate Court for relief, and the sheriff, under the judgment of that court, gave a new bond, in legal form, which was approved by the probate judge in due form: *Held*, that whether the court had jurisdiction or not, the bond was good, as a voluntary bond, and being in legal form, and approved by the proper officer, it was binding, and the statutory remedy by motion would lie on it; *McCroskey v. Riggs*, 9 S. & M. 107.

See *De Soto Co. v. Dickson*, digested in *Tax Collector*, 12.

7. *Same: Liability of sureties on new bond.* Property levied on by a sheriff under an attachment, and which is not sold by him under the *vendit. exponas* after judgment, and from which the levy has not been legally removed, is, in contemplation of law, in possession of the sheriff, until the return day of the *vendit. exponas*; and hence, if he omit to account for it legally in his return on the *vendit. exponas*, his sureties on a new bond executed by him on the day before said return day, will be responsible; *Garrett v. Hamblin*, 11 S. & M. 219.

8. *Judgment against sheriff no evidence against his sureties.* A judgment against the sheriff alone, rendered without notice to his sureties, is no evidence against them, in a subsequent action for the same cause; they being neither parties nor privies thereto; *Carmichael v. The Governor*, 3 H. 236; *Torrey v. Jordan*, 4 H. 401.

9. *Sureties entitled to notice of suit against them.* Judgment cannot be rendered against a sheriff's sureties, upon notice to him alone; *Torrey v. Jordan*, 4 H. 401.

10. *Administration of official oath.* The probate judges of this State, from the year 1833, to the adoption of the Rev. Code of 1857, were vested by law with the authority

to administer official oaths to the sheriffs of their respective counties; *Alexander v. Polk*, 10 G. 737.

See further for actions against sheriff, next sub-division.

II. Remedies against Sheriff.

1. Motions against them.

11. *Statute allowing motions strictly construed.* The statutes giving summary proceedings by motion against sheriffs, attorneys, &c., must be strictly construed, and are not to be extended beyond their letter; *Lombard v. Whiting*, W. 229; *Connell v. Lewis*, W 251.

See ATTORNEY AT LAW, 31.

12. *Same: Statute is constitutional.* The statute authorizing summary proceedings, by motion, against a sheriff and his sureties, for official misconduct, is not a violation of that provision of the constitution which guarantees the right of trial by jury; *Lewis v. Garrett's Adm'r*, 5 H. 434.

13. *Form of the motion.* In such proceedings, it is not necessary to set out the bond in the motion. It is sufficient to describe it as the official bond of the sheriff, and to name the sureties thereon; *Id.*

14. *When the motion may be made.* A motion against a sheriff for a failure to return an execution, is not required to be made at the return term of the execution, but may be made at a subsequent term; *Steen v. Briggs*, 3 S. & M. 326.

15. *Notice of the motion is necessary.* The sheriff is entitled to be served with notice of the motion against him; *Vance v. Connell*, W. 254. And the sureties are also entitled to notice of the motion against them; *Demoss v. Camp*, 5 H. 516; *Coleman v. Saunders*, 5 H. 287; *S. P., Torrey v. Jordan*, *supra*, 9.

16. *Waiver of notice.* But, after the sheriff and his sureties have appeared, and contested a motion against them on the merits, it will then be too late for the first time, to raise an objection to the sufficiency of the notice on the motion; *Izod v. Addison*, 5 H. 432.

17. *Service of the notice.* If the service of the notice be made by the coroner—though it is not an official act—it will be good if properly proven; and if the defendants produce a copy of the notice given them by the coroner, this is proof of service. And, where the coroner returns that he duly served the notice, and it does not appear from the bill of exceptions, that due proof of service was not made *aliunde* of this return, the judgment of the court, holding that there was due service of notice will be presumed correct; *Coleman v. Miss. & Ala. R. R. Co.*, 5 H. 419.

It is no part of the official duty of a sheriff to serve such a notice, but if he do serve it, and the service be duly proven, it will be sufficient; *Lewis v. Garrett's Adm'r*, 5 H. 434.

18. *The notice is the only process on a motion.* In summary proceedings by motion,

against the sheriff and his sureties, no other process is required to bring the parties into court, than notice of the motion proven to have been duly served on them; *Lewis v. Garrett's Adm'r*, 5 H. 434.

19. *Motion: Notice: The pleadings: Form of notice.* The motion against a sheriff and his sureties for a failure to pay over money, and the notice thereon, constitute the pleadings in that proceeding; and the notice is sufficient if directed to the sheriff as such, and to the sureties (naming them), "as sureties on the official bond of said sheriff;" *Hamblin v. Foster*, 4 S. & M. 139.

20. *Trial: Regularity of the proceedings: Waiver.* After trial of a motion on the merits, the regularity of the pleadings on the motion cannot be objected to; *Lewis v. Garrett's Adm'r*, 5 H. 434. And so, the sufficiency of the notice cannot be objected to, after trial on the merits; *Izod v. Addison*, *supra*, 16.

21. *Trial, an admission of character of the defendants.* An appearance by parties proceeded against by motion, as a sheriff and his sureties on his official bond, and a defence of the motion on the merits, are an admission by them of the character in which they are sued. If the sureties desire to deny that they are such, they must crave over of the bond, and plead *non est factum*; *Hamblin v. Foster*, 4 S. & M. 139.

22. *Jury trial on motion.* Where no fact is disputed on the trial of a motion but the service of the notice, the defendants are not entitled to a trial by jury; *Coleman v. Miss. & Ala. R. R. Co.*, 5 H. 419.

23. *Discontinuance as to sureties.* In a motion against a sheriff and his sureties, a discontinuance may be entered as to the sureties not served with notice; *McCrosky v. Riggs*, 12 S. & M. 712.

24. *Defence to motion: Plaintiff's receipt.* On the trial of a motion against a sheriff for the fine allowed by the statute, for a false return upon an attachment, in not including in the levy six bales of cotton, the levy and sale of the cotton having been proven, the sheriff introduced in evidence, receipts of the plaintiff, in "part of the payment of the proceeds of perishable property sold," &c.: *Held*, if it had been made affirmatively to appear, that the receipts were for the proceeds of the sale of the cotton omitted from the return, it would perhaps have availed the sheriff as a defence, but as it appeared that there was other perishable property sold, the fact that the receipts were given for the proceeds of the cotton, was not shown; *Garrett v. Hamblin*, 11 S. & M. 219.

2. Actions against Sheriff for Failure to Pay over Money.

25. *Motion against sheriff alone.* The plaintiff in execution, may proceed by motion against the sheriff alone (without joining his sureties), for a failure to pay over money collected by him on execution; *Dunn v. Newman*, 7 H. 582.

26. *Plaintiff may waive the damages.*

The plaintiff in such a motion may waive the statutory damages, and claim only the principal sum collected. *Ib.*

37. *Suit by assignee of the judgment.* A sheriff's bond contains a stipulation to pay over money collected by him to the plaintiff in execution or his assignee, and for this reason an action may be maintained on it in the name of the governor for the use of the assignee, to enforce payment of money so collected by the sheriff. If it were not for this stipulation, the action must have been brought in the name of the plaintiff in execution as assignee; *Matthews, Gov., &c. v. Bailey*, 3 C. 33 (citing *Wilson v. McElroy*, 2 S. & M. 241; *Brown v. Lester*, 13 S. & M. 392).

38. *Execution evidence in such action.* Executions, by virtue of which the sheriff has collected money, are admissible in evidence against him in an action on his bond, for a failure to pay it over. And where the action is by another sheriff, for his costs so collected, it is no objection to the execution that the fee bill of the original execution was not attached to the execution on the forthcoming bond; *McIntyre v. Weathersby*, 1 H. 331.

39. *Notice from attorney not to pay client.* The sheriff is not justified in refusing to pay over money collected by him when it is demanded by the plaintiff, because the plaintiff's attorney has notified him not to pay it—the attorney's fees on that judgment being paid; *Dunn v. Neuman*, 7 H. 582.

40. *May pay to plaintiff's attorney.* The sheriff is authorized to pay over money collected by him on execution, to the plaintiff's attorney of record, unless he be expressly notified by the plaintiff not to do so. The mere expression by the plaintiff of a wish that the attorney should not have the money, will not do; *Buller v. Jones*, 7 H. 587.

41. *Refusal to pay on the ground of disputed title.* Where a sheriff seeks to justify his refusal to pay to the plaintiff, money collected under execution, upon the ground that there is a controversy respecting the title to the money, which he asks the court to determine, he must set forth in his plea the facts on which he claims justification, so that the court may determine their sufficiency, and may also determine whether the plaintiff is entitled to the money; *Trotter v. Parker*, 9 G. 473.

41a. *As to plea to action on bond,* see PLEADING, 127.

III. Sheriff's Return, and his Duties and Liabilities in relation thereto.

1. Amendment of Sheriff's Return.

42. *Amendments allowed.* It is the universal practice to allow sheriffs to amend their returns according to the facts; *Garner v. Collins* W 518.

43. *Amendment of return on mesne process.* The sheriff's return on mesne process cannot be amended after judgment, and after the term has passed at which the judgment is rendered; *Dorsey v. Peirce*, 5 H. 173; *Collins v. Terrall*, 2 S. & M. 383; *Hughes v.*

Lapice, 5 S. & M. 451; *Planters' Bank v. Walker*, 3 S. & M. 409.

Nor can it be amended after the return term without notice to the adverse party. But if the return be good, a void amendment will not vitiate it; *Williams v. Doe ex dem. Oppelt*, 1 S. & M. 559. See PROCESS, 26 et seq.

44. *Amendment of return on final process.* The return of the sheriff on final process may be amended after the return term; *Planters' Bank v. Walker*, 3 S. & M. 49.

45. *That sheriff cannot make amendment after his term of office has expired.* See PROCESS, 26, et seq. AMENDMENT, 31, et seq.

2. Form and time of Return.

46. *As to the form,* see PROCESS, 9 to 25.

47. *Sheriff cannot enter the return after the return day.* The sheriff has no power to enter a return on a *fi. fa.* after its return day has elapsed, not even to enter facts which transpired before that day; *Anderson v. Carlisle*, 7 H. 408.

3. Impeachment of and Explaining Return.

48. *Power to impeach as between the parties.* Whilst it seems that the truth of a sheriff's return upon an execution cannot be collaterally impeached between the parties to the process, yet the legal effect of the return may be inquired into and determined; and it is no infringement of this rule to hold that a return of "stayed by order of the plaintiff's attorney," made by a sheriff on an execution, meant his attorney of record, and that the attorney had no such power to make the stay; *Doe v. Ingersoll*, 11 S. & M. 249.

49. *Explaining the return.* A sheriff cannot be permitted to impeach his own return, but this rule does not prevent the sheriff from showing how a particular act was done, which is returned by him generally as having been done; the legal effect of the return and the explanation being the same. Hence, if he return that the property levied on was sold, and the proceeds paid to a certain execution creditor, who was the purchaser of the property sold, it will not be error to allow him to show that the money bid was not in fact paid, but merely receipted for by the creditor, this being in effect the same as the return; *Shotwell v. Hamblin*, 1 C. 156.

And so where the return on process is "executed," it is not a contradiction of it to show that it was executed by leaving a copy at the residence of the defendant, and that there was no personal service; *Lapice v. Hughes*, 2 C. 69.

50. *Sheriff cannot contradict his return.* The sheriff cannot contradict his return that certain property was sold under a *fi. fa.* on which the return is made; *Shotwell v. Hamblin*, 1 C. 156 (citing *Planters' Bank v. Walker*, 3 S. & M. 409).

51. *Sheriff as a witness to impeach his return.* A sheriff will not be permitted to testify as a witness in impeachment of his own return; *Doe ex dem., &c., v. Snyder*,

3 H. 66; *Planters' Bank v. Walker*, 3 S. & M. 409.

4. Failure to Return.

52. *Liability for failure.* If the sheriff fail to return a *fi. fa.* on the return day, he is liable, on motion, for the amount of it, and eight per cent. interest and five per cent. damages; *Helm v. Gridley*, W. 511. And the liability is the same whether the defendant had property in the county or not. The liability arises from the failure to return, and not from the fact that the plaintiff is injured thereby; *Steen v. Briggs*, 3 S. & M. 326; *Moorehead v. Holliday*, 1 S. & M. 625. And the return must be made to the clerk's office from which the execution issued; and the return of "*nulla bona*" is not even *prima facie* evidence that the execution was returned into the clerk's office on the proper day. The return into the clerk's office and its date, are matters in *pais* and depend on proof by parol testimony; *Izod v. Addison*, 5 H. 432.

See EXECUTION, 85.

5. Setting aside Return, and Sheriff's Receipt.

53. *Court's power to set aside.* The court has control over its own process and over its own officers; and it may (without the intervention of a jury), though a jury trial be demanded, hear proof and set aside a sheriff's return of satisfaction on an execution, if it be illegally and improperly made; or it may empanel a jury, or not, in its discretion; *Anderson v. Carlisle*, 7 H. 408; *Planters' Bank v. Spencer*, 3 S. & M. 305. But the return cannot be set aside except on notice to the sheriff or to the defendant; *Mann v. Nichols*, 1 S. & M. 257. And so a sheriff's receipt, for money paid on an execution, may be explained or contradicted by parol; and it may be invalidated by showing that it was given for improper funds not receivable in payment of the execution; *Gasquet v. Warren*, 2 S. & M. 514; *Catlett v. Alexander*, 4 H. 404.

6. Miscellaneous as to Sheriff's Return.

54. *The return day.* The Act of 1838 gave the sheriff until the middle of the term of the court to return executions. Under this act, where the term is for twelve days, the sheriff must make his return before the expiration of the sixth, or it will be too late to save him from the penalty of the statute; *Steen v. Briggs*, 3 S. & M. 326.

55. *Sheriff's return as evidence.* The return of a sheriff upon process, when made in the proper discharge of his duty, and the commands of the writ, is evidence between third parties; and, in some cases, for the sheriff where he is a party; but it is not evidence for him where he shows he has not done his duty; *Rowland v. Gridley*, 1 H. 210.

56. *Return of service of notice in ejectment.* At common law, the notice in ejectment might be served either by a private person or the sheriff, but whether served by one or the other, an affidavit proving the service was necessary; but, under our statutes, the sheriff's

return is sufficient without affidavit; *Williams v. Doe ex dem. Oppelt*, 1 S. & M. 559.

57. *On chancery process.* The sheriff was an officer of the Supreme Court of the Mississippi Territory, and, as such, required to execute all process emanating from it; and hence, his service of a subpoena from the chancery side of said court, though it be not directed to him, is good, and his simple return of "Served" is sufficient evidence of service; *Smith v. Bradley*, 6 S. & M. 485.

IV. The Levy, and Duties and Liabilities in Relation thereto.

1. How the Levy is to be Made.

58. *As to what is a levy on personalty*, see EXECUTION, 28, 29.

59. *Same: As to realty*, see EXECUTION, 30.

2. On what Interest a Levy can be Made.

60. *As to this*, see EXECUTION, 31 to 42.

3. Levy where the Sheriff has Several Executions.

61. *As to this*, see EXECUTION, 23.

4. Levy, where there are Principal and Sureties.

62. For this, see EXECUTION, 24 to 27. PRINCIPAL AND SURETY, 41 to 46.

5. Levy on Partnership Property.

63. *As to this*, see PARTNERSHIP, 41, 42.

6. Levy under Voidable Process.

64. *Same.* The sheriff is not bound to inquire into the regularity of the issuance of process in his hands to be executed, but only as to the jurisdiction of the court issuing it; he must obey, therefore, a *supersedeas* if issued by a court of competent jurisdiction, though no *supersedeas* bond was given prior to its issuance; *Williams v. Stewart*, 12 S. & M. 533 (citing *Walker v. Dowell*, 4 S. & M. 118).

65. *Same: Voidable process is a justification to the sheriff.* And this principle was applied in favor of a sheriff who had levied on personalty claimed by a married woman, not a defendant in the execution, and where the sheriff, upon her making the necessary affidavit, and executing a claimant's bond, had delivered her the property. And it was held on a motion against the sheriff, for an unauthorized omission to levy the execution, that the bond of the married woman was not void; that it was, if not valid, at most only voidable, and that the tender of it suspended his right to proceed with the execution, and he was justified in delivering the property under it; *Moore v. Chambers*, 11 S. & M. 408.

66. *That levy and sale under voidable execution are good*, see EXECUTION, 82, 90, 16, 17, 18.

7. Omission to Levy and its Consequences, the Loss of Property Levied on.

67. *Is a breach of the sheriff's bond.* The omission to levy an execution, or to pay over

money collected on it, is a breach of the sheriff's bond; *Lewis v. Garrett's Adm'r*, 5 H. 434.

68. *Voluntary omission: Construction of the statute.* Under the statute (H. & H. 642, § 42), imposing certain liabilities on a sheriff, who shall make any return upon an execution, which shall show that he has voluntarily and without authority of law, omitted to levy, it is not necessary that the return should show, in so many words, that he "voluntarily and without authority omitted to levy it." It is sufficient, if it so appear from the return and the circumstances surrounding it. A sheriff has control of process in his hands, unless otherwise directed by the plaintiff, or other competent authority; and if he fail to discharge his duty according to law, it can but be from his own voluntary act. Hence, if he so conduct himself with regard to process in his hands, that he is at last unable to render it available for its ends, he brings himself within the statute; *Garrett v. Hamblin*, 11 S. & M. 219.

69. *Same: Case in judgment: Loss of property levied on.* Where a sheriff, who had seized property under an attachment, so conducted himself with reference to a portion of it, that a part was taken from his custody, and a part escaped; and where the plaintiff in attachment had obtained his judgment thereon, and issued his *venditioni exponas* to the sheriff, commanding him to sell the attached property, and the sheriff in his return thereon, made no mention of that part which had escaped, and falsely returned as to the part taken, that he was deprived of it by force; it was held in a motion against the sheriff and his sureties for a voluntary and unauthorized omission to levy the *venditioni exponas*, that both he and his sureties were liable for the property taken, and also for the property which had escaped; *Ib.*

70. *Same: Duty of sheriff to preserve property levied on.* It is the duty of the sheriff who has seized property under legal process, to provide such a number of legal guardians for it, as the amount and variety of the property require for its protection; and his omission to do so, if the property be lost, will be a "voluntary and unauthorized omission to levy," the process as to the property lost, for which the sheriff and his sureties will be liable under the statute; *Ib.*

71. *Same: Examples.* And so if the sheriff levy on a horse, and turn it into a field, where it dies for want of food, he is liable; and so, if having levied on a slave, he loan him to the defendant, and the slave be returned to the sheriff, and afterwards he escape and go to the defendant, where the sheriff permits him to remain, the sheriff will be liable; *Ib.*

72. *Same: Liable where the property is wrongfully taken from him.* If personal property levied on, be wrongfully taken from the possession of the sheriff or his bailee, he is, nevertheless, liable to the plaintiff in execution for its value, to be ascertained by a jury; or if the sheriff return the value on the

execution, he may be made liable for that, on motion without a jury; *Collins v. Terrall*, 2 S. & M. 383.

73. *Same: Liability where plaintiff pays sheriff, bailee, &c.* Where the plaintiff in an attachment, endeavored to increase the interest of a deputy sheriff, in a full and faithful discharge of his duty, in the safe keeping of the property seized, by a promise of pecuniary reward, this will not make the deputy sheriff the plaintiff's agent, so as to relieve the sheriff from responsibility for the illegal acts or omissions of his deputy, done without the consent of the plaintiff; *Garrett v. Hamblin*, 11 S. & M. 219.

74. *Same: Where he has returned personally, because really was levied on.* A sheriff who has levied an execution, is bound to make a legal disposition of the property levied on; and will be liable on his bond for the consequences of his omission to do so. And if he has levied the same execution on realty and personalty, and the former, being appraised under the valuation law (see that title), would not sell for two-thirds of its appraised value, whereby a sale of it was, under the statute, postponed for twelve months, it will be no excuse for the sheriff's voluntarily returning the personalty, that the two-thirds appraised value of the land was more than sufficient to pay the debt. It was his duty to have sold the personalty under the levy; *Butler v. Williams*, 14 S. & M. 54.

75. *Same: The thirty per cent. damages.* Where a judgment is recovered against a sheriff and his sureties on a motion against them for a voluntary and unauthorized omission to levy an execution, interest at the rate of thirty per cent. per annum, from the return day, follows as a matter of course, without any previous demand by the plaintiff; *Garrett v. Hamblin*, 11 S. & M. 219.

76. *Has no power to levy on property not the defendant's.* A sheriff cannot justify the taking of the goods of a person not a party to the execution in his hands, and he is liable to the owner, in replevin, if he so take his goods; *Yarborough v. Harper*, 3 C. 112.

76a. *The defendant pointing out property to be levied on.* Where the defendant in execution points out personal property to the sheriff to be levied on, which is accordingly done; this is an admission by the defendant of the liability of the property to be levied on, and he cannot afterwards object that it was not liable; *Jayne v. Dillon*, 6 C. 283.

V. Sheriff's Power to Collect Money from a Judgment Debtor.

1. The Necessity for an Execution.

77. *Same.* A sheriff has no power to receive payment of a judgment, unless he have an operative execution in his hands emanating from the judgment; *Planters' Bank v. Scott*, 5 H. 246. And if he receive payment without such execution, his acts are unofficial, and not obligatory on the plaintiff, unless he acted by the plaintiff's consent—in which case, he will be considered as the private agent of the

plaintiff, and his acts and responsibilities will be regulated by the law of principal and agent. Hence, if he receive the money without an execution, by the consent of the plaintiff, his act will be binding on the plaintiff, though he received bank paper (which was at par), instead of gold and silver, which he was instructed to take—the debtor in the execution having no notice of the instructions; *Crane v. Bedwell*, 3 C. 507 (citing *McFarland v. Wilson*, 2 S. & M. 269, and post. 78).

78. *Collection and sale after return day of execution.* The sheriff is a mere officer of the law, with power to enforce the process of the court; and when the process has expired by limitation, the sheriff's powers have expired with it; and hence, he has no power to receive money on an execution, after the return day thereof, though the execution still remain in his hands. If he be special agent of the plaintiff, with power to collect the money without execution, he may do so as such agent, but not as sheriff, without an operative execution; *McFarland v. Wilson*, 2 S. & M. 269 (see ante, 77); *S. P., Wood v. Robinson*, 3 S. & M. 271; *Lehr v. Rogers*, 3 S. & M. 468; *Kane v. Preston*, 2 C. 133; *Edwards v. Ingraham*, 2 G. 272, for which see *EXECUTION*, 63, 64.

79. *Same.* And if the sheriff receive money without execution or after the return day he will not be liable on his official bond; nor is he bound in such case to give notice of it to the plaintiff in order to put in operation the statute of limitations against the plaintiff, against plaintiff's attempt to hold him liable for it; *Edwards v. Ingraham*, 2 G. 272.

2. The Funds he must Receive.

80. *Can take nothing but legal tender.* The sheriff can receive nothing in payment of an execution but legal tender money; *Planters' Bank v. Scott*, 5 H. 246. He cannot receive bank notes in satisfaction, and if he do so, and so endorse the execution satisfied, it will be set aside; *Tutt v. Fulgham*, 5 H. 621; *S. P., Anderson v. Carlisle*, 7 H. 408; *Gasquet v. Warren*, 2 S. & M. 514; *Davis v. Pryor*, 6 S. & M. 114. The payment in anything but legal tender, is no satisfaction of the execution, unless the plaintiff directed it, or afterwards ratified it; *Gasquet v. Warren*, *supra*. See generally on this subject, *EXECUTION*, 56 to 59.

VI. Sheriff's Duty to appropriate Money where there are several Executions against the Defendant.

81. *His duty to appropriate the money to oldest execution levied.* Where a motion was made against a sheriff for not appropriating money made by a sale under several executions, to the one emanating from the oldest judgment which was against the defendant as second endorser, the others being against him as principal, it was held to be no defence for the sheriff, that he might have made the money on that execution, out of the first endorser, if he had discharged his duty according to law; *Hamblin v. Foster*, 4 S. & M. 139.

82. *As to sheriff's power and duties in appropriating money to the oldest execution, when it was not levied both before and after the passage of the enrolment law, see EXECUTION, 62, 92, 97a, and JUDGMENT, 90, et seq.*

83. *Liability of the sheriff under the enrolment law of 1844: Liability of junior creditor.* The sheriff is liable on his bond to the oldest unsatisfied judgment creditor, whose judgment has been enrolled, if he pay the money made by a sale under a junior judgment to the plaintiff in a junior judgment, even though it be done by mistake of law; but this does not give the sheriff or the senior creditor any claim to demand the money back from the junior creditor, since it is not unconscientious for him to receive the avails of his own execution; *Tiffany v. Johnson*, 5 C. 227.

84. *Same: Where such sale is made on a credit.* But where the sheriff makes a sale of property on a credit, and for the note of the purchaser, this is an unauthorized act, and binds only those parties who consented to it; and if the return of the sheriff show this to be done under a junior execution in the hands of the sheriff, the plaintiff in a prior judgment duly enrolled, cannot move the court for an appropriation of the money, for there is no money in court to appropriate; but the older judgment creditor may treat the sale as void, and levy on the property so sold; *Id.* See *CHANCERY*, 279.

85. *Liability of sheriff for not appropriating money collected on several executions.* To an action on a sheriff's bond, assigning as a breach, that the sheriff had failed to apply money collected by him on several executions, to the execution of the plaintiff, it was pleaded that the plaintiff was the purchaser of the property of the defendant in execution, at the sale, and that he retained out of his bid a sum greater than the amount due on his execution; and to this the plaintiff replied that he did not retain said money on said execution; *Held.* that the replication was bad, because it did not show by what authority or right the plaintiff had retained the money. It was also replied to said plea, that if said execution had been levied with the others, it would have been entitled to the money raised by said sale; *Held.* that the replication was also bad, since the plaintiff was purchaser of all the property sold at the sale; if this execution was prior and not levied, it was still a lien on the judgment which the plaintiff had purchased, and at all events, it was the duty of the plaintiff purchasing it, to apply it to the oldest execution; *Brown v. Hamblin*, 1 C. 392.

VII. Indemnifying the Sheriff.

86. See *BOND OF INDEMNITY TO SHERIFFS*.

VIII. Sheriff's Deputy.

87. *Deputy not legally appointed.* A person acting as deputy sheriff, who has not been legally appointed as such, cannot take a

valid forthcoming bond; but if there be proof that he acted in that capacity, it will not be sufficient evidence that he was not appointed, that the probate clerk has examined his office and could not find the appointment, especially where it is shown that the probate clerk who held the office when the appointment should have been made and filed in his office, kept his office carelessly; *Pritchard v. Myers*, 11 S. & M. 169.

87a. *Special deputy*. A special deputy may be appointed under the hand and seal of the sheriff; but the appointment need not be filed in the probate clerk's office; nor is such appointment required to be made on the writ the deputy is appointed to execute, nor need it be filed with the papers in the case. Where a special deputy's name is signed to the return in the writ, the court will presume his appointment to be legal, until the contrary is shown; *Nelson v. Nye*, 43 M. 124.

88. *Same: Estoppel to sheriff to deny the appointment: Unsworn deputy*. Where a motion is made against a sheriff, based on an illegal return made by one signing himself as deputy sheriff, if the sheriff deny that such person was his deputy, and there is no record of his appointment as such, proof that before and after the return the sheriff recognized him as deputy, is sufficient to show his authority to act as such. And the statute which declares the acts of such deputy void when done without his having taken the proper official oath, is not to be construed so as to render the sheriff not liable for the acts of an unsworn deputy. Such acts are void only as to persons to be affected by them at their election, and they are binding on the sheriff if such third parties elect so to consider them; *Pickens v. McNutt*, 12 S. & M. 651.

89. *Deputy estopped to deny his official character*. A deputy sheriff who has continued to act as such after the expiration of his term of appointment, by collecting money on executions and making returns on the same in his official character, cannot deny that he was deputy sheriff in a motion against him by the sheriff for his failure to pay over money so collected; *Womack v. Nichols*, 10 G. 320.

90. *Liability of deputy sheriff for penalty in making false return on process*. Art. 12, p. 122, of the Rev. Code of 1857, which provides, that if any sheriff or his deputy, coroner, or other officer, shall make a false return on any process, such sheriff, deputy, &c., shall, for every such offence, be liable to pay the sum of five hundred dollars, to be recovered on motion, and notice given to such sheriff, deputy, &c., creates a penal offence against the officer committing the act, and renders him individually liable for it; and the sheriff and his sureties are not liable on motion under that article for a false return made by his deputy. Whether they would be liable in an action on the sheriff's official bond: *Quære? State v. Nichols*, 10 G. 318.

91. *Sheriff's remedy against deputy*. A sheriff may proceed against his deputy by motion for the failure to pay over costs col-

lected by the deputy on executions placed in his hands; and if such motion be made for costs collected on various executions, it need not set out the executions if a schedule or list of the executions be filed with it; *Womack v. Nichols*, 10 G. 320.

92. *Same: Demurrer to motion: Practice*. If a motion against a deputy sheriff be double in embracing two distinct demands, for which the same judgment cannot be rendered, the defendant cannot assign for error that his demurrer thereto was overruled, if, before the trial, the plaintiff dismiss as to one of the grounds of the motion; for the dismissal secures to the defendant all the advantage he would have had if his demurrer had been sustained; *Id.*

93. *Power of deputy to appoint sub-agents*. A deputy sheriff cannot appoint servants or agents to perform duties required of him by law. Such power is only in the sheriff; *Welsh v. Jamison*, 1 H. 160.

94. *Power of deputy to execute process on the sheriff*. The sheriff can execute process on his deputy, but the deputy cannot execute process on the sheriff; *Ford v. Dyer*, 4 C. 243. See PROCESS, 20a.

94a. *As to setting aside sheriff's sale when the deputy is a purchaser*, see CONSTITUTIONAL LAW, 56.

IX. Sheriff's Sales.

See EXECUTION, 69 to 80.

1. Nature of Sheriff's power to sell, and Irregular Sales.

95. *Power to sell, not a naked statutory one*. It seems that a sale under a naked power derived from the statute will be void, if the statute be not strictly complied with; and if the validity of the sale depends upon the performance of an act *in pais*, the purchaser is bound to show the performance of the act. Such is the rule in relation to tax sales. A sheriff's sale is, however, regulated by a different rule, as his sales are judicial, whilst the power of a tax collector is derived wholly from the statute; *Doe v. Natchez Ins. Co.*, 8 S. & M. 197; *S. P., Minor v. Natchez*, 4 S. & M. 602; *Natchez v. Minor*, 10 id. 246, for which see *post*, 97.

See GUARDIAN AND WARD, 58c. EXECUTORS AND ADMINISTRATORS, 352, 352a. 381.

96. *Effect of irregularities generally, in sheriff's sales*. Mere irregularities in a sheriff's sale of realty, will not vitiate the title of a *bona fide* purchaser at the sale; *Doe v. Pritchard*, 11 S. & M. 327 (citing *Natchez v. Minor*, 10 S. & M. 246). Neither irregularities in the judgment or execution will affect a *bona fide* purchaser, and they cannot be inquired into collaterally; *Cockerel v. Wynn*, 12 S. & M. 117.

97. *Same: Some instances*. An error in the execution, as to the date of the judgment from which it emanates, is a mere irregularity, and does not affect the sale; *Cockerel v. Wynn*, 12 S. & M. 117. And so a *bona fide* purchaser will not be affected by the fraud

of the sheriff in making the sale; *Rollins v. Thompson*, 13 S. & M. 522.

2. Irregularities in the Notice.

97a. *Same.* Irregularities of a sheriff in giving notice of the sale of real estate under execution, will not vitiate the title of a *bona fide* purchaser at such sale, who has no notice of them. And so, a total failure to give the notice, or the giving it in a mode different from the one prescribed by law, will not affect a *bona fide* purchaser. The sale by a sheriff, made under an execution, is not the exercise of a mere naked statutory power, uncoupled with an interest, but the power is conferred by the judgment and execution. The rule is different in cases of sales by tax collectors, where the sale is the exercise of a naked statutory power, and the purchaser must show, that the statute has been complied with in all respects, or the sale will be invalid; *Minor v. Natchez*, 4 S. & M. 602; *Natchez v. Minor*, 10 S. & M. 246; S. P. *Doe v. Natchez Ins. Co.*, *ante*, 95. For the example, see EXECUTION, 74.

See EXECUTORS AND ADMINISTRATORS, 381.

98. *Same.* When the purchaser has notice. But the doctrine does not apply where the purchaser is the plaintiff in execution, or the owner of it by assignment. For such party is held to be charged with notice of any irregularity committed by the sheriff in executing the process; *Winston v. Olley*, 3 C. 451. And the rule is the same where the attorney of the plaintiff purchases; *Moody v. Harper*, 9 G. 599, for which see REM ADJUDICATA, 13. Thus, a sale for a grossly inadequate price, without any notice, will be set aside, if the plaintiff in execution were the purchaser; *Winston v. Olley*, *supra*.

99. *Same.* Another instance. Without special authority conferred by the statute, a sheriff cannot postpone his sale from the day named in the notice, to another day. And if he do so, and sell on the postponed day without giving the full notice required by law, and the purchaser have notice of the irregularity, the sale will be set aside upon the owners returning the purchase money; *Enloe v. Miles*, 12 S. & M. 147.

100. *Same.* Sale of perishable property under attachment. The statute on the subject of attachments provides, that if three freeholders under oath shall certify that the goods levied on by attachment are of a perishable nature, the sheriff may, if the defendant fails to replevy the same within twenty days after the levy, sell the same before judgment at public vendue for cash, and deposit the proceeds with the clerk, to abide the result of the suit: *Held*, in an action by the defendant in attachment against the sheriff, instituted after the attachment had been quashed to recover the goods attached, that the sale, unless made in strict accordance with the statute upon the certificate of three freeholders, and on ten days' notice, though good as to purchasers without notice, would not exempt the sheriff from responsibility for the fair value of the goods, and that if he made

no deposit of the proceeds of the sale, and no tender to the defendant of the sum so produced, before action brought, even if the sale was regular, he was liable therefor; *Kirby v. Coldwell*, 4 C. 103. See *post*, 105.

3. Defendant's Rights where Sale is Illegal.

101. *Right of defendant where levy is legal and sale illegal.* Where there has been a legal levy of an execution on personal property, if the sale be illegal, the defendant in execution cannot recover the property from the purchaser, for the levy deprived him of his right of possession; *Jayne v. Dillon*, 6 C. 283; S. P., in *Hutchins v. Lee*, W. 293; where it was held that if a runaway slave remained in jail for the time, when the law condemns him to be sold, the title is divested out of the owner, and an irregularity in the sale will not defeat the purchaser's title.

4. Proof of the Notice.

102. *Return of the sheriff stating notice.* The return of the sheriff on an execution, that he gave legal notice of the sale, is at least *prima facie* evidence that such notice was given; *Drake v. Collins*, 5 H. 253.

103. *Proven by parol.* It is competent to show by parol proof that the sheriff did advertise his sale of realty according to law; *Doe ex dem. Cocke v. Lane*, 3 S. & M. 763.

5. Sale under several Executions where one is Good.

104. *If one be good, the sale is valid.* Where executions from several judgments against the same defendant, are levied on the same land, and it is sold under them, if one of the judgments and the execution issuing from it be valid, it will not vitiate the sale that all the others are bad, nor does it affect the sale, that it appears that several of the defective executions had been previously to the others levied on the land, and that it was not sold under that levy for want of time; *Kune v. Mackin*, 9 S. & M. 387; *Banks v. Evans*, 10 S. & M. 35.

And so if a sale be made under several executions, one of which only binds the property, the title of the purchaser will be good; *Hand v. Grant*, 10 S. & M. 514.

And the recital in the sheriff's deed that the sale was made under a particular execution among others, is *prima facie* evidence that the said execution was in his hands at the time of the sale; *Bunks v. Evans*, *supra*.

6. Liability of Sheriff for Loss and Negligence.

105. *Liable for loss occasioned by his negligence.* An action for damages lies against a sheriff, if personalty levied on by him, sell for less money on account of his neglect to perform his duty in reference to the sale; see *ante*, 100, for an instance.

7. Sales when Purchaser refuses to Pay his Bid.

106. *Right of sheriff to sue for the bid.* A sheriff is entitled to recover from a bidder at one of his sales, the amount of his bid, for realty, non proving his bid, and a tender of

the deed and a demand of the money; *Hand v. Grant*, 5 S. & M. 508.

107. *Same: Memorandum of the sale: Statute of frauds.* And in such an action his return on the execution showing a sale to the defendant for a specified sum, is a sufficient memorandum to satisfy the statute of frauds, if indeed such a sale be within the statute, (and as to that, *Quære?*) and it is admissible in evidence on his behalf, but his memorandum in a book is not; *Ib.* See as to statute of frauds, *post* 114.

108. *Same: Certainty in the return.* And a return in these words is sufficiently certain as to the description of the property, viz.: "Levied this and other *fi. fas.* on lots 4 and 5, in square one, south of Main street, Columbus, advertised and sold the same according to law, 16th March, 1840, to Hand & Huddleston, for \$3,005; *Ib.*

109. *Same: Return of the deputy.* And in such a case it is immaterial whether the return be made by the sheriff or his deputy; *Ib.*

110. *Power of sheriff to resell: Duty of purchaser.* The sheriff is not compellable to make a deed to a purchaser of realty at his sale until the bid is paid, and if the bidder fail to pay his bid at once, the sheriff may resell on the same day; *Davis v. Pryor*, 6 S. & M. 114.

111. *Resale: Action against bidder for loss.* The sheriff sold land under an execution, and the bidder refused to pay his bid, whereupon the sheriff readvertised and resold, and the same person became the purchaser at a less price, and the sheriff brought the action to recover from the bidder, the costs of the resale and the loss occasioned by the difference in the bid; *Held*, it not appearing that the sheriff had been in any way damaged by the failure to pay the first bid, he could not recover, but, that, if the plaintiff in the execution lost his debt by the failure to pay the bid, he might sue for and recover the difference, and so might the defendant, for the sacrifice occasioned by the resale; *Adams v. Griffin*, 3 S. & M. 556. The rule would perhaps be different in a sale of personality, as the title to it is changed by the levy; and it may also be true, that, if the sheriff had tendered a deed and demanded the money, and brought an action to recover the bid, he could have sued; *Ib.* This the sheriff can do. See *ante*, 106; *post*, 113.

112. *Purchaser bound to pay.* A purchaser at sheriff's sale will not, even with the consent of the debtor, be relieved from his obligation to pay the bid, because the execution was afterwards technically satisfied by a levy on a sufficient amount of property to pay the judgment, but which was not actually applied to that purpose. The sale being regular at the time it was made, the right of the creditor to demand the amount which was bid, cannot be defeated by any subsequent action of the sheriff, not being an actual payment of the judgment to him; *Jones v. Grant*, 5 G. 592.

8. Substituted Bidders.

113. *Sheriff's power to receive substituted bidders.* At a sheriff's sale of realty, A. was the purchaser, and on the next day, B. wrote to the sheriff that A.'s bid had been transferred to him, and that he, B., would make the necessary arrangements to pay it. B. failed to do this, and the sheriff returned the facts on the execution, and then resold the land under an *alias* execution, for a less sum than A.'s bid; and then the plaintiff in the execution sued B. for the difference in the two sales: *Held*, that if the sale had been between private parties, and not judicial, B. would have been liable; but that the sheriff had no power to receive B. as a substituted bidder, and that B. was not liable; *Matthews v. Clifton*, 13 S. & M. 330. See *ante*, 111.

114. *Same: Consummation of the substitution of bidder.* A sheriff's sale is not within the statute of frauds. The sheriff in the sale is the agent of both parties; and his memorandum is sufficient to take the case out of the statute. He is the mere instrument of the law, to transfer the title out of the defendant in execution, and vest it in the purchaser; and this agency does not cease with the mere knocking down the land to the highest bidder, but continues until the sale is consummated by the payment of the bid and the making of the conveyance. And hence, if the purchaser transfer his bid to one who pays the money, and, being present, the purchaser direct the sheriff to make the deed to the substituted vendee, a conveyance to the substituted purchaser, so made at the time, and before the return of the execution, will be good, and will divest all title of the original purchaser arising from his bid; *Endicott v. Penny*, 14 S. & M. 144.

115. *Same: Presumption in favor of deed to substituted purchaser.* When it appears by the sheriff's return on an execution, that the land sold under it was bid off by a different person from the one to whom the sheriff's deed was made, it will, after the lapse of fifteen years, without such bidder setting up any claim to the land, be presumed that the deed was properly made to the grantee named in it; *Cooper v. Granberry*, 4 G. 117.

9. Sheriff's Deed, and his failure to make one.

116. *Delivery of the deed.* The delivery of a sheriff's deed need not be made on the day of the sale, in order for it to take effect from that time; if dated on that day and acknowledged afterwards before a competent officer, to have been signed, sealed and delivered on the day of its date, it will take effect from that date; *Kane v. Mackin*, 9 S. & M. 387.

117. *As to effect of recital in the deed,* see *ante*, 104. and *EXECUTION*, 73.

118. *Remedy against sheriff for failure to make a deed.* Whether a mandamus is the proper remedy against a sheriff, to compel him to make a deed; *Quære?* *Davis v. Pryor*, 6 S. & M. 114.

119. *Statute authorizing successor of sheriff*

to make a deed. The statute authorizing the successor of a sheriff to make a deed to land sold by his predecessor, when the sheriff making the sale has vacated his office without making a deed, applies, when the vacation of the office occurs, by the expiration of the sheriff's official term. But such a remedy can only be had, when the return of the sheriff who made the sale, shows not only the sale of the property, but also the payment of the price by the bidder. A receipt of the plaintiff in execution, endorsed on that process, showing a payment of the bid to him, will not do, if the sheriff's return fails to show the payment; *Thornton v. Boyd*, 3 C. 598.

10. Sales without Revivor.

120. *As to sales of personally*, see REVIVOR, 20. EXECUTION, 82, 89, 93, 17.

121. *As to sales of realty*, see REVIVOR, 21, *et seq.* EXECUTION, 16, *et seq.*

11. Sale, when Judgment afterwards Reversed, and Execution quashed, and on Voidable Executions.

122. *Defendant entitled to money on subsequent reversal.* Where the plaintiff in a judgment under which a sale of realty has been made, gives written instructions to the sheriff to make a deed to the purchaser, as he had settled his bid with him, this is sufficient to uphold the deed of the purchaser, and to entitle the defendant in execution to a return of the money from the plaintiff, upon a subsequent reversal of the judgment; *Doe v. Natchez Ins. Co.*, 8 S. & M. 197.

123. *A bona fide purchaser not affected by subsequent reversal.* A purchaser at sheriff's sale, who pays his bid by allowing to the plaintiff the amount as a credit, on a debt due by the plaintiff to him, is as much a bona fide purchaser, as if he had paid the money; and his title will not be affected by a subsequent reversal of the judgment under which the sale was made; *Natchez Ins. Co. v. Helm*, 13 S. & M. 182.

124. *Quashal of execution will not affect prior sale.* The quashal of an execution will not vitiate a sale previously made under it; *Doe v. Snyder*, 3 H. 66.

125. *Sale under voidable execution.* A sale made under a voidable execution, is good; *Doe ex dem Starke v. Gildart*, 4 H. 267.

12. Sales for Inadequate Price.

126. *Gross inadequacy as evidence of fraud.* Whether gross inadequacy of price in a sheriff's sale, is *per se* evidence of fraud; *Quære?* yet, taken in connection with other suspicious circumstances, it is entitled to great weight in determining the character of the transaction; *Taylor v. Eckford*, 11 S. & M. 21.

127. *Setting aside sale for gross inadequacy of price.* Whether equity will set aside a sheriff's sale for gross inadequacy of the price, independent of all other circumstances; *Quære?* yet, if such inadequacy be coupled with a total failure to give notice of the sale, it will be ground for setting it aside,

where the owner of the execution is the purchaser; *Winston v. Olley*, 3 C. 451.

It seems, that mere inadequacy of price, is not sufficient of itself for the rescission of a sheriff's sale, yet it constitutes good ground for the refusal by a court of equity, of its aid to the purchaser, in getting the fruits of the purchase; *Clement v. Reid*, 9 S. & M. 535.

128. *Same.* It is no ground for vacating a sheriff's sale otherwise fair, that the property sold low under a mistaken belief that it was bound by a prior mortgage, and that the true condition of the title was known to the purchaser; *Drake v. Collins*, 5 H. 253.

13. Purchasers at Sheriff's Sale, their Rights and Liabilities.

A. GETS INTEREST OF DEFENDANT ONLY.

129. *Same.* A purchaser at execution sale, gets only the title of the defendant in execution, and takes the property subject to all the equities existing against the defendant; *McClanahan v. Barrow*, 5 C. 664; *Meade v. Thompson*, W. 450. He gets only the actual interest of the defendant, and if his title were acquired by fraud, the purchase at sheriff's sale is no obstacle to setting it aside. And, if the defendant has sold the land prior to the judgment, a purchaser at sheriff's sale will get no title, though the deed were not recorded, if the purchaser was in possession before the judgment; *Taylor v. Eckford*, 11 S. & M. 21.

That the registration laws apply for the benefit of purchasers at sheriff's sale, see DEED, 45. REGISTRATION, 15, 16. VENDOR AND VENDEE, 64. JUDGMENT, 113.

130. *Same.* As a general proposition, a purchaser at sheriff's sale, takes the estate subject to all equities which existed against the owner, but at the same time it is also true, that he stands in many respects, upon the same footing as other purchasers; and the court inclined to the view that generally such a purchaser would not be affected by a vendor's lien of which he had no notice (and citing for this view, *Butley v. Greenleaf*, 7 Wh. 46; Kent Com. 154, note a); but however this may be, it was held that the purchaser was not to be affected by a lien for purchase money unpaid, to a larger amount than the consideration mentioned in the deed; *Kilpatrick v. Kilpatrick*, 1 C. 124.

131. *Same.* The judgment creditor takes in execution all that belongs to his debtor, and nothing more, and he stands in place of his debtor, when he purchases under the judgment; and takes it subject to every liability under which the debtor himself held it. The general lien of a judgment is subject to all the equities existing in the defendant's property, in favor of third persons, and a court of equity will limit such lien to the actual interest of the judgment debtor in the property. And therefore, an injunction will be granted at the instance of the vendor, who has made a deed acknowledging the payment of the purchase money, restraining a judg-

ment creditor of the vendee from selling the land, until the vendor's claim for the unpaid purchase money is paid; *Walton v. Hargroves*, 42 M. 18; S. P., *Kelly v. Mills*, 42 M. 267, for which, see VENDOR AND VENDRE. 62.

The same general principles were recognized in *Money v. Dorsey*, 7 S. & M. 15; and they were applied in that case, in favor of a vendee, who had taken a bond for title on the payment of the purchase money, and had paid a part, and his bond had never been recorded.

B. THE PURCHASER GETS ALL THE DEFENDANT'S INTEREST.

132. *Defendant's land liable for sale: Extent of interest sold.* As a general rule, all the defendant's land (not exempted by statute from sale under execution) may be sold under execution against him; and if the land or any portion of it, be sold under execution, and conveyed in fee simple by the sheriff, it is incumbent on the defendant in ejectment, who resists the validity of the sale, to show that the defendant in execution had not such an interest in the land as was subject to sale—the ownership of the defendant in execution being first established, where he is not the defendant in ejectment; *Doe ex dem Cocke v. Lane*, 3 S. & M. 763.

133. *Construction of sheriff's return as to extent of interest sold.* Where the sheriff's return states merely that he "levied" on certain realty of the defendant, and "sold it," it will be understood that he sold the fee simple interest; *Ib.*

134. *Same: A greater interest sold than defendant had.* Where the sale and conveyance of the sheriff are of the fee simple, and the defendant has a less interest in the land, that interest whatever it is, will pass; *Ib.*

134a. *Purchaser gets all defendant's rights.* A purchaser at sheriff's sale gets all the rights of the judgment debtor, and may invoke in his support, all the protection and defence to which the judgment debtor was entitled, being by his purchase, substituted to all his rights; *Lambeth v. Elder*, 44 M. 80.

C. EJECTMENT BY PURCHASER TO RECOVER THE LAND.

135. *Same: Against the defendant in execution.* In an action of ejectment by a purchaser at sheriff's sale, against the defendant in execution, the plaintiff, on the production of the judgment, execution, return thereon, and the sheriff's deed, if there be no fatal defect in either, is entitled to recover. Mere irregularities in the judgment and execution are not fatal, and cannot thus be inquired into collaterally; *Doe v. Natchez Ins Co.*, 8 S. & M. 197; S. P., *Doe v. Pritchard*, 11 S. & M. 327; *Doe v. Parker*, 3 S. & M. 114; *Smith v. Otley*, 4 C. 291; *Pickett v. Doe*, 5 S. & M. 470. The sheriff's deed alone without the judgment, is inadmissible; *Bledsoe v. Little*, 4 H. 13. See EJECTMENT. 7. 8.

136. *Same: Against a third party.* But if a stranger to the judgment and execution

be in possession, then the plaintiff must show that the defendant went into possession under the defendant in execution, and that his right has ceased; and if the defendant in ejectment claim adversely to the execution debtor, then plaintiff must show that the debtor had title. If both plaintiff and defendant in ejectment claim title under purchase at sheriff's sale, under execution against the same debtor, and the defendant in ejectment show no other title than the one derived under such purchase, the plaintiff need not show title in the defendant in execution, as both parties claim under him; *Ib.*

137. *Title not affected by sheriff's return.* The title of a purchaser at sheriff's sale cannot be affected by the return of the sheriff on the execution made after the sale; *Banks v. Evans*, 10 S. & M. 35.

D. RELIEF OF PURCHASER FROM HIS BID, CAVEAT EMPTOR.

138. *Same: Caveat emptor is the rule in sheriff's sales.* And a purchaser thereat cannot be relieved of his bid on the ground that he obtained less than he supposed he was buying; and hence, he cannot be relieved because he was ignorant of a conveyance made by the debtor, before the judgment was rendered under which the sale was made, the conveyance being of record; *Hand v. Grant*, 10 S. & M. 514.

139. *Same.* Whether if the judgment debtor had no salable interest in the land sold under execution, the purchaser can be relieved of his bid; *Quære? Ib.*

14. Miscellaneous as to Sheriff's Sales.

140. *Levy essential to sale.* A previous levy is essential to the validity of a sheriff's sale of realty; *Hamblen v. Hamblen*, 4 G. 455.

As to how levy should be made, see EXECUTION. 30.

141. *Sheriff liable for advertising fees.* The sheriff is liable for the costs of the advertisement of his official sales, required by law to be published in a newspaper, where the advertising was done at the instance and request of his deputy; *Terrall v. McRae*, 6 S. & M. 136.

142. *As to sales under junior executions,* see EXECUTION. 69, and ante, 84, 85.

143. *Sale of perishable property under attachment.* See ante, 101.

143a. *Sale after return day.* See ante, 78.

X. Miscellaneous.

144. *Substitution of sheriff to creditor's rights.* The statute (H. & H. 298, § 29), gives the right to the sheriff to pursue the original judgment debtor in a case, where by his failure to return an execution, he has become liable for the amount, and that liability has been established by judgment which he has paid. But this right is not conferred on the sheriff's sureties, who have paid the judgment rendered against the sheriff and themselves for his failure to return; but where the

sureties have paid such judgment, the sheriff may have execution for their benefit, against the original judgment debtor; *Dillon v. Cook*, 5 S. & M. 773.

145. *Same*. But under the statute, if the sheriff voluntarily pay such execution without having been made liable therefor by judgment against him, and without any agreement with the plaintiff that such payment shall not operate as a satisfaction, it will operate as a satisfaction, and he will not be entitled to the benefit of the original judgment; *Morris v. Luke*, 9 S. & M. 521; S. P., *Rollins v. Thompson*, 13 S. & M. 522.

146. *Lien on slaves for costs*. It seems a sheriff has a lien on slaves committed to his custody by order of court, for the payment of jail fees, and is not bound to restore them under an order of court, until his fees are paid, but if there be several slaves he ought only to retain enough to cover the value of the fees; *Sterle v. Shirley*, 13 S. & M. 196.

147. *Sheriff as ex-officio administrator*. See EXECUTOR AND ADMINISTRATOR, 72, 329a.

Shieldsborough, Town of.

1. *Power to license public wharf*. The 14th section of the Act of 1854, incorporating the town of Shieldsborough, confers the power on the corporate authorities of the town to grant to the owner of a licensed public wharf the exclusive right to erect and keep such a wharf within the limits of the corporation; and if such exclusive right be granted in consideration of twenty-five dollars paid by the grantee to the corporation, the privilege is irrevocable; *Martin v. O'Brien*, 5 G. 21.

See SEA SHORE, 4, 5. CONSTITUTIONAL LAW, 107.

Shelly's Case.

See LIMITATION OF ESTATES.

Shipping.

See COMMON CARRIER. CONSTITUTIONAL LAW, 144. ATTACHMENT, 125 to 129. PRINCIPAL AND AGENT, 83.

1. *Effect of bill of lading as to title*. Where goods are shipped on board a vessel and a bill of lading taken by the shipper, and delivered to the vessel for the consignee, the title to the goods is not thereby necessarily vested in the consignee. This depends upon the intention of the parties; if the shipment be made and the bill of lading be delivered with the intention of passing title in pursuance of an agreement to that effect, the title will pass; but if there be no contract of sale and purchase between the consignor and consignee, the owner's title will not be divested. And there is a difference between a contract by which a right to the goods is passed to the consignee, and an agreement by which he is merely entitled to the proceeds of their sale. In the latter case there is no change of title and no property passes, and the right remains in the consignor, and the property is subject to his debts if attached *in transitu* and be-

fore a direct delivery to the consignee. And this is so though the consignee be the factor of the consignor for the sale of the goods, and be also a creditor of the consignor, and the goods were shipped to the consignee to sell in order to pay his indebtedness; *Bonner v. Marsh*, 10 S. & M. 376.

2. *Same: Case in judgment*. A planter in Louisiana was indebted to his factor, in New Orleans, to the amount of several hundred dollars, and the planter shipped by steamboat eleven bales of cotton to the factor to be sold to pay this debt, and delivered the bill of lading to the boat to be by it delivered to the factor, who was consignee therein. On the way to New Orleans, the steamer touched at Natchez, in this State, and there a creditor of the consignor attached the cotton for his debt: *Held*, in a contest between the attaching creditor and the consignee, that the cotton was liable to the attachment; *Ib*.

3. *Consignee's right in the goods*. The consignees in a bill of lading are *prima facie* entitled to the possession of the goods, and they have such a special property in them as to give them a right of action for the recovery of the possession; *Butler v. Smith*, 6 G. 457.

4. *Liability of owner of vessel for damages to wharf boat*. The owner of a steamboat, landing at a wharf boat kept for the landing of steamboats, is not liable for an injury done to the wharf boat in the landing of the steamer, if he exercise due and proper care, prudence and skill in making the landing; *Thomasson v. Agnew*, 2 G. 93.

5. *Same: Contract to receive freight, &c*. A contract by a wharfinger that he would not charge storage and wharfage for "any goods left with him for any citizen of a named town," embraces goods consigned to citizens on storage for others; *Butler v. Smith*, 6 G. 457.

Sinking Fund.

See COMMISSIONER OF SINKING FUND.

Sixteenth Sections.

See SCHOOL LANDS, &C.

Slander.

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I. What Words are Slanderous.

1. *Slanderous at common law*. Words merely abusive and insulting are not actionable at common law unless special damages are laid in the declaration, and proven; but such words are actionable under the statute; *Davis v. Farrington*, W. 304. The words "the plaintiff got drunk at Christmas," are not actionable at common law; *Warren v. Norman*, W. 387.

2. *Same.* A general charge of stealing, unaccompanied by any explanation, is actionable at common law, because it imports a felony; but if there be an application of the charge in the words spoken, by which it is clear that a felonious stealing, is not meant, the words are not actionable. Hence, it is not actionable at common law to charge one with stealing "a bee tree," that phrase having reference to the wild, unreclaimed insect, and a standing tree, neither of which is the subject of larceny; *Cocke v. Weathersby*, 5 S. & M. 333.

3. *Same.* The words "the plaintiff swore a lie," spoken of the plaintiff's testimony before a justice of the peace, if they do not constitute a formal and direct charge of perjury, manifestly convey such an imputation; *Lewis v. Black*, 5 C. 425. Such words, however, when not applied to any particular act of swearing, are not actionable at common law; *Crawford v. Melton*, 12 S. & M. 328.

4. *Words actionable under the statute.* The statute (H. C. 801), provides that all words which from their usual construction and common acceptation are considered as insults, and lead to violence and a breach of the peace, shall hereafter be actionable. Under this statute, the words "the plaintiff swore a lie," are actionable; *Crawford v. Melton*, 12 S. & M. 328; *Lewis v. Black*, 5 C. 425. Words merely abusive and insulting are also actionable; *Davis v. Farrington*, W. 304; and the words "that plaintiff got drunk at Christmas" are also actionable; *Warren v. Norman*, W. 387; and so the words "that the plaintiff has negro blood in his veins;" *Scott v. Peebles*, 2 S. & M. 546. It is not necessary that the words should be spoken to or in presence of the plaintiff; *Scott v. Peebles*, *supra*.

II. Privileged Communications.

See LIBEL, 3.

5. *Communication made in discharge of a duty.* Where words imputing misconduct to another are spoken by one having a duty to perform, and they are spoken in good faith and in the belief that the speaking is in discharge of that duty; or where they are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises, and, therefore, no action can be maintained on them, without proof of express malice. But if the occasion be used merely as a means of enabling the party to indulge his malice, and not in good faith, to perform a duty, and make a communication useful and beneficial to others, the occasion will furnish no excuse; *Sands v. Robison*, 12 S. & M. 704.

6. *Same: Application of the principle.* This principle was, in this case, applied to information given by a justice of the peace to the grand jury of his county in relation to an offence which, he had heard from others, had been committed; and it was also held

that it was not sufficient proof of express malice on the part of the justice of the peace, that the slandered person had made him pay a debt in specie; *Id.*

7. *Comment on evidence in judicial proceedings.* In all judicial proceedings, the parties are permitted to speak freely, and if they use harsh language they will not be liable to an action, though the same words spoken on another occasion, would be actionable. But this privilege is not to be abused, nor is a party permitted to utter slanderous words against a witness by way of insult, and not in the course of his defence or the assertion of his claim. When the plaintiff was being examined as a witness against the defendant, the latter asked him: "Do you say I put you on W.'s land?" And plaintiff replied, "I do." The defendant then said, "that is a lie," and afterwards repeated the same assertion: *Held*, that the words were not spoken to the court by way of comment, but to the witness, and being afterwards repeated, they were not privileged, and a plea setting up that the words were spoken in the court and by way of commenting on evidence, will be bad unless it aver that they were spoken without malice and in good faith; *Lewis v. Black*, 5 C. 425.

8. *Repetition of words heard from another.* Whether it is a good plea to an action of slander, that the slanderous words were spoken by another, naming him, and that the defendant, without malice, only repeated what his informant told him, and that he gave him as his author; *Quære?* Those cases which hold the defence to be good, put it upon the ground that it affords the injured party ample redress, by pointing out to him the author of the slander; and if it be conceded to be the true rule, still the plaintiff cannot thus be turned over to seek redress from an irresponsible party, or one residing beyond the limits of the State; *Scott v. Peebles*, 2 S. & M. 546.

And the defendant must also have disclosed his author when he made the repetition, and he must even then show that the repetition was made with good motives and on a proper occasion; *Jarnigan v. Fleming*, 43 M. 710.

And so if the first speaking of the words be slanderous, each repetition of them by the same party is also slanderous; *Lewis v. Black*, 5 C. 425.

III. The Declaration.

9. *Declaration on words actionable by statute.* A declaration on words merely insulting and abusive, must aver "that the words, from their usual construction and common acceptation, are words of insult, and lead to violence;" *Warren v. Norman*, W. 387. It is necessary, where the action does not lie at common law, to show by averments in the declaration, that it was given by the statute, and comes within its purview. An averment that the defendant spoke words "contrary to the statute, and with a view to insult the plaintiff, and to lead him to com-

mit violence and a breach of the peace." is sufficient for the purpose; *Scott v. Peebles*, 2 S. & M. 546.

10. *Declaration for words actionable at common law: Case in judgment.* In a declaration for words actionable at common law, in which the actionable words are, "that the plaintiff swore a lie," uttered concerning the plaintiff's testimony before a justice of the peace, it is not necessary to aver that the plaintiff's testimony related to a matter material to the issue, nor that the justice of the peace had jurisdiction of the case. These will be presumed until the contrary appears. Nor is such averment necessary, if the action be brought under the statute; *Lewis v. Black*, 5 C. 425.

11. *Variance.* Slanderous words spoken of the plaintiff in the third person, will not support a count on words spoken to the plaintiff in the second person; *Cocke v. Weatherby*, 5 S. & M. 333.

IV. Pleas.

12. *Plea of justification as evidence of speaking the words.* The plea of justification, when the general issue is pleaded, cannot be introduced in evidence to prove the words spoken. For each plea being separate and distinct, an admission in one is no evidence to overturn another; but it may be considered by the jury as evidence of malice, and in the way of aggravation of damages; *Doss v. Jones*, 5 H. 158. The plea is, however, an admission of the speaking of the words; *Jarnigan v. Fleming*, 43 M. 710.

13. *Same: Tenor of the plea.* A plea of justification should admit the speaking of the words, and contain an averment of their truth, or it should contain other matter which shows that the speaking was justifiable. *Lewis v. Black*, 5 C. 425. The plea should be specific to every particular of the declaration, and the proof must be full and complete, or the defence will fail; *Jarnigan v. Fleming*, 43 M. 710.

14. *Same: Notice under general issues of matter in justification.* The notice of justification accompanying a plea of not guilty, need not in form amount to a special plea of justification, but it must fully notify the plaintiff in substance of the charge relied on, so that he may be prepared to prove his innocence; and hence, a notice that "the defendant will prove the truth of the words complained of," is insufficient; *Powers v. Presgrove*, 9 G. 227.

15. *Plea of justification to the action under the statute.* It seems that where the action is brought under the statute, the ordinary plea of justification would be bad, under that provision of the same statute which enacts "that no plea, exception or demurrer shall be sustained in any court in this State, to preclude a jury from passing thereon, who are hereby declared to be the sole judges of the damages sustained." The plea, if allowed, should traverse the allegation in the declaration, that the words were spoken in a manner

to insult and lead to a breach of the peace; *Crawford v. Melton*, 12 S. & M. 328.

16. *Plea of mitigation.* Under the Pleading Act of 1850, the defendant had a right to plead specially matter in mitigation of damages; but if the matter so pleaded could not have that effect, the plea will be bad; *Lewis v. Black*, 5 C. 425.

16a. *General issue: Mitigation and justification.* Under the general issue, the defendant may give in evidence any mitigating circumstances (Rev. Code, 493, art. 96), but he cannot give in evidence matters proving or tending to prove the truth of the words; *Jarnigan v. Fleming*, 43 M. 710.

V. Matter in Mitigation of Damages.

See DAMAGES, 13, 14.

17. *Words spoken in a passion.* That the actionable words were spoken in a sudden heat of passion, is a circumstance in mitigation of damages; *Powers v. Presgroves*, 9 G. 227.

18. *Right of defendant to show provocation.* If the evidence show that the actionable words were spoken immediately after the trial of a law suit between the plaintiff and the defendant, and that they were occasioned by it, it will be competent for the defendant to show in mitigation of damages, the facts and circumstances occurring on and the conduct of the parties during the trial; *Id.*

See LIBEL, 5.

VI. Evidence.

19. *Evidence of plaintiff's good character.* In an action of slander, evidence of the general character alone of the plaintiff is admissible; and hence, evidence of particular rumors against the plaintiff circulating among, and charges preferred by a minority of his neighbors, is inadmissible; *Powers v. Presgroves*, 9 G. 227.

20. *How proof of character made.* Proof of character must be made by inquiries as to the general reputation of the party where he is best known, and as to what is said of him by those among whom he dwells, and with whom he is most conversant; and ordinarily, the witness ought to come from the neighborhood of the party whose character is under investigation. But the court will not, unless under peculiar circumstances, undertake to determine by a preliminary examination, whether a witness to character has sufficient knowledge to enable him to testify; and hence, what is the neighborhood of the party whose character is under investigation, whether it be circumscribed or extended, and what weight is to be given to the witnesses living near or remote, and the sufficiency of their knowledge of his character, are matters to be considered and determined by the jury; *Id.*

21. *Proof of plaintiff's good character as aggravation.* Where justification is pleaded (though the plea be adjudged bad and the trial is on the plea of the statute of limitations), the plaintiff may prove his good character in

aggravation of damages. Whether a different rule would prevail where the general issue alone is pleaded; *Quere?* And this principle was applied in the case where the actionable words were "that the plaintiff had negro blood in his veins;" *Scott v. Peebles*, 2 S. & M. 546.

VIII. The Damages and Costs.

22. *Jury sole judges of.* In an action of slander under the statute, the jury are, by the terms of the statute, "the sole judges of the damages sustained;" and the court has no power to set aside the verdict for excessive damages; *Lewis v. Black*, 5 C. 425.

23. *Statute on costs construed.* The statute which deprives the plaintiff of his right to recover costs in actions for slander, &c., unless he recover damages to the amount of ten dollars at least, does not apply to a judgment rendered in an action commenced before that date; *Gayden v. Bates*, W. 209.

VIII. The Verdict.

24. *Form of.* Where a declaration in slander contained five counts, a verdict finding "the issue for the plaintiff, and assessing his damages at \$400," is not a proper response to any one of the counts; *Cocke v. Weatherby*, 5 S. & M. 333.

IX. Miscellaneous.

25. *Province of jury.* When in an action of slander, the words complained of are not in a foreign or technical language, and not ambiguous or uttered in fable, enigma or question, but are such plain and ordinary words as are in common use, an instruction to the jury, "that unless the words used were understood by the hearers to have been uttered in a malicious and slanderous sense, they must find for defendant" is erroneous. In such cases, it is the judgment of the jury, and not the opinion of the hearers, that must determine whether the words were slanderous and malicious or not; *Jarnigan v. Fleming*, 43 M. 710.

26. *Slander by malicious prosecution.* A slander may be perpetrated by a malicious suit. Such a suit may be the most effective means for propagating it, and in many cases, an action will lie for slander propagated in this way. And it seems, in such cases, that the party injured, has an option either to bring an action for slander or for malicious prosecution; *Ib.*

27. *Presumption of malice.* Slanderous words, unless privileged or uttered under circumstances tending to rebut the presumption of malice, will be presumed to be malicious; *Jarnigan v. Fleming*, 43 M. 710.

Slaves.

See CRIMINAL LAW, sub-division Slaves.

1. *The malicious killing of a slave is murder, even when done by the master.* See *State v. Jones*, W. 83.

2. *Runaway slaves: Sale of.* See *Hutchins v. Lee*, W. 293; *Shelton v. Baldwin*, 4 C. 439. Arrest of; pursuer has no right to kill in order to arrest; *Thompson v. Young*, 1 G. 17. Right of slave to arrest a runaway; *Jordan's Case*, 3 G. 382.

3. *Rights of slaves.* Has no right to sue, except for his freedom; *Talbot v. Norage*, 1 C. 572. Property purchased for slave with his money, raises a trust for slave; *Leiper v. Hoffman*, 4 C. 615.

4. *Liability of master for torts of slave.* Master is by statute liable for thefts committed by his slave; *Dowell v. Boyd*, 3 S. & M. 592; *Atchison v. Potts*, 6 S. & M. 120. Not liable generally for torts of slaves, unless committed by his order; *Leggett v. Simmons*, 7 S. & M. 348.

5. *Remedies for recovery of slaves: Jurisdiction of equity where complainant has legal title.* See *Bates v. Bates*, W. 356; *Butler v. Hicks*, 11 S. M. 78; *Hull v. Clark*, 14 S. & M. 187.

6. *Habeas corpus to recover slaves.* See *Scudder v. Seal*, W. 154; *Arnett v. Bitchel*, W. 496. See HABEAS CORPUS, 6 to 9.

7. *Action against party removing slave out of the State.* See *Jones v. Donald*, 4 C. 461; *Turner v. Herron*, 5 G. 460.

8. *Master's right to sue for tort to slave.* *Lamar v. Williams*, 10 G. 342.

9. *Emancipation of slaves.* As to carrying slave out of this State and emancipating him; *Hinds v. Brazeale*, 2 H. 837; *Ross v. Vertner*, 5 H. 305; *Waile v. Am. Col. Society*, 7 S. & M. 663; *Leiper v. Hoffman*, 4 C. 615; *Shaw v. Brown*, 6 G. 246; *Mitchell v. Wells*, 8 G. 235; by will here directing removal; *Leech v. Cooley*, 6 S. & M. 93; *Wade v. Am. Col. Society*, 7 S. & M. 663.

Request of freedom here, with assent of Legislature; *Shattuck v. Young*, 2 S. & M. 30. Trust for emancipation; *Weathersby v. Weathersby*, 13 S. & M. 685. Who takes when there is illegal bequest; *Manning v. Read*, 1 G. 308; *Lusk v. Lewis*, 3 G. 297; S. C., 6 G. 401; *Garnett v. Cowles*, 10 G. 60. 10. *American Colonization Society as a legatee.* See *Wade v. American Colonization Society*, 7 S. & M. 663; *Lusk v. Lewis*, 3 G. 297.

11. *Status of negroes.* Not embraced in general legislation; *Thornton v. Demoss*, 5 S. & M. 609; *Minor's Case*, 7 G. 630.

They are not citizens; *Leach v. Cooley*, 6 S. & M. 93; *Shaw v. Brown*, 6 G. 246; *Heirn v. Bridault*, 8 G. 209; *Mitchell v. Wells*, 8 G. 235.

Incapable of holding property in the State; *Heirn v. Bridault*; *Mitchell v. Wells*, *supra*.

Their status in other States not recognized here; *Mitchell v. Wells*, 8 G. 235.

12. *Abolition of slavery: President's proclamation.* *Vicksburg R. R. Co. v. Green*, 42 M. 436.

That the loss by abolition fell on owner, and not on his vendor; and that purchaser must pay for slave, notwithstanding emancipation. See *Bradford v. Jenkins*, 41 M. 328;

Blwett v. Evans, 42 M. 804; *Whitworth v. Carter*, 43 M. 61; *Moyfield v. Bernard*, 1b. 270; *McMillen v. Causry*, 1b. 227.

12a. *Time of abolition.* The precise time of the abolition of slavery in this State, has never been judicially determined; *Herrod v. Davis*, 43 M. 102.

12b. *Legacy to a slave good after emancipation.* Though a legacy to a slave may have been illegal and void at the testator's death, because of the disability of the legatee, yet it may be, whilst in the hands of the executor, a valid trust, which, if possession of the executor continue till the slave is emancipated, will then vest in the freedman, and may then be enforced in his favor, according to the testator's intention; *Hoover v. Brem*, 42 M. 603.

13. *Sale of slave charged with crime.* *Doughty v. Owen*, 2 C. 404.

14. *Trial of slave Minor's Case*, 7 G. 630; *Jordan's Case*, 3 G. 382; *Dowell v. Boyd*, 3 S. & M. 592; *Byrd's Case*, 1 H. 247.

15. *Ordinance of 1787 constitutional.* *Harry v. Decker*, W. 36.

16. *Confessions of slave to master.* *Sam's Case*, 4 G. 347.

17. *Introduction of slaves for sale, illegal.* *Brien v. Williamson*, 7 H. 14; *Green v. Robinson*, 5 H. 80; *Panthers' B'k of Tenn. v. Conger*, 12 S. & M. 527; *Glidevell v. Hite*, 1b. 110; *Cowen v. Boyce*, 1b. 769. Introduction without certificate of character is illegal; *Deans v. McLendon*, 1 G. 343; *Merrill v. Melchior*, 1 G. 516; *Barker v. Justice*, 41 M. 240.

But not illegal for settler in the State to bring slave with him; *Hope v. Evans*, 4 S. & M. 321.

18. *Mortgage of slave does not carry her issue.* *Turnbull v. Middleton*, W. 413.

19. *Bequest of slave as to issue.* Judge of Probate v. *Alexander*, 2 G. 297.

2. *Remainderman entitled to issue, during life estate.* 1b.

Spanish Laws and Land Claims.

1. *Spanish law when in force here.* The laws of Spain continued in force in this State, till after the territorial government was actually organized in 1799; and by that law executors had no power to sell immovables; *Chew v. Calvert*, W. 54.

2. *Spanish grants of land were donative.* Grants of land here by Spain were donative, and not subject to the rights of community between husband and wife. The conditions in these grants were for the benefit of the donee, and were rarely, if ever, fulfilled; *Chew v. Calvert*, W. 54; and the Spanish Government attached but little importance to them; *Winn v. Cole*, W. 119.

3. *Order of survey signed by deputy governor: Effect of vesting title.* A Spanish order of survey, signed by a deputy governor, is presumed *prima facie* to be issued by competent authority and valid. And such order vests such a right as can only be divested by the alienation of the grantee, or his voluntary abandonment, or by an entire

failure to perform the conditions of the grant, or by some act against the government which would justify confiscation; *Winn v. Cole*, W. 119.

4. *Same: Revocation.* The report of the surveyor general of the Spanish Government stating land so located to be vacant, and the allegation of that fact in a subsequent grant to another party, does not amount to confiscation, or the revocation of the grant; and if it be a revocation, it would be an act of capricious tyranny, and ought to be disregarded; 1b.

5. *Spain's rights bounded north by thirty-one degrees.* It is now well settled, that Spain never had a right of soil in the State above the thirty-first degree of north latitude; and all grants and dispositions of land made by Spain above that line, were in their inception void for want of title in that government. The title to that territory now in this State, was, after the Declaration of Independence, in the State of Georgia; *Doe ex dem Nevitt v. Beaumont*, 6 H. 273.

6. *Same: Cession by Georgia: Conflict of titles by grant and by survey from Spain.* But in 1802, Georgia ceded the territory to the United States, and by the second article of the treaty of cession, it was provided, that all persons who on the 27th of October, 1795, were actual settlers within the territory ceded, should be confirmed in all grants legally and fully executed prior to that day, "by Great Britain and Spain, or by the State of Georgia;" and by the third article, it was provided, that the land ceded, after satisfying \$1,250,000 to the State of Georgia, and grants recognized in the preceding article, should belong to the United States; and there was a proviso which authorized the United States Government, after satisfying the debt to Georgia, and these grants before recognized, to appropriate 500,000 acres, to satisfying or quieting other claims to land, than those recognized in the cession.

In 1803, Congress passed an act providing for a board of commissioners to examine claims, &c., and directed also that persons resident, &c., and having claims under warrants of survey from the British or Spanish governments, should be confirmed in their title: *Held*, that a title under a Spanish grant, fully completed and perfect, was superior to an older title under a Spanish warrant of survey, and needed no confirmation by the board of commissioners; that the former was a title under the State of Georgia, and was superior to the title of the United States, and that the latter, by the terms of the cession, could not be confirmed so as to interfere with a perfect and complete Spanish grant; 1b.

7. *Certificate of confirmation.* The certificate of the confirmation of a Spanish grant made by the board of commissioners, constitutes title to the land embraced in it; *Surget v. Little*, 2 C. 118.

8. *Right of settler to sell his claim.* A person who was an actual settler on public land when it belonged to Spain, had, under the

Act of Congress of 1803, an inchoate right of donation, which he might validly sell, and if, afterward, the right was confirmed, it would enure to his vendee. This is not a sale of public land, nor of a pre-emption, nor within the policy of the law prohibiting the sales of such rights; *Nixon's Heirs v. Carco's Heirs*, 6 C. 414.

Spoliation.

See ALTERATION OF WRITINGS. DEED, 83, 84.

Stamps.

1. *Validity of unstamped writings.* All deeds, or other instruments of writing, made during the late civil war, are valid and admissible in evidence, though not stamped at the time of their execution as required by the laws of the United States; provided, that after the war, they are stamped by the proper revenue officer, in accordance with the Act of Congress; *Frazer v. Robinson*, 42 M. 121.

2. *Presumption as to stamping by revenue officer.* Where the proper revenue officer stamps an unstamped deed, or other instrument of writing, and certifies thereto, the law presumes he has done his duty and affixed the amount of stamps required by the Act of Congress; *Ib.*

3. *Amount of stamps necessary.* A deed of conveyance of land, which recites a consideration in Confederate treasury notes, is not required to be stamped according to the amount of Confederate money stated, but according to its value at the time of the execution of the deed, as compared with gold; *Ib.*

4. *Failure to stamp.* An unstamped instrument may be stamped in court, and then read in evidence without any proof on the part of the party offering it, that the omission to stamp was not fraudulent. The omission to stamp is not evidence of fraud, and the objector must show affirmatively the fraudulent intent, or it will be admitted; *Morris v. Morris*, 44 M. 441.

5. *Right to recover on original consideration, where note is unstamped.* Where there is a count on an unstamped instrument, and also on the original consideration, if the former be inadmissible in evidence, because it was not stamped, a recovery may be had on the consideration for which the note was given; *Humphreys v. Wilson*, 43 M. 328.

State Decisions.

See HIGH COURT, 187 to 192.

State Papers.

See EVIDENCE, 82.

State Sovereignty.

See CONSTITUTIONAL LAW, 105 to 110.

State.

See CONSTITUTIONAL LAW. PUBLIC CONTRACTS.

1. *Delay of State officer does not affect the State.* A delay on the part of the officer of the State to bring suit against a defaulting tax collector, constitutes no defence to him; *State v. Joiner*, 1 C. 500.

2. *Not bound by statute of limitations.* The State is never included within a disabling statute, unless the intention to do so be plain, and it is not barred by the statute of limitations; *Ib.*; *S. P. Josselyn v. Stone*, 6 C. 753.

3. *State bound to pay counsel employed by attorney general.* The attorney general, by the Act of 1841, has power to employ additional counsel to assist him in any case in which the State is a party, and to make a contract for the fee of counsel so employed, which will be binding on the State, if the power to employ be exercised in good faith, and the service be rendered. But there being no provision in the act for the auditor to issue his warrant in payment of the fee, application must be made to the Legislature for payment, but if such application be made, and the Legislature refuse to pay a part of the fee, and it does not appear that the claim was fully investigated by the Legislature, or the ground on which the other part was refused does not appear, the Chancery Court should render a decree against the State for the unpaid balance; *Mayer v. State*, 6 C. 706.

4. *Liability for interest.* As a general rule, the State is not bound to pay interest on claims against her, and in cases which contemplate the action of the Legislature before payment, the debt will not be presumed to be complete until demand made on the Legislature, and interest should be calculated only from that time; *Ib.*

See INTEREST, 15.

5. *State's rights as a suitor.* The State of Mississippi is as properly a plaintiff in a prosecution or suit instituted in her name, as a private individual is in a like case; and hence, is entitled to all the remedies provided by law for plaintiffs against sheriffs or other officers for misconduct in the execution and return of process; *State v. Nichols*, 10 G. 318.

Statutes.

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I. Enactment of Statutes, and the time they go into Operation.

1. *Legislative Rolls.* The enrolled acts of the Legislature, when signed by the Speaker of the House of Representatives and by the President of the Senate, and approved by the Governor, and deposited in the office of Secretary of State, like the Parliament Rolls of England, are records, and import absolute and uncontrollable verity. They are conclusive evidence of the due enactment of the statutes contained in them, and cannot be impeached in any manner whatever; *Green v. Weller*, 3 G. 650; S. P., *Swann v. Buck*, 40 M. 268.

2. *Journals of the Legislature.* The journals of the two Houses of the Legislature, are memorials of their proceedings, but they do not import absolute verity, and are not conclusive of the facts stated in them. And even if it were competent to show by extrinsic evidence that an act verified and attested, and enrolled according to the forms of the Constitution, has not been passed as it appeared by the record contained in the legislative rolls to have been passed, yet the courts cannot take judicial notice of the journal of the Legislature, in order to ascertain the true state of facts; they would have to be proven by an examined copy; *Green v. Weller*, *supra*; S. P., *Swann v. Buck*, 40 M. 268.

3. *Style of enacting clause: Constitutional provision.* It is not required that the Legislature should adhere literally to the formula of words prescribed in the constitution of the State, as to "the style of the laws;" if a statute shows on its face the authority by which it is adopted and that it was the intention of the Legislature that it should have the effect of a law, it will be sufficient. Hence, if the Legislature use the formula, "be it resolved," in the enacting clause of a statute, instead of "be it enacted," the formula prescribed in the constitution, it will be a substantial compliance with the constitution; *Swann v. Buck*, 40 M. 268.

4. *Joint resolutions.* All legislative acts duly enrolled, signed by the presiding officers of both houses, and approved by the governor, stand on an equal footing as to dignity, and must equally prevail as the acts of the sovereign power of the State, whether they be "enacted" or only "resolved;" and an act, therefore, passed in the shape of a joint resolution, is a statute, and obligatory as such; *Id.*

5. *When a statute goes into effect.* The constitution provides that "no laws of a general nature, unless otherwise provided for, shall be enforced until sixty days after the passage thereof." But this provision in relation to the date of its operation, need not be by express terms, if the intention to give it an earlier operation sufficiently appears from the act or resolution, otherwise than from its general phraseology. Nor is it necessary that the intention shall appear from the act or resolution itself. To determine when

it is to go into effect, we may look at all the other laws passed by the Legislature at the same session, on the same subject matter; and if any other act be subsequently passed, which manifestly proceeds on the idea, and makes provisions with reference thereto, that the former act is then in operation, the former act will at least have effect from the date of the last act, if it be provided in the last act, that it shall go into operation on its passage; *Swann v. Buck*, 40 M. 268 (citing *West Feliciana R. R. Co. v. Johnson*, 5 H. 273).

6. *Same.* And so, if an act supplemental to the first act be passed before the expiration of sixty days from the date of the first act, and in the supplemental act it is provided that it shall take effect from and after its passage, the original act will go into effect with the supplemental act; *West Feliciana R. R. Co. v. Johnson*, *supra*.

7. *What is the date of the passage of an act.* The date of the passage of a statute, as to rights conferred by it, is the time when it goes into operation. The exemption law of 1841, approved 23d January, 1841, exempted certain property from sale for debts created after its passage; but by the express terms of the act, it did not go into operation till July, 1841; *Held*, that the exemption thereby allowed did not apply to any contract made before 1st July, 1841; *Smith v. Brown*, 6 C. 810.

II. Repeal of Statutes.

1. Generally.

8. *Repeal does not divest a vested right.* The repeal of a statute does not divest a right vested under it; *Baygens v. Beard*, 41 M. 531. See *Assessor of Taxes*.

9. *Repeal of statute, with provision to leave it in force as to past transactions.* A statute repealing another, even if the former be a mere remedial law, may continue the old law in force, as to past transactions; *Jennings v. Hammond*, 1 S. & M. 174.

10. *Repeal of penal statute.* After the expiration or repeal of a law, no penalty can be enforced, or punishment inflicted for a violation of it, committed whilst it was in operation, unless some special provision be made for that purpose by the repealing statute; *Teague's Case*, 10 G. 516.

11. *Same: Case in judgment.* A party was indicted for a violation of a statute which prohibited the sale of vinous and spirituous liquors in any quantity whatever, within a certain locality; he entered into a recognizance for his appearance, which was forfeited, and judgment *nisi* was entered against him and his sureties. The act under which he was indicted was then repealed, but the repealing act provided, that "it should not be so construed as to release or discharge from punishment any who had violated the act intended to be repealed, by selling vinous and spirituous liquors in less quantities than one gallon"; *Held*, that this last act must be construed so as to save a prosecution un-

der the first act, although the indictment did not charge a sale in a less quantity than one gallon; and that, on trial of that indictment after the date of the repealing act, the State would be held to prove that the sale was in a less quantity than one gallon; and therefore the judgment *nisi* should be made final; *Ib.*

12. *Repeal of repealing statute.* Where a repealing statute is itself repealed, the former repealed act is thereby revived; *Aberdeen v. Saunderson*, 8 S. & M. 663.

13. *Same: Case in judgment.* The power granted by the charter of the City of Aberdeen, A. D. 1837, to the corporate authorities to license retailers, was not repealed but only suspended by the Act of 1840, which totally prohibited the granting of such license to any person in the State; and when this last act was itself repealed, the power of said corporate authorities revived and is not repealed by the Act of 1846, providing generally for a different disposition of the money arising from the grant of licenses to retailers; *Ib.*

14. *Repeal by subsequent change in the constitution.* A statute which was, at the time of its enactment, valid and constitutional, will be repealed by a subsequent change in the constitution, introducing a provision repugnant to the statute. Hence the statute authorizing the Chancery Court to grant issues *decisavit vel non* is repealed by the constitution of 1832, which vests an exclusive jurisdiction over that matter in the Probate Court; *Hamberlin v. Terry*, 7 H. 143.

2. Repeal by Implication.

15. *Repeal by implication: Not favored: Both statutes must stand if possible.* The law does not favor a repeal of a statute by implication; and hence, where two statutes are seemingly repugnant, they must be so construed, if possible, that the latter shall not be a repeal of the former by implication; *McAfee v. Southern R. R. Co.*, 7 G. 669; *Richards v. Patterson*, 1 G. 583; *S. P., Southern R. R. Co. v. Jackson (City of)*, 9 G. 334. They must be so construed that both may stand and harmonize if possible; *Com'l Bk of Natchez v. Chambers*, 8 S. & M. 9. There will be no repeal by implication, unless the repugnancy between the two statutes be plain and unavoidable; *Planters' Bk v. State*, 6 S. & M. 628. And when a repeal by implication is allowed, the extent of the repeal will be only so far as there is a plain and manifest repugnancy between them; *White v. Johnson*, 1 C. 68.

16. *Same: When a repeal by implication is effected.* But there will be a repeal by implication when the two statutes are so repugnant and inconsistent that they cannot stand together by giving each a fair construction; *Com'l Bk of Natchez v. Chambers*, 8 S. & M. 9; *S. P., Peyton v. Cubaniss*, 44 M. 808.

And when a subsequent statute contains nothing restricting the general terms used in it, effect must be given to such terms according to their plain meaning; and if, when so construed, the statute is repugnant to a

former statute, the latter is repealed to the extent of the repugnancy; *Southern R. R. Co. v. Jackson (City of)*, 9 G. 334.

And so, when it is evident that the later act was intended by the Legislature to be the sole and exclusive rule in the case provided for in both, there will be a repeal by implication; *Swann v. Buck*, 40 M. 268.

17. *When repugnant provision in last act is unconstitutional.* If the provisions in the last act which are repugnant to the first act be unconstitutional, there will be no repeal by implication; *Com'l Bk of Natchez v. Chambers*, 8 S. & M. 9.

18. *Instance where the repugnancy was held no repeal.* In 1843 the Legislature passed a general law, providing a mode of proceeding in the Circuit Courts, by *quo warranto*, against banks, for a violation of their corporate franchises. In 1843, proceedings were commenced against the Planters' Bank under that act. In 1844, the Legislature passed a special act in relation to the Planters' Bank and the Mississippi Railroad Company, authorizing them, on certain conditions, to surrender their charters, and upon their refusal to do so, making it the duty of the attorney general to proceed against them by bill in chancery, have a receiver appointed to take charge of their property, and proceed to have them wound up. The Act of 1844 provided, that if either of these two corporations would accept and comply with its provisions, by a voluntary surrender of its charter, then such corporation should be exempted from the *Quo Warranto* Act of 1843. The Planters' Bank did not accept these conditions of the Act of 1844; and the proceedings before stated, under the *Quo Warranto* Act of 1843, having progressed to final judgment against the bank, trustees were appointed under the *Quo Warranto* Act of 1843, and the bank appealed to this court. The cause was, in this court, submitted on a preliminary motion involving the question, whether the special law of 1844, in relation to the bank and the Mississippi Railroad Company, had not, as to those corporations, repealed the *Quo Warranto* Act of 1843, and taken away the jurisdiction of the Circuit Court: *Held*, that there was no necessary repugnancy between the two acts, and, therefore, the latter is not by implication a repeal of the former; that no proceedings having been instituted in chancery under the special Act of 1844, the Circuit Court did right to pronounce judgment under the Act of 1843; *Planters' Bk v. State*, 6 S. & M. 628.

19. *Same.* All the acts of the Legislature upon the same subject matter (for instance, the acts on limitation of actions), are to be construed together, as one series, and a later act is not to be construed to be a repeal of a former act, by implication, unless to the extent of a plain and manifest repugnancy between them. And especially will not a later act be held, by implication, to change a policy recognized in all former acts on the same subject, by cutting off a class of rights, which in the other acts were

especial objects of care and favor. Hence, a later act of limitation of actions, which does not profess to embody all the legislative provisions on the subject, but professes only to be an amendment of the former acts, and which omits all reference in prescribing periods of limitations, to the exception—contained in all the former acts—in favor of infants will not be held to repeal that exception—there being no necessary repugnancy between the acts; *White v. Johnson*, 10 C. 68. See *post*, 41.

20. *Same* The Act of 16th March, 1852, granted all the three per cent. fund then in the State treasury to the several counties of the State; the Act of 18th November, 1857, granted all of that fund then in the treasury to five railroad companies therein named, without making any express reference to the former act. A large sum which was in the treasury at the date of the first act, was never, in fact, distributed to the counties, but remained in the treasury at the date of the last act—in 1857—together with a large sum which had been received as a part of the three per cent. fund since the passage of the Act of 1852: *Held*, that as there was no express repeal of the Act of 1852 contained in the Act of 1857, the general words of the last act did not divest the rights of the counties secured by the first Act, and that the two acts must be so construed as to give effect to both of them; and, therefore, that the Act of 1857 did not grant to the railroad companies any portion of the three per cent. in the treasury at the date of the Act of 1852, and by that last act granted to the counties; *McAfee v. Southern R. R. Co.*, 7 G. 669.

21. *Same* The 15th section of the Revenue Act of 1822 (H. C. 172), allowed minors, whose lands were sold for taxes, one year after their attaining majority, in which to redeem. The Revenue Act of 1846 makes provisions in reference to the subject matter of redemption of lands embraced in the Act of 1822, but omits all reference to the right of redemption by minors: *Held*, there is no necessary repugnancy between the two acts, and that it must be intended that the Legislature, in enacting the latter statute, were satisfied with that provision of the former statute, and intended to make no alteration in it, as was done with regard to other provisions relative to the right of redemption; *Richards v. Patterson*, 1 G. 583.

22. *Instance of repeal by implication.* Where an act directed the trustees of dissolved banks to sue for and collect the debts due the banks, and sell the property of such banks, and a subsequent act directed a peremptory sale of these debts and other property in a prescribed mode, it was held, that there was a direct repugnancy between the two acts, and that the latter was, by constitutional, a repeal of the former; *Com'l B'k of Natchez v. Chambers*, 8 S. & M. 9.

23. *Instance of repeal prevented by subsequent legislative recognition.* On the 24th of February, 1844, the Legislature passed a Statute of Limitations, by the 13th section of

which the lien of judgments rendered prior to its passage, was limited to two years from the passage of the act. On the same day was passed the enrolment law, which contains the following provisions: "all liens of judgments &c., shall cease and determine as against creditors and purchasers from the debtor, unless the same be enforced by execution within five years from the date of the enrolment." On the 19th of February, 1846, the Legislature passed an act placing a construction on said 13th section of the Act of 1844: *Held*, that the recognition by the Legislature in this last act, of the said 13th section (before the lien limited by it had expired), had the effect of preventing its repeal by the enrolment act; *Planters' B'k v. Black*, 11 S. & M. 43.

24. *Two contemporaneous acts construed with reference to a repeal.* In this case it was held that the above named two acts were incapable of satisfactory reconciliation, except to consider the enrolment act as determining the conditions on which the lien should accrue, and the limitation act as fixing its duration; and the lien, therefore, of a judgment rendered prior to the passage of these two acts, expired with the lapse of two years from that time; *Emanuel v. Jones*, 12 S. & M. 473.

III. Construction of Statutes.

See CONSTITUTIONAL LAW, 1 to 13.

1. General Rules.

25. *Statutes construed with reference to their meaning, object, spirit, and scope.* In construing a statute, the object is to get at its spirit and meaning, its design and scope. And that construction will be justified which evidently embraces the meaning and carries out the object of the law, although it be against the letter and grammatical construction of the act; *Dixon v. Doe*, 1 S. & M. 70.

A statute will be construed according to its object and spirit, though against the letter; *Painter v. Trotter*, 10 S. & M. 537.

And it must be construed according to its reason; and thus, where a statute is special but the reason of it is general, it is to be received in a general sense; *Grand Gulf B'k v. Archer*, 8 S. & M. 151. A statute must be construed according to its reason and object; *Love v. Taylor*, 4 C. 567.

26. *Same.* In the construction of statutes the main object is to ascertain the true meaning and intention of the Legislature; and where upon a due consideration of the subject matter of the statute and the object intended to be accomplished by its enactment, such intention is manifest, courts will give it effect although it be not sanctioned by the literal interpretation; but courts will not abandon the literal interpretation to carry out an alleged intention of the Legislature, if such construction be doubtful; *N. O. J. & G. N. R. R. Co. v. Hemphill*, 6 G. 17.

26a. *Must be made to harmonize.* A statute must receive such construction as will, if possible, make all its parts harmonize with

each other, and render them consistent with its scope and object; *Ellison v. M. & O. R. R. Co.*, 7 G. 572.

And the whole of it must be looked to in order to reconcile apparent repugnances and contradictions; *Dixon v. Doe*, 1 S. & M. 70.

26b. *Intention: Literal sense: Consequences.* In the exposition of a statute, the intention of the maker, when ascertained, will prevail over the literal sense of the words, and its reason and intention will prevail over the strict letter. Where the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion. If the meaning of a statute be doubtful, the consequences are to be considered in the construction; but where the meaning is plain, no consequences are to be regarded; *Learned v. Corley*, 43 M. 687.

2. Construing the Words.

27. *Same.* The true sense in which words are used in a statute, is to be ascertained generally by taking them in their ordinary and popular signification; or if they be terms of art, then in their technical meaning; *Green v. Weller*, 3 G. 650; *S. P. Forniquet v. West Feliciana R. R. Co.*, 6 H. 116. When this sense is clear, no resort can be had to construction; *Brien v. Williamson*, 7 H. 14; *Smith v. Halfacre*, 6 H. 582.

28. *Same: An instance.* A bank charter authorized the taking of seven per cent. interest, on notes payable within four months; and eight per cent. interest on notes having a longer time to run; *Held*, that a note payable four months after date, though entitled to three days of grace, which made it payable in four months and three days, was not such an one as was entitled to draw eight per cent. interest; that the Legislature referred to four months' notes in the ordinary acceptance, viz., those payable on their face at four months; *Forniquet v. West Feliciana R. R. Co.*, 6 H. 116.

28a. *Same.* The inquiry is not into the abstract force of the words used, but in what sense the Legislature intended to use them; and this sense is to be collected from the context, and a narrower or more extended signification given, according to the intention thus indicated; *McIntyre v. Ingraham*, 6 G. 25.

29. *Words used in same sense throughout.* When it appears that the framers of a statute used a word in a particular sense, generally in the act, it will be presumed that it was intended to be used in the same sense, wherever it occurs in the act, unless an intention to give it a different meaning plainly appears in the particular part alleged to be an exception to the general meaning indicated; *Green v. Weller*, 3 G. 650.

30. *Sense of words to be derived from the statute.* The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can

be clearly ascertained from all its parts and provisions, the intention thus indicated will prevail, without resorting to other means of aiding in the construction; *Id.*

For instances, see CONSTITUTIONAL LAW, 4, 5, 6.

3. General Words in a Statute.

31. *How construed.* Though the particular case may not have been within the contemplation of the Legislature, when the act was framed, yet, if the language employed embrace it, it is not the less within the influence of the act; for the very object of using general words is to embrace particular cases, which could not be foreseen; *Bank of United States v. State*, 12 S. & M. 456. See *ante*, 16, for repeal of statute by general words. See also *post*, 39. LIMITATION OF ACTIONS, 86.

32. *Same: Their effect restrained.* But general words in a statute are not to receive a construction which would give it effect beyond the legislative power, and thereby render the statute unconstitutional; *Marshall v. Grimes*, 41 M. 27. Nor should general words in a statute be construed so as to divest a right clearly granted by a previous statute, if they be susceptible of a fair construction consistent with the right there granted; *McAfee v. Southern R. R. Co.*, 7 G. 669. For the instance, see *ante*, 20. See also *post*, 34.

33. *Same.* The terms "effects," "estate," and words of like general import, when used in a clause enumerating personal estate, will generally be confined to *estate or effects ejusdem generis*, with those particularly specified, if a different construction be not required by the context; *McIntyre v. Ingraham*, 6 G. 25.

34. *General words operating as an exemption from taxation.* A subsequent statute, exempting in general terms a certain class of property from taxation, will operate as a restriction upon a power, previously granted to a municipal corporation, to levy taxes on all property within its limits; *Southern R. R. Co. v. Mayor, &c., of Jackson*, 9 G. 334.

35. *General words restricted by omission of part from a former statute.* Where the Legislature, in former statutes imposing taxes, made a marked distinction in the language employed to indicate two sources of revenue, a later statute imposing a tax, and which applies the tax by the description used in the former statute, to one of these subjects alone; this tax, so imposed in the last statute, will not be held to extend to the other of the sources of revenue mentioned in the first statute, though the other might properly be embraced in the description by which the tax is applied, if the Legislature, in its former statute, had not made a distinction; *James v. Elder*, 1 C. 134.

4. Where Language is loose and inaccurate.

36. *Same.* Where the language of a statute is loose and inaccurate, critical rules should not be applied in its interpretation; but the

intention of the Legislature must be looked to; *Briscoe v. Anketell*, 6 C. 361.

See CONSTITUTIONAL LAW, 95.

5. Construction where Statute is drawn with Care.

37. *Same.* Where a statute seems to be drawn up with care and deliberation, and the word "shall" is used in every instance in which the statute is mandatory, except the one in question, and there "may" is used, the court will not construe "may" as mandatory, but as vesting a discretion; *Ridley v. Ridley*, 2 C. 648.

6. "Shall" construed as "may."

38. *Same.* The word "shall" may be construed as "may," if the spirit and intention of the act require it; *Cason v. Cason*, 2 G. 578.

7. The whole Statute looked to, and the Context.

39. *Same.* The intention of the statute must be deduced from the whole and every part of it taken and compared together; *Grand Gulf Bk v. Archer*, 8 S. & M. 151; *S. P., Green v. Weller*, 3 G. 650.

The language of the whole act is to be looked to, and if any particular clause or expression be not so large and extended in its import as those used in other parts of the act; and if upon a view of the whole act, the real intention of the Legislature can be collected from the more large and general expressions used in the act, effect must be given to the larger and more extended expressions; *Grand Gulf Bk v. Archer*, 8 S. & M. 151.

It is a cardinal rule of construction, that the intention of the Legislature is to be deduced and taken from the whole and every part of the statute taken together, from the words and the context, and such construction adopted, as will best effectuate the intention of the law giver; *Green v. Weller*, 3 G. 650.

8. Statutes in pari materia construed together.

40. *The old law looked to.* In construing statutes we must look to the old law, the mischief, and the remedy; *Dixon v. Doe*, 1 S. & M. 70; *Grand Gulf Bk v. Archer*, 8 S. & M. 151.

41. *All statutes in pari materia construed together.* All statutes on the same subject matter, are to be construed together, and a harmonious interpretation adopted, if practicable; *Scott v. Searles*, 5 S. & M. 25.

The several statutes upon the same subject matter, are to be taken and considered together, and compared, as having one object in view, and being parts of one system; and this rule applies, though some of the statutes have expired or have been repealed, or are not referred to in the others; *Grand Gulf Bk v. Archer*, 8 S. & M. 151. See also, *ante*, 19.

42. *Same: Example.* Where one statute required a bond and security to be given in all cases of appeal, and another declared that executors and administrators should not

be liable even for costs, beyond the assets in their hands, it was held that the latter created an exception to the former, in favor of executors and administrators, in cases where they took appeals; *Scott v. Searles*, 5 S. & M. 25.

9. Construed so as to make no Part useless.

43. *Same.* A statute should not receive such a construction as would render any of its provisions vain and useless; *Martin v. O'Brien*, 5 G. 21.

And it is a well settled rule of construction, that words in different parts of a statute must be referred to their appropriate connection, giving to each in its place its proper force—*reddendo singula singulis*—and if possible rendering none of them useless and superfluous; *McIntire v. Ingraham*, 6 G. 25.

See LIMITATION OF ACTIONS, 43.

10. Statute Construed according to its Policy, and the Policy of the State.

44. *Same.* The courts in construing a doubtful statute, will adopt that construction which is just and equitable, and consistent with the policy of the State, in preference to one which is contrary to that policy, and makes a rule unjust and inequitable; *Shelton v. Baldwin*, 4 C. 439.

A statute ought to receive such a construction, as is consonant to the manifest policy of the Legislature, indicated in its passage, although in opposition to its strict letter; *Ingraham v. Speed*, 1 G. 410; *S. P., Read v. Manning*, 1 G. 308; *Olive v. Walton*, 4 G. 103.

11. Not Construed to have Retro-active Effect.

45. *Same.* It is an established rule for the construction of statutes, that a retro-active operation will not be given to a statute, unless it be the manifest intention of the Legislature that it should have that effect; *Brown v. Wilcox*, 14 S. & M. 127; *S. P., Gayden v. Bates*, W. 209; *Eusten v. Van Dorn*, W. 14. There must be a plain declaration in it to that effect; *Hooker v. Hooker*, 10 S. & M. 59; *Stewart v. Davidson*, 1d. 351; or its words must admit of no other meaning; *Garratt v. Beaumont*, 2 C. 377.

Courts will not give a statute a retro-active operation, unless the intention of the Legislature to that effect, be plain and clear. Such legislation is unjust, and condemned by the courts. But where that intent is plain, and it is liable to no other constitutional objection, it will be carried out; *Carson v. Carson*, 40 M. 349. See *post*, 51.

46. *Same: Application of the principle.* So much of the limitation act of 1844, as provides that no execution shall issue on any judgment, after the lapse of seven years from the issuance of the last preceding execution, as to cases where the last execution was issued prior to the passage of the act, will not be construed to make the statute commence to run from the date of such issuance, but only from the passage of the law. And,

especially is this so, since the same act in another part, provides that the periods of limitation therein prescribed, shall commence from the date of the passage of the act; *Brown v. Wilcox*, 14 S. & M. 127.

See CONSTITUTIONAL LAW, 71, 72.

12. Statutes which are Strictly Construed.

47. *Statutes giving summary remedies.* Statutes allowing summary remedies should be strictly construed, so as not to extend them beyond their letter; *Lombard v. Whiting*, W. 229; *Connell v. Lewis*, W. 251; S. P., *Banks v. Cage*, 1 H. 293; *Sloan v. Johnson*, 14 S. & M. 47; *McCreary v. Hoopes*, 3 C. 428, for which three last cases, see ATTORNEY AT LAW, 31.

48. *Statutes in derogation of the common law.* The Revenue Act of 1850, which prescribes a forfeiture of land for the non-payment of the taxes due thereon, is in derogation of the principles of the common law, and operates harshly, and frequently with injustice to private rights, and confers extraordinary powers on the revenue officers, and should therefore receive a strict construction; and its operation be confined within the limits of the language employed; *Hopkins v. Sandilge*, 2 G. 668.

See TAX SALES AND TAX-DEED.

49. *Statutes in derogation of the common law.* Statutes are to be construed in reference to the principles of the common law, and it is not to be presumed, that the Legislature intended to make any innovation upon the common law, further than the necessity of the case absolutely required; *Edwards v. Gaulding*, 9 G. 118; *Hollman v. Bennett*, 44 M. 322.

See HUSBAND AND WIFE, 78.

50. *Same: Case in judgment.* The Act of 1846, which provides that thereafter, "all illegitimate children shall inherit the property of their mothers, and from each other, as children of the half blood, according to the statutes of distributions and descents, now in force in this State," being an innovation of the common law, is to be construed strictly; and it does not therefore remove any disability of, or confer any right on, illegitimates, except such as are specially mentioned in the act; *Edwards v. Gaulding*, *supra*.

51. *Penal statutes.* Penal statutes cannot be extended by construction, so as to bring within their provisions cases not embraced in their plain letter; *Merrill v. Mechior*, 1 G. 516. They must be construed strictly, so as not to embrace cases not within the letter of the law; *Foote v. Vanzant*, 5 G. 40.

13. Remedial Statutes Liberally Construed.

52. *Same.* A statute should not receive such a construction as to make it impair existing rights, or create new obligations, or impose new duties or disabilities in respect to past transactions, unless such plainly and expressly appear to be the intention of the Legislature; but this rule does not apply to statutes purely remedial. On the contrary,

remedial statutes are construed liberally, to advance the remedy; and hence, where a statute is passed, giving a new and summary remedy for certain causes of action, it will apply to causes of action of that class, existing prior to its passage, without any express words to that effect; *Green v. Anderson*, 10 G. 359.

53. *Same: Instance.* The attachment law of 1857, is purely remedial, and so much of it as gives a remedy by attachment against a debtor who has made an assignment of his property to defraud his creditors, applies as well to assignments made before the passage of the act, as to those made afterwards; *Id.* See *ante*, 45.

14. Miscellaneous, as to Construction of Statutes.

54. *Long usage adopted.* When the true meaning of a statute is doubtful, a construction which has been adopted by the inferior courts for a long period of time, and under which many important rights have accrued, will not be disturbed; *Plummer v. Plummer*, 8 G. 185.

55. *No proof of intention, aliunde the statute.* The intention of the Legislature in enacting a statute, must be derived from the statute itself. Proof *aliunde* of the motives and purposes of the Legislature are wholly inadmissible; *Pagaud's Case*, 5 S. & M. 491.

56. *Statute passed under a mistake as to the common law.* A statute which shows on its face that it was passed under a belief that the common law gave a certain right, which, however, is a mistake, will not have the effect to change the common law, so as to give that right, if there be nothing else in the statute to produce that result, but the disclosure of the belief on the part of the Legislature that such right existed. Hence, the Act of 1846, which gives the defendant in ejectment the right to set off against *mesne* profits, the value of improvements made by him, though evidently passed under the (mistaken) belief that the plaintiff had a right to recover such profits in that action, will not have the effect to change the rule of the common law which denies such right to the plaintiff; *Davis v. Delpit*, 3 C. 445.

See HUSBAND AND WIFE, 78.

57. *How foreign statutes construed.* The construction of a foreign statute in the courts of this State, should be that which is adopted in the State by which it was enacted; *Sampson v. Breed*, W. 267.

58. *Domestic statutes construed by our courts.* This court, in the construction of domestic statutes of the State, passed for the good government of its citizens, and the welfare of the commonwealth, will not yield its well matured and clear convictions to the opinion of the Supreme Court of the United States, but will exercise its own judgment in exclusion of all other tribunals; *Deans v. McLendon*, 1 G. 343.

See CONSTITUTIONAL LAW, 115, 116. SUPREME COURT OF THE UNITED STATES, 1.

IV. Miscellaneous.

59. *Statute ordering makers, endorsers, &c., to be sued in same action.* The Act of 1837, requiring the makers, endorsers, &c., of a bill or note, to be sued in a joint action, is neither repugnant nor contradictory in its provisions, and is a constitutional change in the remedy, without impairing the obligations of contracts; *McMillan v. Sprague*, 4 H. 647.

60. *Construction of act locating county seat of Hancock county.* The Legislature having previously located the county seat of Hancock county elsewhere, in 1846, passed a law, by the first section of which it was provided "That the seat of justice of Hancock county was thereby made permanent, and located at Gainesville." The other sections contain provisions that the citizens of Gainesville should erect at their own expense, suitable public buildings, and that if such buildings were not erected in time to hold the spring term of the court in 1846, that in ten days thereafter, the officers required by law to keep their offices at the court house, should remove their books and records to such buildings in Gainesville, as the citizens shall provide: *Held*, that by this act the county seat was located at Gainesville; *Monet v. Jones*, 10 S. & M. 237.

61. *Annulling private statute for fraud.* A private act of the Legislature, authorizing an administrator to sell his intestate's land, may be annulled by a Court of Chancery, on the ground that its passage was obtained by fraud. But when the representation to the Legislature upon which the act was procured was, "That the personalty of the intestate was insufficient to pay his debts, without serious inconvenience to the widow and heir," and the proof was, that it was insufficient, exclusive of the price of the only slave of the intestate which had been sold by the administrator to the widow, it was held, that the act was not procured by fraud; *Williamson v. Williamson*, 3 S. & M. 715.

62. *Unconstitutional provision in a statute.* An unconstitutional provision in a statute does not affect separate and independent parts of the statute, which can have effect and operation without it; *Brown v. Beatty*, 5 G. 227; *Isom v. Miss. Cen. R. R. Co.*, 7 G. 300; *Williams v. Cammack*, 5 G. 209; *Campbell v. Union Bk.*, 6 H. 625. See CONSTITUTIONAL LAW, 102, 103, 104.

63. *Remedy given by statute exclusive.* Where the Legislature has authorized the erection of a work of internal improvement, and a mode is prescribed by statute for the assessment and payment of damages, resulting to individuals from the construction of the work, the parties injured are confined to the remedy prescribed by the statute, which is, without any negative words being used, exclusive of the remedy, which would otherwise exist at common law; *Brown v. Beatty*, 5 G. 227.

Subrogation and Substitution.

1. *Purchaser paying encumbrance.* Where a purchaser of encumbered property pays off one of the encumbrances of equal dignity with those remaining, he will be entitled to be subrogated to the rights of that encumbrance, and to have a *pro rata* distribution of the proceeds of the property when sold to pay the encumbrances; *Ross v. Wilson*, 7 S. & M. 753.

See PRINCIPAL AND SURETY, 65 to 69. SHERIFF AND SHERIFF SALES, 144, 145. TAX COLLECTOR, 5. CHANCERY, Sub-division. MARSHALLING ASSETS. EXECUTOR AND ADMINISTRATOR, 368, 368a, 154.

Submission of Laws to the People.

See CONSTITUTIONAL LAW, 121 to 124.

Sufferance, Tenancy by.

1. *Purchase from husband of wife's estate.* A purchaser from the husband of the wife's fee, is, after the termination of the husband's courtesy, a tenant at sufferance to the wife, if she be living, and to her heirs, if she be dead; and he cannot, therefore, purchase in an outstanding, paramount title so as to defeat the rights of the wife or her heirs; *Griffin v. Sheffield*, 9 G. 359; *S. P., Day v. Cochran*, 2 C. 261.

Sunday.

That contracts made on Sunday are illegal. See CONTRACTS, 33.

Supersedeas.

See WRIT OF ERROR.

1. *In criminal case.* A writ of error in a criminal case will not operate as a *supersedeas* unless a recognizance for the appearance of the accused in that court be taken; *Craft's Case*, W. 409.

2. *When writ of error coram nobis is issued.* A *supersedeas* cannot issue in favor of all the defendants when they sue out a writ of error *coram nobis*, unless they all join in the bond; *Jones v. Miss. & Ala. R. R. Co.*, 5 H. 407.

3. *For excessive levy.* To justify the *supersedeas* of an execution, on the ground of an excessive levy under it, the excess must be so glaring as to indicate a disposition to abuse the process of the court; *Walker v. Gilbert*, 13 S. & M. 693.

4. *Sheriff bound by issuance of.* If a *supersedeas* be issued by a competent court, the sheriff need not inquire further into the regularity of its issuance. Whether it be regular or not, he must obey it, if issued by competent authority; *Williams v. Stewart*, 12 S. & M. 533 (citing *Walker v. McDowell*, 4 S. & M. 118, for which see EXECUTION, 95.)

5. *Correspondence between bond and supersedeas and execution.* The writ of *supersedeas* and the bond should correctly describe the

execution and the judgment superseded; but it is immaterial that there is a misdescription of them in the petition for the writ. In an action on a *supersedeas* bond, the questions are, Was the bond given? Was the execution superseded, and has it been discharged? Hence, a misrecital in the petition of the date of the execution, is no objection to the admissibility in evidence of the record of the judgment and execution superseded; *Tucker v. Zollicoffer*, 12 S. & M. 591.

6. *The consideration for the bond.* When a *supersedeas* bond is given in pursuance of an order of the court, which directs the issuance of the *supersedeas*, on the condition that the bond be executed, this order, and not the judgment superseded, is the consideration for the bond; and hence, the bond is valid notwithstanding the judgment is void; *Bosley Breiner*, 2 C. 457.

7. *Breach of the bond.* There is a material difference between the *quashal* and the *dismissal* of a writ of error. A writ is quashed for some formal defect in it, which does not go to the merits, and it is usual in quashing a defective writ, to grant a new one; but the dismissal of the writ of error means a disposal of the case without further hearing. And hence, if a *supersedeas* bond be conditioned to pay the judgment superseded, in case the writ of error *coram nobis* be dismissed, there will be no breach of that condition if the writ be merely quashed; but if in such case the bond be conditioned to perform the judgment the court may render, and the court quashing the writ adjudge that the plaintiff in error pay the costs, the obligors will be bound for the costs; *Ib.*

8. *Same.* A *supersedeas* bond cannot be broken unless a *supersedeas* has actually issued; *Wharton v. Porter*, 10 S. & M. 305. For effect of admission in the bond of the issuance of the *supersedeas*, and action on it, see PLEADINGS, 15, 19, 20, 25.

9. *Administrator not bound to give bond.* It seems that an administrator is not bound to give a *supersedeas* bond, as his official bond is sufficient; *Williams v. Stewart*, 12 S. & M. 533. See APPEAL, 6.

Supreme Court, old, before 1832.

1. *Has power to grant a mandamus.* The Supreme Court has power to grant a *mandamus*; *Robson, ex parte*, W. 412.

2. *Errors must be excepted to.* The Supreme Court will not notice errors in the rulings of the court below, unless they be excepted to; *Carraway v. McNeice*, W. 538.

3. *Erroneous charge.* An erroneous charge upon an abstract immaterial point is no ground for reversal; *Garner v. Collins*, W. 518.

4. *Appeal: Newly discovered evidence.* As a general rule, on an appeal from the chancellor to the Supreme Court, newly discovered evidence cannot be admitted; *Hogat v. Hunt*, W. 216.

5. *Rehearing in chancery, a matter of discretion.* Whether a rehearing will be granted

by the chancellor, is a matter of discretion, and his refusal to do so cannot be reviewed on appeal; *Ib.*

6. *Non-resident administrator made a party.* Upon a proper showing to the court that a non-resident party is dead, the cause will be revived against his legal representatives by publication of notice to them; *Ib.*

7. *Judgment when cause is referred, on the ground that the judge doubts.* Where a judge entertains doubts as to a question of law in a case before him, and refers the question to the Supreme Court (as he was authorized to do by the law at that time), it seems that the Supreme Court should certify their opinion back to the judge, who should proceed in accordance therewith; and that the Supreme Court should not enter judgment on the case so referred; *sed Quære?* But if a judgment were entered by the Supreme Court, it would be going very far to decide that the judgment was void; *Howard v. Cousins*, 7 H. 114.

Supreme Court, under Constitution of 1870.

See HIGH COURT.

Supreme Court of United States.

See CONSTITUTIONAL LAW, 115, 116; STATUTES, 58.

1. *Respect to its opinions.* The High Court of Error and Appeals of the State, whilst entertaining the highest respect for the decisions of the Supreme Court of the United States, will not surrender its own convictions, and abandon its own rulings upon questions exclusively within its jurisdiction, in order to conform to decisions made by the Supreme Court of the United States in analogous cases; *Doe ex dem Shelton v. Hamilton*, 1 C. 496.

See ante, 58.

Surveying.

1. *United States: Survey of public lands: How made.* Under the Act of Congress of 1805, the boundary lines of sections which have not been actually run and marked, are to be ascertained by running straight lines from established corners to the corresponding established corners; but in fractional townships where no such opposite corresponding corners have been or can be established, the lines are to be ascertained by running from established corners, due North and South, or East and West, as the case may be. And when no line has been run, the true boundary can be ascertained only in this way: The line must not only be run but marked, to make the survey a closed one, and whether a line has been so marked as to close out all further inquiry, as to the true boundary, is a question of fact for the jury; *Newman v. Foster*, 3 H. 383.

2. *Same: Original corners and lines must be followed.* The original corners and lines made by the United States surveyors, and by which the land was sold by the United States

government. are the true boundaries, and no line which varies from these can be established, except by consent of the owners. And these lines and corners cannot be disregarded in order to make an equal sub-division of a section, or a fractional part thereof; *May v. Baskin*, 12 S. & M. 428.

3. *Same: Magnetic variation.* The true boundaries of land once owned by the United States, are the lines established by the survey made by the government, and under which it was sold; and wherever these lines are obvious, they must be followed, notwithstanding the government survey may have been made upon an assumed, or a wrong magnetic variation; *Bonney v. McLeod*, 9 G. 393.

4. *Survey: A part of the patent.* The survey (by the United States surveyor) is to be taken as a part of the patent. It is the source of title, and a matter of record, and may be resorted to in order to control the calls of the Patent. And if the plat or certificate of survey show an artificial or natural boundary, though variant from the course or distance called for, it must be taken as the true boundary, if it can be ascertained as described in the grant; *Newman v. Foster*, 3 H. 383.

5. *Same: Meaning of dotted lines on survey.* A dotted line upon a map is not *per se* conclusive evidence that the line was run; but it seems to be presumptive of the contrary, but parol evidence may be admitted to explain it; *Ib.* See EVIDENCE 139.

6. *As to admissibility in evidence of surveys, maps, &c.,* see EVIDENCE, 84, 85, 86; and as to the proper certificate to such maps, see EVIDENCE, 88.

7. *Copies of maps, surveys, &c.* Copies of the official maps of the surveys of land in this State, deposited in the surveyor general's office, are the best evidence of the nature, extent, and character of such surveys, and, therefore, parol evidence that a private survey conforms to such official survey, is inadmissible; *Surget v. Little*, 5 S. & M. 319; *Bl-doe v. Little*, 4 H. 13.

8. *Survey of Spanish grant.* A survey and map made under the authority of the United States is not admissible in evidence to change the survey of a Spanish grant made prior to October, 1795; *Doe v. King*, 3 H. 125.

9. *Power of surveyor general.* The surveyor general has no power to issue an order changing original lines; *Ib.*

10. *Parol evidence as to boundaries.* Parol evidence is admissible to prove boundaries; but the establishment of a boundary between two properties, different from the true one, cannot be made by parol; it being within the statute of frauds, it must be in writing; *May v. Baskin*, 12 S. & M. 428.

See BOUNDARIES.

Swamp and Overflowed Land.

1. *Act of Congress donating overflowed land to the State.* The issuance of a patent to the State as provided for by the second

section of the Act of Congress of the 28th September, 1850, donating swamp and overflowed lands to this and other States, is not necessary to the vesting in the State of the legal title to the lands thereby granted. The first section of that act grants, at the date of its passage, to the State, all the swamp and overflowed lands within its limits, and the legal title to the same, vests then in the State, as fully as if the lands were specifically designated in the act; *Fore v. Williams*, 6 G. 533 (citing *Ruherford v. Green*, 8 Wheaton, 196); S. P., *Funston v. Metcalf*, 40 M. 504. But that act grants no particular land as swamp land; it is necessary that there should be an ascertainment of the land, and an approval of it by the secretary of interior; and until this is done, no title to any particular land vests in the State; and if land which is swamp and overflowed, be omitted from the list of lands located and confirmed to the State, no title to that vests in the State; *Funston v. Metcalf*, *supra*.

2. *Same: Confirmation of the lands to the State.* The object of that provision of the said act of Congress, which directs as the mode of ascertaining the lands thereof granted, that the secretary of interior shall make out an accurate list and plat of the lands embraced in the act, and transmit it to the governor of the State, is simply, that the ascertainment and location of the lands should be made by the authority and with the approval of the secretary; and hence, the confirmation by the secretary of the interior of a list of such lands, made by a commissioner appointed by the governor of the State, is a substantial compliance with the act, and a sufficient designation of the lands embraced in it; *Fore v. Williams*, *supra*.

3. *Same: List a record.* A list of swamp and overflowed lands, located in the State, under the Act of Congress of the 28th September, 1850, approved and confirmed by the secretary of the interior, and transmitted by him to the register of the United States land office, for the District in which the lands are situated, is a record, and a copy thereof duly certified by the register, is admissible in evidence; *Ib.*

4. *Proceeds of the sales of swamp lands.* The commissioners appointed by the Act of 16th March, 1852, for the sale of swamp and overflowed lands, are bound to appropriate the proceeds thereof to the general purpose of leveeing and draining swamp and overflowed lands; but they are not bound to appropriate them to leveeing and draining each tract sold by them, the amount which they received for the sale of that tract; *Baugh v. Lamb*, 40 M. 493.

5. *Sale of scrip for land, under the Act of 1852.* The Act of 15th March, 1852, ch. 16, does not authorize the location of scrip issued under its provisions, for the purpose of building levees in the counties of Tunica, De Soto, Coahoma and Bolivar, on swamp and overflowed lands, situated in any other counties than those above named; *Jackson v. Dilworth*, 10 G. 772.

6. *Same: Act of 1852 construed.* By the Act of 16th March, 1852, ch. 14, a vested right to all the swamp and overflowed lands, situated within the district therein mentioned, is granted to the several counties in which they lie, and this right cannot, by the Legislature, be divested out of any of said counties without its consent; *Ib.*

7. *Same: Vested rights.* The issuance and sale of script by a county, under the provisions of said act, vests in the holder thereof the right to locate it on any of the swamp and overflowed lands in that county, not appropriated by the previous location of script issued by that county in pursuance of that act; and the Legislature has no power, by a subsequent act, to authorize other script to be located in said county, or to ratify illegal locations of such script theretofore made in such county; *Ib.*

Taxes and Taxation.

See TAX COLLECTOR. TAX SALE. TAX DEED.

1. *As to constitutional rules on the subject of taxation,* see CONSTITUTIONAL LAW, 32 to 44.

2. *As to taxation by municipal corporations.* see CORPORATIONS, 12, 13, 14. CONSTITUTIONAL LAW, 33, 34, 35, 36.

3. *As to power to levy local taxes for local improvements,* see CONSTITUTIONAL LAW, 40, 41, 42.

4. *As to power to exempt property from taxation,* see CONSTITUTIONAL LAW, 37 to 39.

5. *As to uniformity and equality in taxation.* see CONSTITUTIONAL LAW, 35.

6. *For distinction between wharfage and tonnage duties,* see CONSTITUTIONAL LAW, 32, 33.

7. *State's power to tax.* The State has power to tax all property in the State, including that which has been brought hither after the taxing law was passed; *Bank of U. S. v. State.* 12 S. & M. 456.

8. *Taxation of loaned money.* By the Revenue Act of 1841, an *ad valorem* tax was levied on all money loaned in this State by individuals. This law applies to loans made within the State, by citizens of other States. Whether it applies to loans made outside of the State, to citizens of the State; *Quære?* *Ib.*

9. *Same.* In such a case, it seems, that after the loan becomes due, it would still be taxable as long as it remained unpaid by the borrower; but it should be assessed according to its real value, and if the borrower become insolvent, and the debt worthless, it would cease to be taxable; *Ib.*

10. *Tax on dealers in slaves.* Negro traders are not included in the term "transient vendors of merchandise and goods," &c.; and hence, not included in a law imposing a tax on such vendors; *James v. Elder,* 1 C. 134.

11. *Same.* A slave dealer who sells in a permanent depot, and does not carry his slaves from point to point for sale, is not

liable to the tax imposed by the Act of 1840; *Newman v. Elam,* 4 C. 474.

12. *Transient vendors and traders in horses, mules and slaves.* Traders in horses, mules and slaves, are, under the Act of 1857, liable to pay county levies on their sales. But such county levies cannot be collected until first levied by the Board of Police; *Shewalter v. Brown,* 6 G. 423.

13. *Tax on circuses.* The sum imposed by the Act of 1857, on circuses for their daily exhibitions, is not a tax but a license; and the counties, therefore, in which the exhibitions are made, have no right to embrace them within the county levies; *Orton v. Brown,* 6 G. 426.

14. *Special tax for a court house.* The Legislature authorized the Board of Police of a certain county, to levy a special tax to pay for the building of a court house for that county, which act, by its terms, was to continue in force for three years only. The board made the levy within the three years, and then rescinded the order making the levy; it was held, on application for a *mandamus* to collect the tax, that the act having expired, that was a good reason for refusing the application; *Ross v. Lane,* 3 S. & M. 695.

15. *Taxes must be assessed.* The tax collector can collect no other taxes than those in his assessment roll. A special tax in the assessment roll of 1841, though remaining uncollected in 1842, cannot be then collected under the assessment roll of 1842, without a new assessment of the special tax; *Ib.*

16. *Same: Mode of assessment of county taxes.* It is not necessary, in order to enable the sheriff and tax collector to collect the county taxes, that there should be any mention, or reference, whatever in the assessment roll, either as to the separate share of each tax payer, or the total amount, or the rate per centum on the State tax, of the county levies. All that is required is, that the tax collector shall have in his possession the assessor's list complete and perfect, so far as it relates to the State tax, and the order of the Board of Police fixing the county levies; *Moore v. Foote,* 3 G. 469.

17. *Same.* The term "levy," when applied to the action of the Board of Police in relation to the county taxes, imports not only an ascertainment of the amount necessary to be raised for the county taxes, but also the performance of all such acts by the board as are necessary to authorize the collector to proceed to collect them; *Ib.*

See BOARD OF POLICE, 14a and 14b, for mode and power of levying taxes.

18. *Lien of taxes.* By the 17th section of the Revenue Act of 1841, it was provided, that the taxes thereby imposed shall be preferred to all payments, executions, encumbrances, and liens of any description whatever, and that they shall, from the first of March of every year, be a lien on all real estate of the person assessed. This statute gives a lien only on realty; as to the other property, it secures only a preference over other liens and encumbrances, for the pay-

ment of the taxes out of the proceeds of the property when sold; and as to such property (not realty), if there be a sale or assignment of it before it is levied on for taxes, the assignee will take it discharged of the taxes; *Anderson v. State*, 1 C. 459. S. P., *Bailey v. Fuqua*, 2 C. 497.

19. *Ad valorem tax*. The term "*ad valorem tax*," in the revenue laws of this State, means a tax or duty imposed on the real value of the thing or article subject to taxation; *Bailey v. Fuqua*, 2 C. 497.

20. *Appointment by Board of Police of commissioners to classify lands*. The Board of Police may, at a special term, make the appointment of commissioners to classify lands, provided for in the Revenue Act of 1842; but if he resigns, the board has no power to appoint a successor; *Ray v. Murdock*, 7 G. 692.

21. *Power of county to tax retailers*. The franchise secured by a license to retail, is not subject to county taxation; *Reed v. Beall*, 42 M. 472; overruled so far as it holds that counties cannot tax retailers; *Coulson v. Harris*, 43 M. 728.

Tax Collector.

- I. Tax collector generally.....1
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I. Tax Collector generally.

1. *Collection of taxes after the expiration of his term, under Act of 1837: Liability of sureties*. Under the revenue laws of this State, as they existed in 1837, the fiscal year commenced on 1st day of March, and ended on 28th of February in each year. Every second year a new tax collector went into office, at the general election in November, while by law the assessment rolls were in the hands of his predecessor. By statute (H. & H. Dig. p. 105, § 20), all collectors, after their term expired, were authorized to finish the collection of arrearages of taxes which had fallen due within their official terms, or they might deliver a list of the arrearages to their successors, who were, by law, compelled to collect them for the outgoing collectors. H. was elected collector in November, 1837, gave bond on the 15th, and died on the 30th of that month, and his sureties were sued for the taxes for the year commencing 1st of March, 1837, and it was shown that the assessment roll was delivered to H. in August, 1837; but it did not appear whether he or some one else was then collector; *Held*, 1st, That the sureties were not responsible for the taxes for the year 1837, unless the list was delivered to him after his election in November of that year, and not then, if delivered to him as collector for the arrearages due in the term of his predecessor; 2d, That his sureties might show his death as an excuse for non-collection of the taxes; 3d, They might show the kind of funds collected by him, if they were legal and the amount thereof, in order to fix their liability; *Montgomery v. The Governor*, 7 H. 68.

2. *Sureties not liable for unauthorized collections*. The sureties are not liable for collections made by the collector of taxes which were illegally assessed, and which he had no authority to make; *Whitfield v. Wooldridge*, 1 C. 183.

3. *Liable for special tax*. The sureties on a tax collector's general bond, are liable for his failure to collect and pay into the county treasury a special tax levied by the Board of Police under the Act of 1838 (H. C., 713), where no special bond has been required, as authorized by that act; *State v. Hathorn*, 7 G. 491.

4. *Sheriff as tax collector*. By the Act of 1843, the office of tax collector was abolished after the 1st day of November of that year; and the duties of that office devolving on the sheriff after that time, the tax collector whose office then expired, had no power afterwards to receive taxes, nor make a sale of land for the collection of taxes; *Griffing v. Pintard*, 3 C. 173.

5. *Collector's right of subrogation*. A tax collector who pays the taxes of a tax payer, is not subrogated to the rights of the State as against such tax payer, and cannot, therefore, levy on and sell the tax payer's property to reimburse such payment; *Id.*

II. His Bond and Actions on it.

6. *Bond: Extent of liability on*. The bond of a tax collector is a security for the discharge of his duties only to the State and county, and not for services which may have been rendered to him by individuals. Hence, though he is required by law to advertise his tax sales, yet the sureties on his bond are not liable to the publishers for advertising the same. This is an individual liability of the collector; *Brown v. Phipps*, 6 S. & M. 51.

7. *Approval of bond: Effect of want of*. A surety on a tax collector's bond, executed in 1836, was sued for the default of the collector, and he pleaded that he delivered the bond to the collector as an escrow, to be by him delivered to the governor of the State, the obligee therein, upon the condition that it should be previously approved by the Board of Police, according to the statute of the State, and that the bond was not so approved; *Held*, that the plea was bad, and that if it were otherwise good, in setting up the non-approval of the bond, it should also have averred, that it was not approved by the probate judge, as that officer at that time had power also to approve the bond; *McNutt v. Lancaster*, 9 S. & M. 570.

See OFFICE AND OFFICER, 7.

8. *As to sheriff and other officers acting without bond and oath*, see OFFICE AND OFFICER, 7, 8, 9, 10, 11, 12.

9. *As to official bonds generally*, see OFFICE AND OFFICER, 15 to 27.

10. *As to penalty of tax collector's bond*, see OFFICE AND OFFICER, 19.

11. *As to time for giving bond*, see OFFICE AND OFFICER, 15.

12. *Bond taken after regular time, prima*

facie void. A tax collector's bond taken fourteen months after the date of his election, is invalid, and no recovery can be had thereon, unless the special circumstances authorizing the taking of the bond at that time, be shown (see H. C. 481, art. 9); *De Soto Co. v. Dickson*, 5 G. 150.

13. *Word omitted in bond*. The omission of a necessary word in a bond, if it be clearly understood from the context, will not vitiate the bond. Thus, where in the condition of a tax collector's bond, in the sentence "Shall pay unto the treasurer of the State and —" to which such treasurer shall be respectively entitled," the word "county" is omitted, it is clearly understood, and the bond is a security for the county taxes; *Ib*.

14. *Copy of, as evidence*. By statute, the original tax-collector's bond given in 1836, was to be deposited in the secretary of State's office, and by statute also a "certified copy," of such bond was made competent evidence. Hence, profert need not be made of the original, and the copy need not contain the endorsement of the approval of the Board of Police on it, nor of the oath of the collector; *McNutt v. Lancaster*, 9 S. & M. 570.

15. *Certificate of auditor: Evidence of defalcation*. By statute, a certificate of the auditor of public accounts under his official seal, as to the amount of the defalcation of a tax collector, is evidence of such defalcation, and of the amount; *Ib*.

16. *Proof of handing him the assessor's roll*. On the trial of an action against a collector and his surety for a defalcation, it is competent to prove by parol that a list of the taxes was delivered to him without producing the list; *Ib*.

17. *Use in the action*. An action on a tax collector's bond, payable to the governor of the State and his successors in office, for a defalcation in State and county taxes, is properly brought in the name of the governor, without the State or county being made use therein; *Whitfield v. Wooldridge*, 1 C. 183.

18. *Separate action for State and county taxes*. But there should be a separate action for the State and a separate action for the county taxes, since a judgment in *solido* cannot be rendered for both funds; *Ib*.

19. *Same: Declaration*. And in such action, especially when it is against the sureties alone, the declaration should aver that the taxes sought to be recovered were legally assessed, since the sureties are not liable for collections made by the collector which he had no right to make; *Ib*.

20. *Who is properly plaintiff*. The State is the proper plaintiff in an action on a tax collector's bond (payable to the State), for the recovery of taxes collected for the county; *State v. Hathorn*, 7 G. 491.

21. *Motion on*. The State may proceed by motion on the bond of a defaulting tax collector, after the lapse of six years from the defalcation, notwithstanding the law requires the auditor, within sixty days after the declaration, to certify to the attorney

general the amount thereof, and requires also the latter officer to institute proceedings immediately; the State not being bound by, disabling statutes, as statutes of limitation, unless expressly included; *State v. Joiner*, 1 C. 500.

22. *Sheriff and tax collector distinct*. The offices of sheriff and tax collector, though required by law to be held by the same person, are distinct, and the statute which prohibits suits against the sureties of the sheriff, without joining the sheriff, does not apply to suits on his bond as tax collector; *Moore v. Foote*, 3 G. 469.

Tax Sales and Tax Deeds.

1. *Power of sale is naked and statutory*. A sale of land by a tax collector for the non-payment of taxes, is the exercise of a naked statutory power; and if the law authorizing the sale be not strictly complied with, the sale will be void; *Hodge v. Wilson*, 12 S. & M. 498; S. P., *Doe v. Natchez Ins. Co.*, 8 S. & M. 197; *Minor v. Natchez*, 4 S. & M. 602; *Natchez v. Minor*, 10 id. 246; digested in SHERIFF AND SHERIFF'S SALE 95; S. P., *Styles v. Weir*, post, 6.

2. *Construction of statutes on the subject*. The act of 1850, which prescribes a forfeiture of land for the non-payment of taxes due thereon, is in derogation of the principles of the common law, and operates harshly, and frequently with injustice, to private rights, and confers extraordinary powers on the revenue officers, and should therefore receive a strict interpretation, and its operation confined within the narrowest limits of the language employed; *Hopkins v. Sandige*, 2 G. 668.

3. *Same: Instance*. By the said Act of 1850, it is provided that the tax collector shall return a list of the delinquent lands, verified by his oath, to the board of police, on the 1st Monday of April in each year; that the board shall, on the 2d Monday in April, examine the same, and order a certified copy to be sent to the auditor of public accounts for record in his office; and that the list and verification so returned and recorded in the auditor's office, shall vest a title to the lands in the State, which shall only be impeachable by proof that the taxes, for the non-payment of which the lands were forfeited, was actually paid; *Held*, that the return of the list on the 1st Monday in April, was an essential prerequisite to a valid forfeiture; and that the owner might show a failure in this respect to defeat the title of the State under the forfeiture; *Ib*. But this act was afterwards held unconstitutional, in *Griffin v. Nixon*, 9 G. 424, and digested under CONSTITUTIONAL LAW, 44, 45.

4. *Instances of irregular and void sale, under Act of 1841: Mode of selling land*. Under the Revenue Act of 1841, a quarter section of land belonging to one owner, was sold for the taxes due thereon, in this way: The collector offered for sale one-eighth, without designating which, for the taxes and costs on both; and there being no bid, he

offered both eighths together, and the same were sold under this offer: *Held*, by all the judges, that the first offer of an eighth, without designating which, was illegal. Sharkey, C. J., also held, that the sale of both eighths together, after one had been offered, there being no bid, was also illegal; that the tax collector could only sell in lots of one-eighth; and that the first eighth offered ought to have been sold for whatever it would bring; and if it did not bring enough to pay the taxes on the whole, then the other eighth ought to have been sold separately for the deficiency. The other judges agreed that there was no irregularity in the sale, by the addition of one eighth to the other in the sale. Thacher, J., thought this was essential to the validity of the sale; and Clayton, J., thought it was immaterial which of the two modes, as contended for by the chief justice and Judge Thacher, was adopted; *Hodge v. Wilson* 12 S. & M. 498; *S. P. Baskins v. Winston* 2 C. 431.

5. *Same: Under Act of 1841: Mode of sale.* Under the Revenue Act of 1843, it is competent to sell the eighths, all belonging to one owner, separately, one after another, until enough is sold to pay the taxes due; *Ray v. Murdock* 7 G. 692.

6. *Irregular advertisements.* The Revenue Act of 1841 required the advertisement of the sale of land for taxes, to state the time and place of sale, and the name of the person as whose property the land was assessed. The advertisement in this case stated the name of the person who entered the land from the United States, but not the name of the person to whom it was assessed: *Held*, that it was insufficient, the object of the advertisement being to notify an absent party that he stood charged with a tax, as well as to notify the public of the time and place of sale; *Stiles v. Weir*, 4 C. 187. And it is essential to the validity of the sale, that the advertisement of notice state the time and place of sale; *Bla-lock v. Gaddis* 4 G. 452.

7. *The assessment: Mistake as to ownership.* Whether the sale of land for the specific taxes due on that land, if it be assessed in the name of the wrong owner, is void for the mistake in the assessment; *Quere?* But however this may be, if the land of A. be assessed as the land of B., and it be then sold with the other land of B. for the taxes due on all the land so assessed to B., the sale will be void; for the property of one person cannot be appropriated to pay the taxes due by another; *Baskins v. Winston*, 2 C. 431.

8. *Same.* The general principle is, that the owner of the property for which taxes are to be paid, and not the property itself, pays the tax. The property is resorted to only as the means of collecting the tax. Hence, land ought to be assessed to the true owner; and if there be no owner stated in the assessment roll, the land cannot be legally sold for the taxes due on it. And this is the rule under the Revenue Act of 1846; *Green v. Craft* 6 C. 75. And under this act, a sale of land for the taxes due thereon, only conveys the

title of the person in whose name it is assessed; and if it be assessed in the name of a person having no interest in it, no title will be conveyed by the sale; *Dunn v. Winston*, 2 G. 135.

9. *Sale of government land.* A sale of government land for taxes is void, it not being liable to taxation; *Dixon v. Porter*, 1 C. 84.

10. *Sale for tax illegally levied.* A sale of land for a county tax, levied at a special meeting of the Board of Police, called without notice as required by law (H. C. 710, § 15), is void. The meeting of the board, without such notice, is unauthorized by law, and its action is not binding; *Jones v. Burford*, 4 C. 194.

11. *Sale after tender of the taxes.* To authorize a sale of the taxpayer's property for the non-payment of taxes, the taxpayer must be in default in the performance of his duty, as required by law. If the taxpayer has once tendered his taxes, which the collector refused to take (being restrained from doing so by an injunction, to which the taxpayer was no party), the taxpayer has performed his duty, and, on the dissolution of the injunction, he cannot be put in default, without a demand; for, being no party to the injunction suit, he is not bound to take notice of its dissolution; *Jones v. Burford* 4 C. 194.

12. *Sale when taxes have been paid.* The power of a tax collector to sell property for the collection of taxes, is special and limited to the end to be accomplished, which is to collect the taxes. When the taxes have been paid, the power ceases; and this, though the collector paid the taxes himself, the taxpayer being delinquent; for the collector is not subrogated to the rights of the State, upon his paying taxes due by a taxpayer; *Griffing v. Pintard* 3 C. 173.

13. *Sale made after collector's term has expired.* A sale of land for non-payment of taxes, made by a collector after the expiration of his term of office, is void; *Id.*

14. *The list required to be made of the lands sold.* Under the Act of 1846, the probate clerk is required to keep a file-book, in which to enter the list of all lands sold for taxes in his county, and of the owners' names, the name of the purchaser, and the date of the sale. The entry of a sale on this book is the consummation of the sale; and if not made according to law, the sale is void; *Green v. Craft*, 6 C. 70.

15. *List to auditor under Act of 1844.* The 66th section of the Revenue Act of 1844, requires the tax collector to transmit by the 1st day of July of each year, a certified account of all the taxes assessed against the lands of non-residents of his county; and a failure on his part to comply with this requirement of the law, renders a sale of the land of a non-resident for taxes, made under that act, absolutely void; *Huntington v. Brantley*, 4 G. 451.

16. *Tax deed impeachable.* The statute of 1843, ch. 1, § 6, which declares that the deed of a tax collector "shall be *prima facie* evidence that the tax collector performed all

things required by law of him before selling, and that he was authorized by law to sell," &c., has reference to the force and effect of the deed as evidence, rendering it *prima facie* evidence, that the steps required by law to make the sale of the land valid, had been taken; that is, that he was authorized by law to make the sale; and devolves on the party controverting the title under such deed, the burden of establishing by proof, the omission, irregularity or fraud, to affect its validity. The residue of the clause, declaring "that said deed shall not be impeached, except for some fraud or neglect directly charged and proved," even if it points to some direct provision to set aside or cancel the deed, has not the effect of excluding evidence to impeach the deed, for such omission, neglect or fraud, when offered as evidence of title in an action of ejectment; *Ray v. Murdock*, 7 G. 692.

17. *Redemption of land sold for taxes.* The 15th section of the Act of 1822 (H. U. 172), allowing minors and insane persons, one year after the removal of their disabilities, in which to redeem land sold for taxes, was in force at the adoption of the Rev. Code of 1857; *Richards v. Patterson*, 1 G. 583.

See STATUTES, 21.

18. *Levee Laws: Redemption: Absolute deed void.* See LEVEE LAWS, 3.

19. *Redemption by rent.* A person who was in possession of land, at the time of a sale thereof for the taxes due on it, and had been during the year the taxes accrued, and after a length of time sufficient for the value of the rent to exceed the amount of the taxes, bought the land at the tax sale, and set up this title against an action of ejectment to recover it, by the true owner: *Held*, 1st. That if the defendant were to be considered as tenant of the owner, and if whilst such relation existed, he could purchase the land at a tax sale, the rent he owed operated as an immediate redemption of the land for the owner. 2d. The law will not permit the defendant to say he was in possession as a wrong doer and trespasser, and if it would, his purchase would be construed as an aggravation of the original wrong. 3d. If he were in possession claiming title as owner, then it was his duty to pay the taxes, and if he permitted the land to be sold for taxes, his purchase would confer on him only his original title; *Gaskins v. Blake*, 5 C. 675.

20. *Correction of misdescription in a tax deed.* Whether a misdescription of the land sold, in a tax deed, will be corrected in equity; *Quære? Skipwith v. Dodd*, 2 C. 487.

Telegram.

1. *Proof of.* The testimony of the person to whom a telegram is directed, is inadmissible to establish its contents, without proof accounting for the absence of the original, and that the alleged writer sent it; but the admission of the alleged writer that he did send it, and of its contents, is competent,

without proof of the loss or destruction of the original; *Williams v. Brickell*, 8 G. 682.

Tenants in Common.

See JOINT TENANTS.

1. *Trover by one against another.* One tenant in common cannot maintain trover against his co-tenant. If one take the whole of the personal chattel to his own use and separate possession, the other is without remedy by action, but may take the chattel to his separate use and possession when opportunity offers; *Hinds v. Terry*, W. 80.

2. *Survivorship.* Although a tenancy in common be created, yet if it be apparent that the donor or testator intended a survivorship, upon the death of one of the tenants happening before they were to receive the absolute and entire interest and control of the property, then such intention shall be effectuated by the devolution of the whole property on the survivor; *Shanks v. Chambliss*, W. 249.

3. *Ejectment by.* One tenant in common cannot maintain ejectment against his co-tenant without proving ouster, but the reception of all the rents and profits by one, and then claiming them as his own, and this refusal upon demand to let his co-tenant in possession, are sufficient to authorize a jury to find an ouster; *Harmon v. James*, 7 S. & M. 111.

4. *Maintenance by.* Whether, after being ousted, a tenant in common may lawfully convey to another, or whether his deed is void for maintenance; *Quære? Ib.*

Tender.

1. *What is a good tender? Money in bags and not counted.* An offer of money in bags is a good tender, and it is the duty of the creditor to receive and count it, and see that there is enough to satisfy him. It is not necessary that the exact amount due should be counted and tendered, it is sufficient, if the debtor offers to pay the amount due, and tender sufficient money to pay it; *Behaly v. Hatch*, W. 369.

2. *Objections to insufficient tender: Waiver of.* If a tender be made in pursuance of a contract for the purchase of a half interest in land, and refused on the ground that there was no tender of the one-half the amount expended for improvements, by the vendor, the latter cannot, in a suit for a specific performance, object that the tender was insufficient, because it did not include interest. In a case where a right is to be forfeited for a failure to pay money by a certain day, if a tender be made in time, and the amount is insufficient, it is the duty of the party who is to receive the money, if he object to the tender on that account, so to inform the other party; *Connell v. Mulligan*, 13 S. & M. 388.

3. *Tender of bank notes.* To an action on a note, payable in the notes of a certain bank, a plea that the defendant tendered the notes of the bank on a day subsequent to

the maturity of the note, to the full amount of the principal and interest then due, is insufficient. The tender not being made on the day of the maturity of the note, it was no longer payable in bank bills, but the holder is entitled to receive the value of the bills, as they were rated on the day of the maturity of the note; *Lanier v. Trigg*, 6 S. & M. 641.

4. *Plea should aver continued readiness.* A plea of tender should aver a continued readiness from the day of the tender to pay the debt, for a subsequent demand of payment by the creditor, and neglect to pay by debtor will do away with the effect of the tender; *Ib.*; S. P., *Guion v. Doherty*, 43 M. 538, digested in PLEADINGS, 121a.

5. *Money brought into court.* A plea of tender, that certain bank bills were, in pursuance of an agreement, made after suit brought, procured and tendered in satisfaction of the debt, is bad, if the notes be not brought into court; *Emmons v. Myers*, 7 H. 375.

6. *Tender of onerous property.* A legal tender, and a refusal to accept of onerous property (not money), is a complete bar to an act on to recover on a contract for the delivery of such property, and it vests the legal title to the property so tendered, in the payee or vendee. He must then resort to the person in whose possession the property is, who, after the tender, holds it as his bailee, and at his risk. But to make such a tender legal, it is not sufficient that the defendant merely declares his readiness to pay, and point out property of the right kind, mingled with other property of a similar character. The property must be specifically pointed out, and clearly ascertained in point of identity, so that the plaintiff might be able to prove it, should he be driven to an action to recover it; *Bates v. Bates*, W. 401.

7. *Same: Place of delivery.* In such a case, if there be no fixed place of delivery, a tender to the person of the payee is good; *Ib.*

8. *Same: Tender must be of the whole.* And if the contract be for a certain number of specific articles, the tender must be of the whole; *Farrar v. Gaillard*, W. 269.

9. *When production of the money unnecessary.* If the owner of goods demand delivery of possession from the warehouseman, and offer to pay his proper charges, which are a lien thereon, and the warehouseman refuse to deliver the goods unless other charges, not constituting a lien on them, are paid, the offer will be a sufficient tender, without an actual production and counting of the money; *Wesling v. Noonan*, 2 G. 599.

Three per cent. Fund.

1. *Board of Police authorized to loan.* By the Act of 1836 (H. C. 141), the three per cent. fund was distributed among the several counties of the State, and placed in the custody and under the control of the Board of Police, who were directed to apply the fund, or the interest, in the opening of roads and

canals. By the Act of 1837 (H. C. 713a), Boards of Police having surplus funds, were directed to invest them in stocks. By these acts the Board of Police were made trustees of the funds, which the Legislature intended should not lie idle, and they were authorized to loan the fund to private persons; *Haynes v. Covington*, 13 S. & M. 408.

2. *As to loan of this fund to railroads, by the Acts of 1852 and 1857,* see *McAfee v. Southern R. R. Co.*, 7 G. 669, digested under STATUTE, 20.

Time.

1. *Rule in equity as to time being essential.* In order that time may be regarded as of the essence of a contract, the parties must fix upon a time for performance, and thereby indicate that the time of performance is regarded as important, or its importance must result from the circumstances of the agreement. Equity will, in general, grant relief against a party who gets that for which he contracted, though not at the time stipulated, on the supposition that the parties looked to the substance of the contract rather than the time of its performance; but it cannot make contracts for parties different from those they entered into, nor enlarge them beyond proper bounds; *Tyler v. McCordle*, 9 S. & M. 230; S. P., *Liddell v. Sims*, 9 S. & M. 596.

2. *Same.* Time is not generally deemed, in equity, to be of the essence of a contract, unless the parties have expressly so treated it, or it necessarily follows, from the nature and circumstances of the agreement; *Jones v. Loggins*, 8 G. 546.

3. *Rule at law.* The time fixed for the performance of an executory contract for the sale of land is, at law, deemed of the essence of the contract, and there is no reason why a court of equity should not regard time as material, where the parties have made it so; *Liddell v. Sims*, 9 S. & M. 596.

4. *Instance where the circumstance made time material.* The holder of a note, on which suit was then pending, proposed to the maker that if he would take up a note made by the holder to another, for a less amount than the one sued on, he would dismiss the suit and release the maker. At the trial of the suit then pending, the maker having failed to comply, the holder notified him he was no longer bound by his proposition, and stated to the maker that if he would take up the note he would credit him with the amount, and thereupon the holder also took judgment. The maker afterwards took up the plaintiff's note and insisted that it was a satisfaction of the judgment: *Held*, that it resulted from the nature of the plaintiff's agreement to dismiss the suit on the maker's compliance therewith, that performance, on the maker's part, should be before judgment, and that the subsequent taking up of the note did not entitle the maker to satisfaction of the judgment; *Tyler v. McCordle*, 9 S. & M. 230.

5. *Instance where time held not essential.* The condition of a title bond "that if the vendee complies promptly with his contract,

that the vendor will execute a deed," does not make time of the essence of the agreement; and a failure of the vendee to comply by the payment of the purchase money when it falls due, will not, therefore, authorize the vendor to rescind, without an offer to perform on his part; *Jones v. Loggins*, 8 G. 546 (citing *Johnson v. Jackson*, 5 C. 498; *Stewart v. Gates*, 1 G. 100; *Eckford v. Halbert*, 1b. 273; *Wulton v. Wilson*, 1b. 576; *Arther v. Pearson*, 3 G. 131; *Prophit v. Robinson*, 5 G. 141).

6. *Same*. Time will not be held as essential when the vendee knew at the time he bought, the true condition of the title; and where the vendor has a complete equitable title, and the failure to procure the legal title according to the covenant, was occasioned by necessary delay in legal proceedings instituted by the vendor to procure it; *Green v. Finucane*, 5 H. 542.

7. *Time of laying promise in assumpsit*. The time at which the promise in an action of *indebitatus assumpsit*, is laid, is immaterial; *Hill v. Robeson*, 2 S. & M. 541. See TRESPASS, 21.

8. *Time in an indictment*. Time need not be proven as laid in an indictment, unless it be of the essence or description of the crime charged; *Miazza's Case*, 7 G. 613.

9. *Time, where essential, may be waived by parol*. If the vendor decline the offer of the vendee to surrender possession of the land, in accordance with a right secured to the vendor by the contract, it will be a waiver on his part of the previous default of the vendee in making payment of the purchase money, and he cannot afterwards insist on the right, without having first demanded payment; *Prophit v. Robinson*, 5 G. 141.

10. *Computation of time*. In the computation of the time for which notice is required to be given of the performance of an act, either the day on which the notice is given, or the day of the performance, must be included and the other excluded; *Mitchell v. Woodson*, 8 G. 567; *Hall v. Cassidy*, 3 C. 48. See PROCESS, 10.

If the notice be, that an act shall be done "within two weeks from 24th August," that day will be excluded; *Curtis v. Blair*, 4 C. 309.

11. *Same: Meaning of "month."* The modern rule is, that when a statute directs a month's notice to be given in reference to judicial proceedings, a calendar, and not a lunar, month is meant. Hence, the statute requiring publication of notice to non-residents once a week for one month, means a publication for a calendar month, which period must intervene the first and last publication, excluding one, and including the other of these dates; *Mitchell v. Woodson*, 8 G. 567.

Toll.

1. *When collectable*. There is an implied undertaking on the part of an incorporated plank road company, with a person travelling

on their road, that the road is reasonably fit for use; and such undertaking on the part of the company constitutes the consideration for the obligation of the traveller to pay toll; and hence, if the company fail in the performance of their undertaking, there is no binding obligation on the part of the traveller to pay toll, and he cannot be compelled to do so; *Sims v. Yazoo & Big Black Plank Road Co.*, 9 G. 23.

Tonnage.

See CONSTITUTIONAL LAW, 33.

Trees.

1. *Title of owner not divested by cutting trees*. Where trees are severed from the soil by one having no right, and converted into wood or other material, the right of the owner of the soil is not divested, so long as their identity can be ascertained in the altered state. Hence, wood cut and corded on the *locus in quo*, by the defendant in ejectment, having no title, will, on recovery of possession by the true owner, belong to him; *Harris v. Newman*, 5 H. 654.

2. *That growing timber is a part of the land*. see LAND, 1.

3. *That sale of growing timber must be in writing*, see FRAUDS. STATUTE OF, 21.

4. *As to penalty, and remedy for cutting trees*, see CUTTING TREES.

Trespass.

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I. What is a Trespass, and Instances.

1. *Void judgment no defence*. The judgment of a court without jurisdiction, is void, and constitutes no defence to an action of trespass; *Stockell v. Nicholson*, W. 75.

2. *Same: Imprisonment without authority*. A commissioner in chancery has no power to imprison a witness called before him for examination, for a contempt in refusing to give testimony before him; and he, with those aiding, advising or urging it, are guilty of a trespass by such imprisonment; *Marsh v. Williams*, 1 H. 132.

3. *Justification under lawful authority*. Persons summoned by an officer to aid in the execution of legal process, are protected in their acts in so doing, unless they exceed their authority; but such summoning is no excuse for trespasses committed before or after the execution of the process; *Payne v. Green*, 10 S. & M. 507. And if a person acting under lawful authority at first, abuse it, he becomes a trespasser *ab initio*; *Dickson v. Parker*, 3 H. 219.

4. *Same: Exces ive battery*. If the plaintiff commence a fight by assaulting the de-

defendant, the latter is, nevertheless, liable in trespass for damages, if he beat the plaintiff beyond what was necessary for self defence. And much more will not the plaintiff's attack justify the defendant in making a new attack on him after the first fight is over; *Bell v. Morrisson*, 5 C. 68.

5. *Plaintiff's fault as an excuse.* Though there be negligence or fault on the part of the plaintiff, remotely connected with the injury, yet if the defendant's fault or negligence was the immediate and proximate cause of the injury, the plaintiff may maintain his action for damages; *Vicksburg & Jackson R. R. Co. v. Patton*, 2 G. 156.

6. *Trespass to realty: Overseer of illegal public road.* The overseer of a public road, illegally established, is guilty of a trespass, if he enter on the land thus illegally appropriated to the road; *Stockett v. Nicholson*, W. 75.

7. *Same: Entry by railroad company before condemnation.* An entry by a railroad company on land for the purpose of constructing their road, if done without the consent of the owner, and previous to a lawful condemnation of the land for that purpose, and the payment or tender of payment of the damages, is a trespass; *M & C. R. R. Co. v. Payne*, 8 G. 700. And so they are liable even for the statutory penalty for cutting trees outside of the right of way, which they may suppose may fall on their track, if they fail to have the trees condemned according to law; *Miss. Cent. R. R. Co. v. Whitehead*, 41 M. 225.

8. *Same: Parol license to enter.* A parol license given by the owner of land to a railroad company to enter and construct their road bed on it, is not within the statute of frauds, and is a good defence to an action of trespass against the company for such entry; *N. O. J. & G. N. R. R. Co. v. Moye*, 10 G. 374. But such license is no bar to an action of trespass by the true owner, if given by one having no title; *Alexander v. Eastland*, 8 G. 554.

9. *Trespass by railroad to cattle on its track.* See RAILWAYS, 33 to 41.

10. *Trespass by railroad to passengers.* See RAILWAYS, 42 to 46.

11. *Trespass on public land.* A purchaser of land from the United States government is entitled to the improvements thereon, at the time of his purchase, and if they be subsequently removed by the person who made them, he may maintain trespass, and recover their value, although he never had actual possession of the premises; *Wellborn v. Spears*, 3 G. 38.

12. *Same: Mistake as to boundary.* If a party intending to trespass on public land cut trees on the land of another, he would be liable to the statutory penalty, but the rule would probably be otherwise, if intending to cut on his own land, he by mistake as to the boundary, cut trees on the land of another. In the latter case, however, he would be liable to an action of trespass for the injury done; *Perkins v. Hackleman*, 4 C. 41.

13. *Liability of principal for trespass of agent.* See PRINCIPAL AND AGENT, 31 to 38.

14. *Liability of master for trespass of his slave.* See PRINCIPAL AND AGENT, 32, 33.

15. *Seizing cattle damage feasant.* If a party having a fence not in accordance with law, seize cattle damage feasant on his land, he is a trespasser; and if the cattle suffer injury whilst in his possession, or in attempting to escape, he is liable therefor as a trespasser. For the right to seize cattle damage feasant exists only when their owner would be liable for their trespass; *Dickson v. Parker*, 3 H. 219.

II. Action for Trespass.

1. The Title and Possession Necessary, and Felonious Trespass.

16. *Possession necessary.* Possession, either actual or constructive, is necessary to enable the plaintiff to maintain trespass. Hence, the owner of a slave cannot maintain trespass for an injury done to him by another during the term for which he was hired, but the hirer may. And the owner may maintain case for the injury done to his reversion; *McFurland v. Smith*, W. 172.

17. *Same.* The plaintiff, in an action of trespass, must either prove actual possession of the land, or show his title to it; *Dejarnett v. Haynes*, 1 C. 600.

18. *The proof of possession.* Where the plaintiff introduces no evidence of title, and his proof of possession is entirely circumstantial—the land being unenclosed—the defendant may, to rebut the evidence of possession, introduce a tax deed to himself for the land, without showing that the tax collector had complied with the law in making the sale; *Jb.*

19. *Possession alone sufficient.* Possession alone, or a mere qualified right, is sufficient to enable the plaintiff to maintain trespass or trover against all, except the true owner; *Harris v. Newman*, 5 H. 654.

And so possession of land by the plaintiff under color of title, is *prima facie* sufficient evidence of ownership to enable him to maintain an action for the statutory penalty for cutting trees thereon. In such case, if the defendant relies on want of title in the plaintiff, he must show affirmatively that it is in himself, or some third person; *Ware v. Collins*, 6 G. 223.

20. *Action for felonious trespass.* In this State, a party injured by the felonious conduct of another, may maintain his action for the injury previous to, and without, a conviction of the felon in a criminal proceeding; *Newell v. Cowan*, 1 G. 492.

2. The Declaration.

21. *Where the time laid is essential.* Where the declaration alleges the trespass to have been committed on a certain day, "and on divers other days" between that day and another day named, it makes the time laid descriptive of the charge, and proof is admissible of any trespass within the time alleged, but of no other; *Payne v. Green*, 10 S. & M. 507. See TIME, 7, 8.

22. *Same: Use.* An action of trespass cannot be brought for a use, and if so brought, it will be considered as brought by the nominal plaintiff alone; and in such case the nominal plaintiff is not a competent witness against the defendant (citing *Hunlley v. Buckner*, 6 S. & M. 70); *Brown v. Thomas*, 4 C. 335. See NOMINAL PLAINTIFF, 3. REPLEVIN, 14.

23. *Debt for cutting trees and trespass cannot be joined.* Counts in debt for the statutory penalty, and trespass *quare clausum fregit* cannot be joined; *Elder v. Hilzheim*, 6 G. 231.

24. *Trespass not proper remedy for cutting trees.* Debt, and not trespass, is the proper remedy for the statutory penalty for cutting trees; *Ware v. Collins*, 6 G. 223. But if there be objections to the form of the declaration, and it claim the statutory penalty, it must be raised by demurrer; *Miss. Cent. R. R. Co. v. Whitehead*, 41 M. 225.

3. Pleas.

25. *Setting up bad fence.* A plea alleging that the premises of the plaintiff were not enclosed by a sufficient fence, is not a defence to an action of trespass, alleging that the defendant broke and entered the close of the plaintiff, and with his oxen, &c., destroyed and carried off two hundred bushels of corn; *Miles v. Myers*, W. 379.

26. *General issue, with an agreement.* There were several counts in the declaration, and a general plea of not guilty filed, with an agreement that any special matter might be given in evidence, that might be pleaded: *Held*, that the plea was as broad as the declaration, and must be considered as justifying the counts separately and collectively, and each trespass in each count; *Payne v. Green*, 10 S. & M. 507.

4. The Damages.

27. *Torts to the person and character: Exemplary damages.* In actions of trespass for injuries to the person or character, the jury are not restricted to merely compensatory damages, but may give a further sum by way of punishment to the defendant, and to operate by the example as a warning to others. And as punishment by pecuniary loss would be unequal, if the same sum were imposed equally on a poor and on a rich man for the same offence, since what would ruin the former, might be a matter of no consequence to the latter; it is proper in all that class of cases to allow evidence of the pecuniary condition of the defendant, to be introduced by the plaintiff. And this rule allows proof of the wealth of one defendant, when there are several, for all the defendants are liable for all the damages which may be lawfully assessed against any one of them; *Bell v. Morrisson*, 5 C. 68.

28. *The jury are the judges.* In such cases the jury act without control on the subject of damages, because there is no legal rule by which they can be measured; unless they are so extravagant as to induce a suspi-

cion of improper conduct, the court will not interfere; *Ib.*

See DAMAGES, 3, 4, 5, 6, 7, 8, 15 to 22.

III. Miscellaneous.

29. *Distinction between trespass and case.* The true distinction between trespass and case is, that when the wrongful act itself occasions the injury, it is trespass; and when the injury is not the direct result of the act, but a consequence of it, the remedy is case; *McFarland v. Smith*, W. 172.

30. *Action of debt for statutory penalty for cutting trees.* This action is governed by the rules of evidence applicable to actions of trespass in similar cases; *Dejarnett v. Hynes*, 1 C. 600. See *ante*, 23, 24, 19, 7. CUTTING TREES.

31. *Waiver of trespass.* Where profits have been received by injuries done to real property, the owner may waive the trespass and recover for money had and received; *O'Conley v. City of Natchez*, 1 S. & M. 31.

32. *Improvements by one having color of title.* One who enters land in good faith under the belief that he has a title thereto, when, in fact, the title is another's, is not a naked trespasser, and is entitled to all legal protection to improvements and property placed on the premises given by statute to parties in possession under color of title; *Miss. & Tenn. R. R. Co. v. Devaney*, 42 M. 555.

33. *Action by executor.* The right to recover damages for a trespass to realty, committed in the lifetime of the intestate, survives to the administrator; *N. O. J. & G. N. R. R. Co. v. Moyer*, 10 G. 374.

Trial of the right to Property under the Statute.

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I. Statutes.

1. *Statutes.* The 25th section of the Act of 1822, in relation to executions (H. C. 903), provides that when an execution shall be levied on property claimed by a person not a party to it, the claimant may make oath of his right, and on entering into bond, payable to plaintiff, in a penalty double the amount of the execution and costs (changed in 1830, to double the value of the property claimed—H. C. 912, art. 8), conditioned for the payment to the plaintiff of "all such damages as may be assessed against the claimant by a jury," in case his claim shall not be sustained, &c., and that he will deliver the property to the sheriff if his claim shall be determined against him. That, when this is done, there shall be a postponement of the sale, and the sheriff shall return the bond and execution, and the court shall thereupon direct an issue to be made up between the parties to try the right to the property; and the jury trying the issue

may allow plaintiff in execution such damages as they think just, not less than ten per cent. on the amount of the execution, in case the claim shall appear to be fraudulent or intended for delay. That the *onus* of proof shall be on the plaintiff, and in case of verdict against the claimant, and the property be not immediately delivered to the sheriff, the claimant's bond shall have the force and effect of a judgment, and execution may issue thereon for the plaintiff's demand and costs.

2. *Statute of 1830. H. C. 912. art. 8.* This statute provided for a stay of execution on the original judgment till the final decision, to the amount of the value of the property so claimed, as endorsed on the execution by the sheriff; that the issue shall be tried and governed by the same rules which regulate and govern the trial of an issue in an action of detinue, and that the final judgment should "have like effect on the parties to said issue," as it would have had if rendered in an action of detinue. That if, from plaintiff's fault, an issue be not made up to try the right at the first term, the court shall discharge the claimant from his bond, and the property claimed shall not thereafter be liable to that execution; and if the failure be the fault of the claimant, then there should be a jury to inquire into the value of the property and whether the claim was fraudulent. That where the verdict is for the plaintiff the jury shall assess the value of the property, and the judgment shall be as in detinue for the specific property, if to be had, and if not, for its value as assessed by the jury; and the value so assessed shall be credited on the original judgment; and if the value be greater than the original judgment, then only the amount of that judgment shall be collected from the claimants.

3. *Statute of 1857, Rev. Code, p. 532.* is not materially different from the above, except that the condition of the bond is for the payment of all damages that may be awarded, instead of all that may be awarded by a jury, and it requires the affidavit to be returned with the bond.

II. Trial, Verdict and Judgment.

4. *Order for the issue.* It would be more formal for the court to order an issue to be made up; and if an issue be made, and a trial had, it will be presumed that the order was made; *McAnully v. Bingaman*. 6 H. 382.

5. *The assessment of the value.* The claimant may show on the trial that the value of the property has depreciated between the time the claim was made and the trial; its value at the trial is to be assessed; *Selser v. Ferriday*. 13 S. & M. 698.

6. *Verdict: Informal.* If the jury find that the property levied on "is the property of the defendant in execution," it is sufficient, without finding that it is subject to the execution, for that follows the fact found; *Thomas v. Estes*. 2 S. & M. 439.

7. *Same: Consequence of not finding as to part of the property.* Under that provision of

the statute, which governs the trial by the rules regulating trials in detinue, the Act of 1820 (H. & H., § 13, p. 591), which provides "that if in trials in detinue, the jury omit to find as to some of the chattels sued for, the verdict shall be a bar to the plaintiff, as to the property so omitted," prevents such omission in trials of the right of property from being error. The property so omitted from the verdict will not be liable to the execution; *Gilliam v. Moore*. 10 S. & M. 120.

8. *Same: Form of verdict: Each item of property must be assessed separately.* If the verdict be for the plaintiff, it should, as in detinue, assess the value of each separate piece of property claimed, or it will be error; *Penrice v. Cocks*, 1 H. 227; *Walker v. Commissioners of Sinking Fund*. 1 S. & M. 372; *Thomas v. Estes* 2 S. & M. 439; *Been v. Lindsey*. 2 S. & M. 581; *Pritchard v. Myers*, 3 id. 42; *Kibble v. Butler*. 14 S. & M. 207. As to what articles may be considered as parts of a whole, and assessed together. See DETINUE, 5, 6. REPLEVIN 18, 23.

9. *Correction of erroneous assessment in gross.* See DETINUE, 7.

10. *Form of judgment.* The judgment should be, as in detinue, for the property, if to be had; and if not for its alternate value; *Been v. Lindsey*. 2 S. & M. 581. The judgment should follow the verdict, and be for the recovery of each article, or its alternate value, and not for the return of the whole, or the recovery of the aggregate value; *Thomas v. Estes*. 2 S. & M. 439; *Been v. Lindsey*. 2 S. & M. 581; *Pritchard v. Myers*. 3 S. & M. 42.

11. *Same: As against surety.* Under the statutes of this State, as they existed prior to the Rev. Code of 1857, if the verdict be against the claimant, the judgment must be rendered against him, alone; and not against him, and the surety; *Kibble v. Butler*. 14 S. & M. 207. Under the Code of 1857, the judgment is against both.

12. *Costs against surety.* If the verdict be against the claimant, the surety under the Acts of 1822 and 1830, was not liable for costs. He is liable only for the damages assessed by the jury, according to his bond. Though costs are generally considered as a part of the damages, yet, as they are always taxed by the clerk and never assessed by the jury, the surety is not liable; *Gayden v. Marshall*. 8 S. & M. 489.

13. *Form of judgment as to endorsement on execution.* That provision of the statute which enacts, that if the property levied on be assessed by the jury, to a greater value than the amount of the execution levied on it, the actual amount due on the execution so levied, shall be endorsed on the execution issuing against the claimant and his sureties, does not apply to the judgment of the court against the claimant, and need not be noticed in it; it applies alone to the execution, and is a mandate to the clerk to make that endorsement on it; *Thomas v. Estes*, 2 S. & M. 439.

14. *Effect of judgment against claimant as satisfaction: The execution.* If the prop-

erty be adjudged liable to the execution, the judgment will be credited with the value of the property, and a *distringas* will issue to get possession of the property; but no sale can be made under it, without a special order of the court. And the same rule will apply, if, instead of the claimants giving bond, the property, by agreement of the parties, is left with the sheriff, who in such case will hold as bailee and not as sheriff; and the property in that condition, is subject to levy under another execution; *Planters' Bank v. Black*, 11 S. & M. 43. See *post*, 18.

15. *Surrender of property by claimant.* When the property is surrendered after judgment against the claimant, and delivered to the plaintiff in execution, without a sale, the execution is not thereby satisfied to a greater amount than the assessed value of the property, if that be less than the amount of the execution; *Gayden v. Marshall*, 8 S. & M. 489.

16. *Judgment against plaintiff on failure to make up an issue: Res adjudicata.* The statute declares, that if from the default of the plaintiff in execution, an issue shall not be made up to try the right to the property, the claimant shall be discharged from the bond, and the property therein mentioned, shall not thereafter be liable to satisfy the plaintiff's execution; this makes a failure of the plaintiff to tender an issue, and the consequent judgment discharging the claimant, a complete bar to the plaintiff's right to levy on that property, to satisfy that debt, and if the property be afterwards sold under other executions junior to the plaintiff's, he having thus abandoned and forfeited his right, cannot claim the proceeds; *Martin v. Loftland*, 10 S. & M. 317. See *post*, 18.

17. *Judgment in trial conclusive.* A judgment against the claimant is conclusive against his title, in a contest between him and a person who holds the property, in virtue of a sale made in pursuance of that judgment; *Shirley v. Fearn*, 4 G. 653.

17a. *Execution: Sale under.* Although the sheriff may have no power under a *distringas* issued against the claimant for the property, to sell the same; yet, in an action of trover by the claimant, against a purchaser from the sheriff, it is competent for the defendant to introduce in evidence, the record of the trial of the right of property, and the *distringas*, to show that the plaintiff has no title; *Ib.* See *ante*, 14.

18. *Duty of plaintiff to cause issue to be made up.* By the express provisions of the statute (art. 295, p. 532, of the Rev. Code of 1857), if by default of the plaintiff in execution, an issue to try the right of the property be not made up at the return term of the execution, the levy will be released, and the claimant discharged from his bond; *Sears v. Gunter*, 10 G. 338. See *ante*, 16.

19. *Time.* And in such a case, it is the duty of the plaintiff in execution, to see that the sheriff discharges his duty, by returning the execution, claimant's affidavit and bond, by a day in the return term early enough to have

an issue made up and tried at that term; and hence, it is no excuse for the default of the plaintiff in execution, in failing to tender an issue at that term, that the sheriff failed to return the execution, etc., till it was too late to do so; *Sears v. Gunter*, 10 G. 338. Under the statutes of 1822 and 1830, it was not necessary that the affidavit should be returned; *Elis v. Abercrombie*, 10 S. & M. 474. See *post*, 29.

III. Evidence.

20. *Onus probandi on plaintiff in execution.* The plaintiff in execution, like the plaintiff in an action of detinue, has the burden of proof, and if he fail to show that the property is liable to the execution, he will fail to subject it, notwithstanding the claimant has no title; *Thornhill v. Gilmer*, 4 S. & M. 153; S. P., *Ross v. Garey*, 7 H. 47. And if only a portion of the property levied on is liable to the execution, the plaintiff must show that specific portion; *Summers v. Roos*, 42 M. 749. See *post*, 24, 25.

21. *That claimant is liable for the debt, cannot be shown.* Where a creditor has sued and recovered judgment against two partners, alleging that they composed the firm, he cannot in that proceeding collect his judgment from a third person, not sued as a partner, nor subject to the payment of his judgment, the partnership assets, which had been before its rendition, conveyed to another, by showing upon the trial of the right to such property under the statute, that the claimant was a partner and liable for the debt due him; *Strong v. Hines*, 6 G. 201.

22. *Evidence of the nature and character of plaintiff's debt inadmissible.* On such a trial, evidence of the nature and character of the debt which is the foundation of the judgment is irrelevant; and therefore, on such a trial, if the wife of the defendant in execution be the claimant, it will be incompetent to show that the foundation of the judgment against the husband is a gin-stand purchased by him for the wife's plantation; *Atwood v. Meredith*, 8 G. 635.

23. *The execution is necessary proof.* The execution levied on the property claimed is a necessary part of the plaintiff's evidence, as showing his right to proceed against the property, and it should be incorporated in a bill of exceptions, which undertakes to set out all the evidence; *Ross v. Garey*, 7 H. 47. See *EXECUTION*, 93.

24. *Title paramount to plaintiff's lien.* The claimant may show in bar of the plaintiff's right, that the property has been, since he made his claim, taken out of his possession, by title paramount to the lien of the plaintiff's judgment; *Selser v. Ferriday*, 13 S. & M. 698. See *ante*, 14, 20, and *post*, 30.

25. *Claimant's general right of defence: Statute of limitations.* In a trial of this kind, the claimant can generally make the same defence that he could if sued in detinue for the same property. He may rely upon his adverse possession for the time prescribed by

the statute of limitations for barring an action of detinue; and this will be a good defence in all cases, when his title, or that of the person from whom he claims, commenced before the lien of the judgment attached, and in all cases where the lien had expired before the levy; *Claughton v. Black*, 2 C. 185.

IV. Miscellaneous.

26. *Where several executions are levied.* In a proceeding of this sort, where several executions are levied on the same property, there should be a bond by the claimant in each case, and a separate trial and judgment; *McAnulty v. Bingaman*, 6 H. 382.

27. *Damages for fraudulent claim.* If the verdict be for damages on account of a fraudulent claim, a new trial will be granted, if there be no evidence to prove the fraudulent character of the claim for if the claim be made in good faith, but be not sustained, the claimant is not liable to be mulcted with ten per cent. damages, as for a fraudulent claim; *Ib.*

28. *As to the respective powers of the court and jury in determining questions of fraud in trials of this sort,* see INSTRUCTIONS, 19, 20, 21.

29. *Omission of sheriff to return affidavit.* It is error to dismiss a trial of the right of property, when a claimant's bond has been regularly executed, on the ground that the plaintiff's affidavit does not appear in the papers in the cause. The statute requires the sheriff to take the affidavit before he takes the bond; it (the Act of 1822) also requires him to return the bond to the clerk's office, but not the affidavit, and his omission to make the return cannot prejudice the claimant; *Ellis v. Abercrombie*, 10 S. & M. 474. See *ante*, 19.

30. *That property claimed may be levied on by another execution,* see *ante*, 14, 20, 24.

31. *Trial under levy of attachment.* Under the statutes, as they existed before Rev. Code of 1857, where the claim was propounded to property levied on under an attachment, the trial could not be had until the plaintiff in attachment had recovered his judgment against the defendant in attachment; for the burden of proof being on the plaintiff, he could not show his right to subject the property until he had established his demand against the defendant; *Mandel v. McClure*, 14 S. & M. 11. And the rule is the same as to garnishees summoned in attachment, no judgment could be rendered against them till judgment against the defendant; *Ib.* (citing *Berry v. Anderson*, 2 H. 649; *Whitehead v. Anderson*, 4 S. & M. 704; *Ford v. Hurd*, *Ib.* 683). See *vide* Rev. Code of 1857, p. 381, art. 38.

Trover.

1. *Gist of the action: Conversion: Case in judgment.* The gist of the action of trover is the illegal conversion. Hence, a seller with

warranty of title is not liable to this action, for pointing out to the sheriff the property so sold for levy and sale under a judgment against him, which is a lien on the property, and of which the purchaser had notice, actual or constructive. The action of the sheriff in seizing and selling the property, is perfectly legal, and his action being legal, the conduct of the seller in pointing out the property, cannot be unlawful; *Phillips v. Lane*, 4 H. 121.

2. *Accrues on conversion: What is conversion.* The action of trover accrues upon the wrongful conversion of the property. A tortious taking is a wrongful conversion, and so an unlawful disposition of the property is a conversion both in the seller and buyer, and so assuming to one's self the title and right to dispose of another's property, is a conversion; *Johnson v. White*, 13 S. & M. 584.

3. *Same.* The plaintiff in trover purchased a field of corn, and was proceeding to gather it, when the defendant came to the field and forbade the gathering, and plaintiff thereupon desisted and brought his action of trover for the conversion of the corn: *Held*, there was no conversion, as there was no severance of the corn from the freehold; and it was also said, if there had been a severance and conversion, the action could not be maintained (citing 1 Chitty's Pl. 169); *Platner v. Johnson*, 4 C. 142.

4. *Conversion by agent of principal's property.* See PRINCIPAL AND AGENT, 71, 72.

5. *Detention after demand.* Where a party, without just claim or interest, wrongfully detains the property of another, after due demand, he is responsible for its value, if it should afterwards be destroyed or lost by casualty. But this rule does not apply where the party detaining the property has an interest in it equal to that of the party making the demand; *Trotter v. White*, 4 C. 88.

6. *Trover for a house.* Trover is maintainable by the owner of land to recover the value of a house wrongfully removed from it; *Stillman v. Hamer*, 7 H. 421.

7. *By tenant in common.* Trover cannot be maintained by one tenant in common against another; *Hinds v. Terry*, W. 80.

8. *Damages.* In trover, the value of the chattel and interest from the time of conversion, is the true measure of damages; *Hinds v. Terry*, W. 80. But the measure of damages for the conversion of a slave, is his value at the time of his conversion, and his yearly value from that time to the trial; *Texada v. Camp*, W. 150.

As to damages generally in trover, see DAMAGES, 3 to 8.

9. *Statute of limitations.* The statute commences to run against an action of trover from the time of the conversion, whether it were known to the plaintiff or not, if there were no fraud used to prevent his having knowledge; *Johnson v. White*, 13 S. & M. 584.

10. *Destruction after conversion.* A party who wrongfully converts the property of another to his own use, is liable for its value,

though it be destroyed afterwards by the public enemy; *Mason v. O'Brien*, 42 M. 420.

Trusts and Trustees.

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I. What is a Trust, and how Created.

1. The Words Necessary to Create a Trust.

1. *No form of words required.* No form of words is necessary to create a trust; but, looking to the acts and intentions of the parties, if it appear that it was their intention to create a trust, the court will so declare and enforce it; *Norman v. Burnett*, 3 C. 183.

2. *Same: The example.* A grandmother who had a life estate in certain slaves, remainder to her children, to be divided among them, hired two of the slaves to the defendant, her son, for the year 1831, "and to continue on in the same way, until a division takes place;" and the son agreed to board, clothe, and send to school the two grandchildren, the heirs of a deceased son of the bailor, "so long as the slaves may be undivided." This he did, until the two grandchildren married and left his house; and after this, the grandmother released him from his obligation to do so; and then the two grandchildren brought this bill to recover the value of the hire of the slaves since their marriage: *Held*, that the transaction created a trust, which was binding both on the grandmother and the son; and that it did not terminate on the marriage of the children, but continued until the death of the grandmother and a division of the slaves; that the trust was founded on a good, though, as to the grandmother, a voluntary consideration, and she could not revoke it, nor release the trustee from his obligation to carry it out; and that the *cestui que trust* were entitled to have boarding and clothing still furnished to them, proportioned to the value of the hire of the slaves; *Ib.*

3. *Precatory words, &c.* If a bequest be accompanied by words expressing a command, recommendation, entreaty, or hope on the part of the testator, that the property

may be disposed of in favor of another, a trust will be created, if the words, the subject, and the object be sufficiently certain; *Wade v. Am. Col. Society*, 7 S. & M. 663; S. P., *Lucas v. Lockhart*, 10 S. & M. 466, for which see *WILLS*, 92, 93.

4. *Force of word "manage."* The word "manage," when applied to money, is a word of trust; and a power conferred to "manage" money, embraces the power to invest it; *Com'rs of Sinking Fund v. Walker*, 6 H. 143.

2. Trusts in Land created by Parol.

See *FRAUDS, STATUTE OF*, 28 to 36.

5. *Parol declaration good at common law and under our statute.* At common law, a parol declaration of a trust, both of real and personal estate, is valid. The 7th section of the English statute of frauds, which prohibits the creation of express trusts in lands, except by writing, was not embodied in the legislation of this State, prior to the adoption of the Rev. Code of 1857; and prior to that date, a parol declaration of a trust in real estate was valid; *Anding v. Davis*, 9 G. 574.

See *post*, 20, 21, 23.

6. *Same.* The admission of parol evidence to show that an absolute deed of real or personal estate, or both, was accepted by the grantee, upon the condition that he would hold the property thereby conveyed, subject to a trust in favor of the grantor, or of a third person, is not a violation of the statute of frauds of this State, as it existed prior to 1857, nor contrary to the rules of evidence on the subject of the admission of parol evidence to contradict, vary, or add to a written agreement; *Ib.*

7. *Same: Absolute deed shown to be a mortgage.* An absolute deed may be shown, by parol evidence, to have been intended by the parties to have operation only as a mortgage, and it makes no difference in this respect, whether the debt intended to be secured thereby, was then contracted by the mortgagor, or was a pre-existing liability; *Ib.*

See, also, *MORTGAGE*, 11, 12, 12a.

8. *Same: Contract to make a will.* A party who receives a deed conveying to him property absolutely, may, in consideration thereof, bind himself by parol to dispose of the property to a designated beneficiary by will; and if he executes a will in pursuance of the agreement, it will be irrevocable, and if he fail to execute it, it will be a fraudulent violation of his contract, against which equity will give relief to the beneficiary; *Ib.*

9. *Same: Case in judgment.* D. conveyed land and slaves, and other personalty, to A. absolutely and in fee simple, and delivered possession. A., when he accepted the deed, made a parol agreement that he would hold the property, and use it so as to produce profits, and that he would apply the profits to the payment of a debt due by D. to him; and that after the debt was thus paid, that he would convey to the children of D.; and in furtherance of this agreement, A. agreed that he

would keep on hand a will thus disposing of the property. A. executed the will as he had agreed, but afterwards destroyed it. After the death of A., and the payment of the debt due to him by D., the children of D. filed a bill to recover the property: *Held*, that the trust in favor of the children of D. was valid, and that they were entitled to recover; *Ib.*

9a. *Same.* A parol agreement between the vendee of land who holds a title bond, and a third person, by which the latter advanced the purchase money and took a deed in his own name, as a security for the loan, is valid, and the trust thereby created in favor of the vendee in the title bond, will be enforced in a court of equity, upon an offer by the vendee and a refusal of the vendor to convey the land according to the terms of the agreement; *Jones v. McDougal*, 3 G. 179.

And so a person who, in pursuance of a previous parol agreement with the debtor, purchases with his own means, the land of the debtor at execution sale, for the debtor's benefit, is a trustee for the debtor, and such an agreement is not within the statute of frauds; *Soggins v. Heard*, 2 G. 426.

3. Purchaser with Notice, a Trustee.

10. *Same.* Where a party purchases a legal title, with a knowledge of an outstanding equitable title he is but a trustee of the owner of the equitable title; *Thompson v. Wheatley*, 6 S. & M. 499.

And a purchaser with notice of a legal or equitable title in another, is guilty of a constructive fraud as against the owner, and is regarded in equity as a trustee for him; and a court of equity will entertain a bill against such purchaser, to make him account for the value of the property, in case he has disposed of it, so that he cannot make restitution of the specific property. And if, after such disposal, the property perish, as a slave by emancipation, this will be no reason why he shall not account for its full value; *Calhoun v. Burnett*, 40 M. 599.

As to what would be notice in such a case, see NOTICE, 6.

4. By Destruction of Title Deeds.

11. *Same.* If a party fraudulently destroy the title deeds of another, and thereupon make a fraudulent sale of the land, and appropriate the proceeds to his own use, he will be liable as upon an implied trust, to restore the injured party to his rights, and a court of equity will compel him to do so; *Phillips v. Hines*, 4 G. 163.

5. Sureties taking Security.

12. *Same.* Where sureties take a conveyance to be void, on condition that the debt on which they are bound is paid, the conveyance is a security for the debt, and they are trustees for the creditor; *Ross v. Wilson*, 7 S. & M. 753.

See PRINCIPAL AND SURETY, 60, 61, et seq.

6. Purchases by Trustee.

13. *Purchase with borrowed funds re-*

paid by trust estate. If a trustee borrow money on his own credit, and purchase property in his name as trustee, and repays the money out of the proceeds of the trust estate, the property will be trust property, and not liable for his debts; *Butler v. Hicks*, 11 S. & M. 78.

14. *Purchase with trust funds.* Property purchased by a trustee with the trust funds, will not be liable for his debts, merely because he took the title in his own name, if he always treated it as trust property; *Hancock v. Titus*, 10 G. 224.

15. *Purchase by agent for administratrix: Case in judgment.* At a sale under execution of slaves belonging to an intestate, V. became the purchaser of six of them, for less than their value by \$1,000, he having stated to the bidders, that he was buying for the widow, and thereby lulled competition. Afterwards, the widow, who was administratrix, paid to V. all the purchase money but \$1,000, and received from him four of the slaves; and it was also agreed between them, that the remaining \$1,000 was to be paid at a specified time to V., who was then to surrender the other two slaves to the widow. The administrator *de bonis non* afterwards sued V. for the two slaves, and for an account of the hire of all: *Held*, that V., by the purchase, became trustee for the creditors and distributees of the estate, and the administrator *de bonis non* was entitled to recover the two slaves, on paying the \$1,000 still due, and interest, after deducting first the hire of the slaves; *Lindsey v. Platner*, 1 C. 576.

7. Bank Stock and Sinking Fund.

16. *Bank stock a trust.* Stock subscribed to a bank, though unpaid, is a trust fund for the payment of the debts of the bank; and it is a continuing trust, and the statute of limitations will not run against its collection; nor can the bank release the stockholder from his liability to pay, as against a creditor of the bank, whose debt was existing at the time the release was attempted to be made; *Payne v. Bullard*, 1 C. 88.

17. *The Sinking Fund a trust.* A trust is created by the tenth section of the charter of the Planters' Bank, by which it is provided, that a certain portion of the dividends accruing to the State, on its stock in the bank, should constitute a sinking fund, under the management of the auditor of public accounts, and the president and cashier of the bank, for the redemption of the bonds issued by the State on account of the bank; and those officers are trustees as to that fund, and may sue as such; *Comm'rs of Sinking Fund v. Walker*, 6 H. 143; *Young v. Hughes*, 12 S. & M. 93.

17a. *Sheriff as a trustee.* If, in a contest between several judgment creditors in the Circuit Court, in relation to the application of money in the sheriff's hands, the creditors, whose claims were postponed, signify their intention to appeal, and it be thereupon agreed between all the parties, that the sheriff shall loan out the money for the benefit of the

party who shall succeed in the litigation; if the creditor, whose claim was preferred in the Circuit Court, receive the money from the sheriff in payment of his judgment, he will be compelled to refund it; if upon the determination of the appeal, his claim shall not be sustained, although he received the money before the appeal was taken, and whilst the judgment in his favor was good and unreversed; for by the agreement, the sheriff was a trustee, and the creditor also became a trustee, by receiving the money in violation of the trust; *Gay v. Edwards*, 1 G. 218.

II. Resulting Trusts.

18. *Money must be advanced at the time of purchase.* In order to establish a resulting trust, the advance of the money by the party selling the claim must precede the purchase; a subsequent payment will not raise the trust when it is denied by the alleged trustee; *Mathorner v. Harrison*, 13 S. & M. 53. A resulting trust will not be created in favor of one whose funds were used in paying for the land, where the purchase was made on a credit; *Bowman v. O'Reilly*, 2 G. 261; *S. P. Gee v. Gee*, 3 G. 190; *Gibson v. Foote*, 40 M. 788.

And the payment must be made at the time of the purchase; a surety, therefore, who afterwards pays the purchase money upon the default of his principal, thereby acquires no interest in the land; *Gee v. Gee*, 3 G. 190.

19. *The trust results only from the use of the claimant's money.* A resulting trust can be raised only when the consideration was paid by one party and the conveyance was taken in the name of another; or where trust money has been used in the purchase of property; *Walker v. Brungard*, 13 S. & M. 723. It will not be raised by an agreement merely to purchase for the benefit of another—the purchaser using his own means in the purchase, and buying in his own name, and being under no fiduciary relations which would prevent him from purchasing; *Walker v. Brungard*, *supra*.

20. *Same: Qualification of the rule: Case in judgment.* But where the claimant is the meritorious cause of the purchase being made at a low price, and the advance of the purchase money is made for his benefit, and the deed taken in the name of the person making the advance, as a surety for its repayment, a trust will result. Thus, J. having made improvements on public land, and having an inchoate pre-emption right, it was entered by P., who was ignorant of J.'s settlement. P., in consideration of this, agreed to let J. have the land at the original cost, which was very low; J., not having the money, applied to R. for a loan, who refused, but agreed to purchase in his own name, and let J. have it if he would return the money by a day stipulated, and the deed was so made, P. believing that J. was to get the benefit of the purchase, and being unwilling to accept that price from another: *Held*, that a trust resulted to J. who was entitled to the land on paying the

purchase money and interest; *Runnels v. Jackson*, 1 H. 358.

21. *Same: Another instance.* E. had made improvements on a quarter section of public land, which was sold at public sale; previous to the sale it was agreed between E. and G. that the latter should buy the quarter section and let E. have that eighth on which his improvements were, upon E.'s returning one-half the purchase money: *Held*, that the case was within the principle of *Runnels v. Jackson* (*ante*, 20), and that E. was entitled to recover the land according to the agreement; *Evans v. Green*, 1 C. 294.

See *ante*, 5, 6, 7, 23.

22. *No trusts if claimant's share of money be indefinite and uncertain.* Where a written bill of sale to a slave is taken in his own name, by one who purchases with funds belonging to himself and another jointly, if there be no understanding or agreement between them, at the time, in reference to the purchase, and if it do not appear to what extent they were severally interested in the purchase money, no trust will result in favor of the party whose money was so used, to the extent of his interest therein, but the title will vest in the purchaser, who will become a debtor to the other to the amount of his money used in the purchase; *Coppage v. Barnett*, 5 G. 621.

23. *Rule as to resulting trusts.* In order to establish a resulting trust from the use of the complainant's money in the purchase of property, where there is no valid agreement to purchase the property with the trust money, it is necessary to show that the money was, at the time of the purchase, the fund of the party claiming the trust, and that it was used in the purchase of the property. If the money had been loaned to the alleged trustee, it was his money, and a trust does not result. And this rule applies where a purchase had been made by the husband, with funds which he had borrowed from the wife. And it does not change the result that the husband or alleged trustee promised to invest the amount of the loan in the purchase of land, unless the promise were in writing, for that would make it an express, and not an implied trust and void by the statute of frauds, if not in writing; *Gibson v. Foote*, 40 M. 788. See *ante*, 5, 6, 7, *et seq.*, 20, 21, and *post*, 24.

24. *Same: Another instance: Statute of frauds.* A grantor in a trust deed, made to secure the payment of his debts, sought to get the benefit of a sale made by the trustees, at which the *cestui que trust*, who was but an endorser on the debts secured by the deed, was the purchaser, upon an allegation that the sale was made by agreement between him, the *cestui que trust* and the trustees, to the effect that the *cestui que trust* should purchase the property, and then mortgage it to a bank for a loan, and that the amount so raised should be applied for the benefit of the trust fund. The *cestui que trust* positively denied this arrangement in his answer, and the only evidence to sustain the claim,

was that of the trustees: *Held*, that as agents of all the parties interested under the deed, the trustees should not have lent themselves to a secret understanding between the grantor and the *cestui que trust*, which was a departure from good faith, and created risk and hazard to the creditors secured by the deed, and this consideration speaks but little for the credibility of their testimony, given to prove the agreement: *Held*, also, that the agreement was void by the statute of frauds, as it was not in writing, and that the purchase was not a resulting trust (see *ante*, 19); *Walker v. Brunyard*, 13 S. & M. 723. See *ante*, 5, 6, 7, *et seq.*, 20, 21, 23.

See ATTORNEY AT LAW, 43.

25. *Resulting trust cannot be set up to defeat vendor's lien.* A resulting trust can never be established so as to deprive the vendor of his lien on the land, for the balance of unpaid purchase money, and especially where he has made no conveyance. The whole doctrine of resulting trusts, proceeds on the idea that he has been paid for his land, and that he has conveyed to the nominal purchaser: *Capers v. McCaa*, 41 M. 479.

26. *Same: Case in judgment.* The vendor sold partly for cash, and took the notes of the vendee for the balance of the purchase money. He conveyed to the vendee, and at the same time took back from the purchaser a mortgage, executed by him and his wife, to secure these notes. The wife afterwards claimed, that the cash payment had been made with her separate estate, and that a part of the notes had been paid in the same way, and asserted a resulting trust on that account against the claim of the vendor to foreclose the mortgage: *Held*, that the vendor's claim was superior to hers; *Ib.*

27. *Rebutter of resulting trust.* The ground upon which the doctrine of resulting trusts rests with reference to property purchased with the means of one person, the title being taken to another, is the presumption of law that the person whose funds are applied in payment of the property so purchased, intended it for his own benefit, and that the nominal purchaser or grantee is a mere trustee; and this presumption may be rebutted by proof, either positive or negative, or by the declarations of the parties contemporaneous with the purchase, or by other direct proof of intention, or by the circumstances attending the transaction, showing that such was not the intention of the parties at the time; *Ib.*

28. *No trust results as between parent and child and husband and wife.* A trust will not result in favor of the father who buys land in the name of the child; such transactions are intended as advancements; *Gee v. Gee*, 3 G. 190. See PARENT AND CHILD, 2.

And so a purchase by the husband in the name of the wife, is an advancement to her; *Fathree v. Fletcher*, 2 G. 265.

29a. *Same: Modification of the rule.* The rule that a purchase by the husband in the name of the wife, or by a parent in the name of a child, shall be deemed an advancement,

is not inflexible, but a mere presumption which exists in the absence of proof to the contrary; and hence, if it appear by the circumstances surrounding the purchase, that no advancement was intended, a trust will result to the husband or father; *Wilson v. Beauchamp*, 44 M. 556.

29. *Same: Held a trust from the circumstances.* This was a case in which the father-in-law advanced money to the son-in-law to buy land, and the money was so invested and the titles taken in the name of the son-in-law. The father-in-law claimed that all the lands were purchased for him, and the son-in-law claimed that all the money was an advancement to him. The court reviewed all the circumstances, and reached the conclusion that the main object of the parties was first to secure a home for the son-in-law, and afterwards to secure a large plantation to the father-in-law, and this conclusion was reached mainly, on the ground that they had so designated the object of the purchase, and the court decreed the land in controversy to the father-in-law, leaving to the son a plantation on which he resided and had his home; *Mahorner v. Harrison*, 13 S. & M. 53.

30. *Same: Division of several purchases.* Several tracts of land had been purchased in the name of the son-in-law, he using the money of the father-in-law, and it appeared to have been the intention of the parties that after the son-in-law was settled in a home, the father-in-law should have a large plantation out of the lands so purchased: *Held*, that the father-in-law had a resulting trust in all the lands until the separate interest of each should be agreed on, and that this agreement might be by parol; *Ib.*

31. *Taking deed in name of administrator.* When an intestate bought and paid for land under an executory contract for the purchase, and, after his death, the deed is made to the administrator, he will be a mere trustee for the heirs; *Hoel v. Coursey*, 4 C. 511.

31a. *No resulting trust from illegal transactions.* The son, by the directions, and with the means of the father, and for his benefit, entered in his own name land which, by law, the father was forbidden to enter: *Held*, that no trust resulted to the father; a court of equity will never raise a trust in violation of law; *Atsworth v. Cordtz*, 2 G. 32.

III. Charging Exonerating, Distribution and Sale of Trust Estate.

32. *Chargeable for beneficial expenditures.* A trust estate for the benefit of a married woman and her children, should be made chargeable for expenditures made, and services rendered by authority of the trustee, which were beneficial to the enjoyment of the estate; such as the removal of slaves from one State to another, where the beneficiaries resided; *Miller v. Pickens*, 4 C. 182.

33. *Costs of suit.* A trustee is entitled in his account for an allowance for costs which have been recovered against him for the bene-

fit of the estate, and should be charged for the value of the trust estate which he kept in his possession as indemnity against the costs; *Shattuck v. Shirley*, 6 C. 13.

34. *Overseer's wages: Release of trust estate by taking trustee's note.* The trustee employed an overseer for the trust estate, which consisted of a plantation and slaves, and at the end of each year retained from the income sufficient to pay the overseer, and, by consent of the overseer, kept the money on interest, giving his individual note to the overseer for the same. At the same time he claimed, in his settlement with the estate, and received credit for the wages of the overseer. The overseer having prosecuted the trustee to insolvency, filed his bill to collect his wages out of the trust estate: *Held*, that the taking of the trustee's individual note, under the circumstances, was a payment of the debt, and a discharge of the trust estate; *Pettibone v. James*, 3 C. 495.

35. *Property used in exonerating trust estate: As a charge on it.* Where a plantation and slaves have been conveyed in trust for the payment of debts, property purchased by the manager, being the agent of the *cestui que trust* and of the owner of the equity of redemption, and afterwards sold to pay the trust debts, if chargeable at all to the estate, is chargeable on the interest of the *cestui que trust*, as well as on the equity of redemption, and the remedy will be in equity; *Boyd v. Lambeth* 2 C. 433.

36. *Sale of corpus of trust estate for expenses.* If a court of equity would in any case touch the *corpus* of a trust estate, merely to pay the expenses of its management, it will not do so where it is shown that the income is not only sufficient, but had been actually retained by the trustee for that purpose, and this too, by consent of the creditor now seeking a sale; *Pettibone v. James*, 3 C. 495.

37. *Sale of corpus to support beneficiaries.* A court of equity in determining upon an application to order a sale of the *corpus* of a trust estate, which the trustee is authorized, in his discretion, to appropriate to the maintenance and support of the beneficiaries, will look with favor upon the claims of those who have supplied the beneficiaries with necessities, which could not be procured by the proceeds of the estate; but it will refuse its aid to secure enforcement of improvident contracts and extravagant purchases made by the *cestui que trust*, even if they were sanctioned by the trustee; *Prewett v. Lund*, 7 G. 495.

38. *Same: Controlling discretion in sale.* Where property is vested in a trustee for the support and maintenance of a married woman and her children, and the trustee is clothed with the discretion to use the *corpus* of the trust estate for this purpose, a court of equity will control this discretion where it is abused, and compel the trustee to sell a portion of the principal of the estate, where it is necessary for the welfare of the beneficiaries; *Ib.*

39. *Same: Evidence against infants.* A

complainant who seeks the aid of a court of equity in the collection of his demand against a married woman and her children, who are beneficiaries in a trust deed, must prove his claim against the minors, the acknowledgment of the mother will not do; *Ib.*

40. *Same: The children are necessary parties.* And in such a case the children are necessary parties; *Ib.*

41. *Right of cestui que trust to charge corpus of estate.* A married woman may charge, in equity, a trust estate secured to her, to the extent of her interest in it, but no further; and hence, if only the proceeds are settled to her use, she cannot charge or encumber the *corpus* of the estate; *Ib.*

42. *Distribution of trust estate.* A fund which is held by a trustee for the payment of all the creditors of an insolvent equally, cannot be appropriated by attachment to one alone, to the exclusion of the others; and this rule applies where the trustee and insolvent reside in another State, and the fund is situated here. For in such case the courts of this State will recognize the law of the other State, in all applications affecting said fund, and will therefore dismiss a bill filed here against the trustee, to have the whole fund applied to the complainant's debt; *Antignance v. Central B'k of Georgia*, 4 C. 110.

IV. Limitation of Actions in Reference to Trusts.

43. See LIMITATION OF ACTIONS, 43f to 59.

V. Sale of Trust Estates under Execution at Law.

44. See EXECUTION, 31 to 36, and MORTGAGE, 70a, for the rule before Code of 1857.

45. *The rule on this subject under Rev. Code of 1857.* Art. 12, p. 308, of the Rev. Code of 1857, provides that "estates of any kind, holden or possessed in trust for another, shall be subject to the like debts and charges of the person for whose use, or for whose benefit, they are holden or possessed, as they would have been subject to if the person had owned the like interest in the thing holden or possessed, as he may own in the uses or trusts thereof [whether the trusts be fully executed or not, and may be sold under execution at law, so as to pass whatever interest the *cestui que trust* may have; and before a sale under a mortgage or deed in trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed in trust, except as against the mortgagee and his assigns, or the trustee, after breach of the condition of such mortgage or deed of trust.]" The words enclosed thus [] are an addition to the Act of 1822; H. C. 610, § 29, for which see EXECUTION, 34.

46. *Same.* Under this statute, contrary to the former rule, the equity of redemption is subject to sale under execution, both before and after breach of condition; but it is not

subject to sale under an execution emanating from a judgment founded on the debt secured by the mortgage; *Carpenter v. Bowen*, 42 M. 28.

VI. Revocation of Trusts.

47. As to this, see *ante*, 2.

VII. Registration of Trust Deeds and Mortgages.

See MORTGAGES, 45 to 51. REGISTRATION. DEEDS, sub-division Registration.

48. *Removal of property to another county.* The removal by the grantor of personality from the county in which the deed in trust conveying it was made and recorded to another county, without the permission of the trustee or *cestui que trust*, will not affect the rights previously acquired under the deed; *Bogard v. Gardley*, 4 S. & M. 302.

VIII. Void and Illegal Trusts.

49. *Heir takes void trust.* If the trust created by a will be declared ineffectual as against public policy, and the will sufficiently show the intention of testator, that the devisee should be trustee only, without any beneficial interest in the bequest, the trust in the property will revert to the heir, and not to the trustee; *Lusk v. Lewis*, 3 G. 297; *S. P., Cheairs v. Smith*, 8 G. 646.

50. *Same.* In this case a bequest was made to a son of slaves, imposing a condition on him to treat the slaves in a manner contrary to law, and it was held that the son took the slaves absolved of the condition. This case was distinguished from *Lusk v. Lewis*, *supra*, in that it was held that the will showed that the son, who was legatee, should have, at all events, a beneficial interest in the slaves, and that the condition imposed was a subsequent one; *Weathersby v. Weathersby*, 13 S. & M. 655. See *post*, 54.

IX. Appointment of Trustees.

51. *Appointment by the Legislature.* The Legislature may appoint trustees, and convey to them public property in trust; *Comm'r's of Sinking Fund v. Walker*, 6 H. 143. And the Legislature may change the trustees so appointed, and substitute others in their stead, and invest them with the legal title; *Young v. Hughes*, 12 S. & M. 94.

52. *Appointment by Chancery Court.* A new trustee in a deed with power to sell to pay debts, cannot be appointed on an *ex parte* petition of the *cestui que trust*; the appointment can only be made on a bill to which all the parties in interest, including the old trustee, shall be parties; *Phipps v. Tarpley*, 2 C. 597.

53. *Who may be a trustee.* As a general rule, all persons capable of confidence, or of holding real or personal property, may be trustees. A corporation may be a trustee, and so may one or more of its officers, and their successors in office; *Comm'r's of Sinking Fund v. Walker*, 6 H. 143.

54. *Corporation as trustee.* If a trust conferred on a corporation be inconsistent with the purposes for which it was created, that may furnish ground why it may not be compellable to execute it, but it is no ground for declaring the trust void if it be otherwise unexceptionable. No person can contest the right of the corporation to execute the trust, except the State; *Wade v. Am. Col. Society*, 7 S. & M. 663. See CORPORATIONS, 38.

55. *Substitution of a trustee by the trustee.* The grantor in a deed in trust, may confer on the trustee the power to delegate the trust, and such power will exist by a grant of power to a trustee and his "assigns." Hence, where a bank conveyed, for the benefit of its creditors, all its assets to two trustees, "to be held by them, the survivor of them, and the heirs, executors, and assigns of such survivor, in trust, for the payment of debts by the bank," and after the death of one of the trustees, the survivor and the bank executed a new deed, by which the property was conveyed to such survivor and another, upon the trusts mentioned in the first deed; it was held that the second deed was a good and valid assignment; *Peck v. Ingraham & Read*, 6 C. 246.

56. *Appointment of new trustee by mortgagee.* The appointment of a new trustee by the mortgagee in pursuance of a power granted in the deed, is valid, and will confer on the new trustee all the powers vested in the old trustees (citing *Cummings v. Parish*, 10 G. 412); *Bradford v. Jenkins*, 41 M. 328. For the case cited, see PARTNERSHIP, 27, 28.

57. *Grant of power to appoint a new trustee.* The power authorizing the appointment of a new trustee, should plainly express the conditions on which a new trustee may be appointed, and should embrace every event that would render such an appointment necessary. In construing such a power, the intention will govern, and that will be determined from the instrument; *Guion v. Pickett*, 42 M. 77.

58. *Exercise of the power.* The appointment of a new trustee under a power cannot be made unless the terms of the power distinctly authorize it in the particular event which may have occurred. Thus, where a deed in trust authorized the beneficiary to appoint a new trustee in the event of the refusal or neglect of the trustee to execute the trust, and the trustee died, it was held that the contingency had not happened on which the power could be executed, and that a new trustee could be appointed only by a court of chancery; *Id.*

See *post*, 63.

X. Powers and Duties, and Rights and Liabilities of Trustees.

1. His Power to Sell.

59. *As to his power to foreclose a mortgage,* see MORTGAGE, 28.

60. *How the power is to be executed.* A trustee, in a deed to secure the payment of debts, with power of sale, can make the sale

only on the terms and on the conditions mentioned in the deed; and hence, if the sale be authorized in the deed, only on the joint request of the grantor and the beneficiary, a sale without the consent of the grantor will be set aside; *Walker v. Brungard*, 13 S. & M. 723.

61. *Proof of the conditions.* Whether in such a case is it necessary in a suit by the purchaser, to recover land so sold, to prove that the sale was made in accordance with the terms of the deed; *Quære?* but if the defendant in ejectment does not claim under the grantor, such proof is unnecessary; *Wightman v. Reynolds*, 2 C. 675.

See EJECTMENT, 5.

62. *Sale of the property where held adversely.* Whether such a trustee can sell a chattel conveyed in the deed, but held at the time of sale adversely; *Quære?* It would seem that he cannot; but if he make such sale, and the purchaser do not pay the price, the title is not divested, and he may sue in detinue and recover the chattel; *Hundley v. Buckner*, 6 S. & M. 70.

63. *Appointment of agent to make sale and deed.* A trustee with a power of sale of land, appointed an agent in 1841, to make conveyance of the land. In 1848, the trustee sold and conveyed the land to the plaintiff. In 1849, the agent made a deed to the defendant, reciting that it was made in pursuance of a sale made by the trustee to the defendant: *Held*,

1st. That the trustee had no power to appoint an agent to make a sale.

2d. But, conceding that the power of attorney made by him in 1841, conferred power to make a deed in pursuance of a sale made by the trustee, this power was revoked in 1848, when the trustee made a sale to plaintiff. That after that sale his duty and office as trustee ceased, and of course a power granted by him as such, ceased.

3d. That the recital in the deed made by the agent to the defendant in 1849, to the effect that the trustee had made a prior sale to the defendant, was no evidence, since at the time the deed was made, the agent had ceased to be such; *Skipwith v. Robinson*, 2 C. 688. See *ante*, 55, 56, 57, 58.

2. Powers of Joint Trustees.

64. *Must act jointly.* As a general rule, trustees cannot act separately, but they must all join in receipts for money in respect of their office; so of joint agents; but where trustees are appointed for public purposes, the acts of a majority are binding (citing *Bodley v. McKinney*, 9 S. & M. 359); *Hill v. Josselyn*, 13 S. & M. 597.

See EXECUTORS AND ADMINISTRATORS, 240 to 246.

3. Trustee's Duty and Rights in respect to Preserving the Estate.

65. *Duty to protect estate from creditors.* A trustee in a voluntary conveyance, made by a father for the benefit of his children, ought

to interpose to prevent the appropriation of the estate, to the payment of the grantor's subsisting debts, by compelling the creditors to exhaust first, the property of the grantor not conveyed in the trust deed; and a creditor cannot subject property so conveyed, to the payment of his debts, through the co-operation of the trustee, and in violation of his duty to preserve the estate; *Joor v. Williams*, 9 G. 546. See *post*, 88, 89.

65a. *Diligence in preserving the estate.* He is bound to use reasonable diligence in preserving the estate for the beneficiaries; *Ib.*

66. *Same.* Trustees must exercise reasonable care and diligence in managing and preserving the estate, and so long as they do this they are not responsible for losses. If, however, they do not strictly preserve the line of their duty, and a loss, though unexpected and unavoidable, occurs, they are liable. Thus, where a trustee deposited the trust fund in his own name in a bank, and the bank failed, he is liable, for it was a breach of the trust so to deposit it; *Coffin v. Bramlett*, 42 M. 194.

67. *Negligence in employing agent.* Where a trustee was compelled to give security for the forthcoming of the trust property, to abide the result of an action at law, and in order to do so was compelled to agree with his sureties, that the property should be put in possession of an agent approved by them, the trustee will be justified in employing such agent, even though it should be shown that he was not entirely suitable to the business; it not appearing that the trustee acted with gross negligence in the matter; *Shirley v. Shattuck*, 6 C. 13.

4. Dealings by Trustee with Beneficiary, and in Reference to Trust Estate.

68. *Trustee cannot buy trust property.* Whenever the trustee sells the trust estate and becomes himself the purchaser, the sale may be set aside at the option of the *cestui que trust*, as a matter of course, without regard to the fairness or unfairness of the sale. The trustee will not be permitted to buy the trust estate in any event. In setting aside such a purchase, the court will order the property resold, and if it should not bring a higher price on the second sale, then the original sale to the trustee will be confirmed; or the court may in its direction set aside the sale entirely, and order the purchase money to be refunded; *Scott v. Freeland*, 7 S. & M. 409. And it is a rule of public policy necessary to the proper administration of trust estates, that the trustee cannot, under any circumstances, become the purchaser of or acquire any interest in the trust estate adverse to the beneficiary; *Joor v. Williams*, 9 G. 546.

69. *As to effect of purchase by a trustee in making the sale fraudulent as to creditors.* See FRAUDULENT ASSIGNMENTS, 61, 62, 63.

70. *Cannot buy even as agent for another.* A trustee cannot buy at his own sale, even as agent for another. His duties as seller and

buyer are inconsistent, and the sale will be void, even at the instance of creditors; *White v. Trotter*, 14 S. & M. 30; *Lawrence v. Hand*, 1 C. 103.

As to purchases by administrators and executors at their own sale, see EXECUTORS AND ADMINISTRATORS, 342 to 345.

71. *Buying from cestui que trust.* A trustee may purchase from the *cestui que trust*, the trust estate, but such a transaction will be regarded with much suspicion and criticised with the utmost rigor, and if attacked by the *cestui que trust*, it is incumbent on the trustee to show that it was fair and just in all respects, and consummated on his part with the most abundant good faith, and that the *cestui que trust* had all the information in relation to the trust estate, possessed by the trustee; *Jones v. Smith*, 4 G. 215.

72. *Same: Sale ratified by acquiescence.* Where the trustee has been guilty of no positive act of fraud in a purchase made by him from the *cestui que trust*, the latter will lose his right to annul the agreement, for want of the *uberrima fides*, required of trustees in such transactions, if he fail to take steps to set aside the contract in a reasonable time after its consummation. In such case, the unreasonable delay will be held a ratification, and in such a case, a failure to take steps to set it aside for three years and eight months, will be held a ratification by the *cestui que trust*; *Jones v. Smith*, *supra* (citing *Scott v. Freeland*, 7 S. & M. 409), for which see *post*, 73, *et seq.*

73. *Same.* The *cestui que trust* must, in a reasonable time after he comes to a knowledge of the sale, or if he be a minor, after his disabilities have been removed, take steps to set aside the sale, or else his assent to, and ratification of the purchase, will be implied. What is an unreasonable delay in setting aside the sale, cannot be accurately laid down; each case must be governed by its own circumstances. In this case, four years' delay was held to be unreasonable, and to amount to an affirmation of the sale. And in case of a ward, one of the strongest circumstances to show ratification, is a failure to take immediate steps, on his coming of age, to set aside the sale; *Scott v. Freeland*, 7 S. & M. 409.

74. *Same.* And in case of a purchase by the guardian of the ward's property, a reception by the ward on his arriving at full age, of the price, with a full knowledge of what had been done by the guardian, is an affirmation of the sale; but this reception ought not to be construed too strongly against him, where it is evident that he acted without due caution; *Ib.*

75. *Same: Case in judgment.* In this case, the land of the ward was sold by the guardian to pay debts, so as to save the slaves of the ward. The guardian was the purchaser, and it was held, that the reception by the ward after his majority, of the slaves thus saved by the sale of the land, with a full knowledge of the transaction, was a ratification and affirmation of the sale; *Ib.*

See further on this subject. HUSBAND AND WIFE, 109, *et seq.*; GUARDIAN AND WARD, 33, *et seq.*

76. *Purchase by trustee from cestui que trust: Case in judgment.* Where, by the terms of the trust, the trustee has the right to keep and sell the property for his indemnity, on account of his liabilities and advances for the estate, if by consent of the agent of the *cestui que trust*, he retain some of the property (slaves) at a stipulated price, the trustee should be charged in the account with the value of the slaves at the time of the appropriation, and not for hire on the slaves till the account was taken; *Shirley v. Shatluck*, 6 C. 13.

77. *May buy after trust ceases.* Although a trustee cannot acquire an interest in the trust property adverse to the interest of the *cestui que trust*, during the continuance of the trust, yet when the trust is at an end, and a new trust created to which he is a party, it is competent for him to make new terms and stipulations for his own security in undertaking the new trust. Hence, where a part of the trust property had been condemned as the property of another, and is liable for his debts, and an arrangement was made by the trustee and the *cestui que trust*, by which the trustee was to become responsible for the debt, and retake the property; it is competent for the trustee in this new arrangement, to prescribe the terms and conditions on which he will act in reference to it, and he may provide for compensation for his trouble in relation to it, and also for the power to keep and sell the property for his own indemnity; *Ib.*

5. Liabilities of Trustees, and their Accounts.

78. *Liability as to collateral papers.* Where the holder of collateral paper collected, by consent of his debtor, bank paper then current, and was notified that the surplus, after paying his debt, had been assigned to another, who then offered to take the bank paper so collected, but the holder refused to pay it; it was held that by this refusal he became liable to pay the amount in legal tender, though the money he had collected had greatly depreciated; *Knight v. Farborough*, 7 S. & M. 179.

79. *Same: Liability for interest on collateral paper.* The holder of collateral paper is liable for interest, at the rate of six per cent. on collections from the same, which he applies to his own use, though the paper bore eight per cent.; *Tarpley v. Wilson*, 4 G. 467.

As to his general liability for interest, see GUARDIAN AND WARD, 58g. *et seq.* EXECUTORS AND ADMINISTRATORS, 253. *et seq.*

80. *Naked trustee not liable to account.* A trustee who is the mere depository of the legal title, is not liable to account for profits, unless he has actually received them; *Tucker v. Cocke*, 3 G. 184.

81. *Trustee taking possession to injury of beneficiary.* Where the trustee, by the terms of the trust, has the legal right to the pos-

session of the trust property (slaves), for his own indemnity, he will not be responsible for damages in withdrawing the slaves from the possession of the *cestui que trust*, whilst making a crop—it being shown that the *cestui que trust*, and his agent or overseer, refused to recognize the trustee's right, and also refused to sign a paper acknowledging that they held the slaves for him. Nor will he be liable, under such circumstances, for taking slaves which had been taken out of his possession by legal process, and which were restored to him on his giving a replevy bond to have them forthcoming, if he thought there was danger of their removal; *Shirley v. Shattuck*, 6 C. 13.

82. *Right to costs in accounting.* Where a trustee had a right to retain slaves, to indemnify him against loss for advances made and responsibilities incurred on account of the trust estate, he would have the right, in taking an account, to charge on the slaves the costs of a suit he had defended for the estate; *Ib.*

83. *Indemnity against damages.* If an agent, appointed by a trustee, with consent of the grantor, or the surety of such agent, be subjected to damages resulting from an effort to collect the trust funds, that fund will be justly chargeable with the damages, if the agent acted with good faith and reasonable skill. Hence, if he sue out an attachment for that purpose in good faith, and is made liable to damages, the trust fund should pay them; *Walker v. Brungard*, 13 S. & M. 723.

6. Compensation of Trustees, and Counsel Fees.

84. *Rule on this subject.* The general rule is well established in England, that a trustee shall have no allowance for his care and trouble in the performance of his duties in relation to the trust estate; but this rule has been modified, so as to allow a solicitor, who is a trustee, compensation for his services as solicitor for the benefit of the trust estate; also, so as to allow the creator of a trust to provide generally for the compensation of a trustee, or to fix it specifically. And it is also competent for the trustee to contract with the *cestui que trust* for compensation for acting; *Shirley v. Shattuck*, *supra*.

85. *Same.* The English rule, making a trustee's office purely honorary, has been generally abandoned; *Ib.*

86. *Allowance for counsel fees.* Trustees are entitled to an allowance for counsel fees, expended by them in prosecuting or defending suits for the estate, in the *bona fide* assertion or protection of its interests (citing *Satterwhite v. Littlefield*, 13 S. & M. 302); *Ib.*

87. *Same: When trustee is the lawyer.* And this rule should be applied when the trustee himself is a lawyer, and acts for the estate as such, where it is manifestly for the interest of the estate, or an advancement of the trust, and he performs his duties with skill and fidelity, and the proceedings were undertaken with an eye single to the best interest of the estate, and were necessary to protect its rights, and were such as a judicious

and discreet man would have instituted on his own account. And it is a strong justification for such services, that they were undertaken at the instance of the *cestui que trust*. But, considering the danger of temptation in such cases, and the opportunities the trustee has of imposing on the trust estate, it is safer for the trustee to employ other counsel; *Ib.*

XI. Rights Acquired through Illegal Act of Trustee.

88. *Third persons can acquire no rights through fraud of trustee.* A third person cannot acquire any interest in a trust estate through a violation of duty on the part of the trustee, if he have notice of the misconduct of the trustee; nor can he acquire such interest through the enforcement of the paramount claims of creditors, if he co-operate with the trustee in enforcing such claims, when it was the duty of the trustee to have taken steps to prevent it; *Joor v. Williams*, 9 G. 546. See *ante*. 65, and *post*, 103.

89. *Same: Case in judgment.* After the rendition of a judgment against a principal and his two sureties, the principal made a voluntary conveyance of a part of his property, in trust, to one of his sureties, who accepted the trust for the benefit of the grantor's minor children. The sureties afterward, by agreement with the creditor, purchased the trust estate at a judicial sale made to collect the judgment; in this they acted as trustees for the creditor, but under an agreement that they should have the absolute title whenever they paid the judgment. A third person afterward paid the judgment, and took from the sureties a conveyance of the title, and filed a bill in equity against the grantor and the *cestui que trust*, his infant children, and procured a decree setting aside the trust deed, on the ground that it was fraudulent as to creditors, and procured also a confirmation of his title: *Held*, that these proceedings were a fraud upon the rights of the *cestui que trust*, and that a court of equity would grant them relief against all the parties; *Ib.*

90. *Same: Right of beneficiary to follow proceeds of illegal conversion.* When the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has the right to follow the property into the hands of whomsoever he may find it, if the possessor be not a *bona fide* purchaser for a valuable consideration, without notice. And where the trustee has, in violation of his trust, invested the trust property in any other property, the *cestui que trust* has his option either to hold the substituted property liable to the original trust, or hold the trustee personally responsible for the breach of the trust; *McLeod v. First National Bank*, 42 M. 99.

XII. Trustees of Bare Legal Title, and of Executed and Satisfied Trusts.

91. *Trustee of bare legal title: His right and title.* A trustee of the bare legal title,

for the purpose of protecting the property of the wife from the control or debts of the husband, may, even after the death of the husband, assert his title against those claiming against the wife, unless she object; *Gully v. Hull*, 2 G. 20.

92. *Same: Power of cestui que trust.* The title of a trustee, even where he is the mere holder of the legal title, is a vested estate, which cannot be defeated by the *cestui que trust*, so long as the necessity for the trust continues; therefore, the joint conveyance of the husband and wife during the life of the former, will not defeat the title of a trustee who holds the legal title to the property for the purpose of securing it from the debts and control of the husband; *Ib.*

93. *Satisfied trusts.* Where one purchases land with the money of another, and takes a conveyance in his own name, or purchases for the benefit of another, and has been repaid his advance of the purchase money, he is a trustee of a satisfied trust, and cannot, on his mere naked legal title, recover possession from the owner of the complete equity; *Brown v. Weast*, 7 H. 181.

But this doctrine will not be extended so as to allow the plaintiff to recover on a complete equitable title; *Thompson v. Wheatley*, 5 S. & M. 499.

94. *Same: Right of cestui que trust to sue.* After the purpose of a trust has ceased or been accomplished, the trust no longer remains, and the *cestui que trust* may maintain an action at law for the trust property without any formal conveyance of the title by the trustee; *Mitchell v. Mitchell*, 6 G. 108.

95. *Same.* Where a slave is purchased by an agent with the funds of the principal, expressly for his use, the latter may maintain an action at law to recover possession of the slave from the former, notwithstanding the naked legal title may be vested in the trustee by reason of his having fraudulently taken the title to the slave in his own name (citing *Mitchell v. Mitchell, supra*); *Fairly v. Fairly*, 9 G. 280.

96. *Same: Vesting of title in such case in cestui que trust.* If an agent purchase a slave with the funds of the principal and for his use, and afterwards deliver possession to the principal, a naked legal title vested in the agent at the time of the purchase, will be thereby fully vested in the principal; *Ib.*

97. *When a trust is executed.* A trust is executed, unless the instrument creating it contemplate some future act of conveyance by the trustee, and without which the estate would not vest in the *cestui que trust*; *Carradine v. Carradine*, 4 G. 695.

98. *Same: Instances.* R. conveyed slaves to K. in trust: 1st, to control and manage the same for S., until she arrived at full age, or married; 2d, then to deliver them into her possession, and account for the profits which had previously accrued; 3d, after such delivery, that he should see that the slaves were not disposed of, but preserved for the heirs of the body of S., in whom, upon her death, they should vest, and if she should die without

heirs of her body, that then the slaves should vest in her heirs by the maternal line: *He'd*, 1st, that S. took a freehold in the slaves; 2d, upon delivery of possession to her, according to the directions of the deed, the trust became executed; and, 3d, that under the operation of the rule in *Shelly's Case*, the whole estate in the slaves vested in S.; *Ib.*

99. *Same: Another instance.* A conveyance of a chattel in trust for the sole and separate use of a married woman for life, and upon her death that the trustee shall return the chattel to the plaintiff, vests a legal estate in the plaintiff immediately upon the death of the tenant for life, without any return or delivery of the chattel by the trustee; *Davis v. Rhodes*, 10 G. 152.

As to when office of trustee ceases, see EXECUTOR AND ADMINISTRATOR, 64.

XIII. Miscellaneous.

100. *Proof of trusts: Case in judgment.* A bill was filed in the name of A., as trustee, and of B., as *cestui que trust*, in which it was stated that A., though holding an absolute deed, was, nevertheless, but a trustee for B., and the object of the bill was to restrain an execution creditor of one to whom A. had aliened the land from levying his execution on it, the deposition of the alienee that he bought from A., as trustee for B., was taken, and was held to be sufficient proof of B.'s interest; *Taylor v. Strong*, 10 S. & M. 63.

101. *As to trustee as a witness to prove a trust created by violation of his trust*, see ante, 24.

102. *Husband as trustee for wife*, see HUSBAND AND WIFE, 110 to 113.

103. *Sale by trustee for his own indebtedness.* Where a trustee, empowered to sell the trust estate and invest the proceeds for the beneficiaries, sells to one having full notice that the property is trust property, in discharge of his own liabilities to the purchaser, the sale will confer no title; and such purchaser, getting no title, a sub-purchaser from him will get none, as he could get the title only of his vendor; *Butler v. Hicks*, 11 S. & M. 78.

See EXECUTOR AND ADMINISTRATOR, 185, 188, 189. *Ante*, 88, et seq.

104. *Trustee's right to possession, and to sue.* Where personal property is conveyed to a trustee for the separate use of a wife, remainder to her children, the trustee having the legal title, though not entitled to the immediate possession, that right being in the wife, can recover possession, in an action of replevin, from a person claiming the property. A court of equity alone can maintain the wife's right to the possession and use of the property against the claim of the trustee; *Presley v. Stribling*, 2 C. 527; *Presley v. Simmons*, lb. 527.

105. *Trustee may sue cestui que trust for possession.* A trustee may sue the *cestui que trust* at law in detinue for the possession of personalty conveyed to him to pay debts, if it be necessary under the terms of the trust for

the trustee to have possession of the property; *Newman v. Montgomery*, 5 H. 742.

106. *May sue at law*. A trustee is regarded as the legal owner and may sue at law on any contract, made within the scope of his power; *Commissioners of Sinking Fund v. Walker*, 6 H. 143; *S. P., Young v. Hughes*, 12 S. & M. 93.

107. *Cestui que trust may buy trust estate*. A *cestui que trust* is not a trustee with respect to the trust property, and he may, as if he were a stranger, purchase it when sold by the trustee, and if he do so and the property be afterwards sold under execution against him and purchased by his wife, with her separate means, she will be entitled to hold it, if there be no other objection to the sale; *Walker v. Brungard*, 13 S. & M. 723.

108. *Same*. And it will be no objection to such purchase by the wife, that the *cestui que trust*, after his purchase, voluntarily and without consideration promised the grantor in the deed, in writing, that he should have the benefit of the purchase; for the promise, being without consideration, it could not be enforced; *Walker v. Brungard*, *supra*.

109. *Trustee selling land: Failure of consideration*. A trustee who sells land is not supposed to have any interest in it, and is not bound for a failure of title; and if the sale convey no title, the vendee may plead failure of consideration to an action for the purchase money; *Campbell v. Brown*, 6 H. 106; *S. C.*, *Ib.* 230.

110. *As to when office of trustee ceases*, see EXECUTOR AND ADMINISTRATOR, 64.

111. *That trustee makes no implied warranty in sales*, see EXECUTOR AND ADMINISTRATOR, 346, *et seq.*, 341b. WARRANTY, 29.

112. *Extent and nature of the estate of a trustee*. See BANKS, 71. EXECUTOR AND ADMINISTRATOR, 139, *et seq.*

Union Bank and Union Bank Bonds.

1. *Supplemental charter, Constitutional*. The supplemental charter of the Mississippi Union Bank is constitutional; and if it were not, then being void, it could not have the effect of invalidating the original charter; *Campbell v. Miss. Union Bank* 6 H. 625.

2. *Charter good, though the bonds were void*. The charter of the Union Bank is valid to create a corporation with banking privileges, without the aid of the fifth section, pledging the faith of the State for the redemption of its bonds; and even if that section were unconstitutional, the charter would be good; *Ib.*

3. *Issuing notes with false statement on them*. Although the Union Bank had no right to issue its own notes, purporting on their face that the faith of the State was pledged for their redemption, still it is not such a violation of law as would vitiate a contract for the loan of such notes, as the borrower must be presumed to know that the statement was unauthorized; *Ib.*

4. *The State bonds*. The bonds of the State, issued to borrow money for the Union Bank, commonly called Union Bank Bonds, are a legal and constitutional debt against the State; *State of Miss. v. Johnson*, 3 C. 625.

Usage, Custom of Merchants, Usage of Banks.

1. *Same*. A note made payable at a bank, or a contract made with a bank, is presumed to be made with reference to the custom and usage of the bank, which are supposed to be incorporated in the contract, and hence, if by the custom of a bank, the makers of notes made payable there, have until the close of banking hours to pay them, a demand before that time at the bank is insufficient, unless the note be permitted to remain in bank till the close of business hours; *Planter's Bank v. Markham*, 5 H. 397.

2. *Extent of effect of usage*. The usage of insurance companies in New Orleans cannot effect insurance companies located at other points, even on contracts of insurance on voyages to New Orleans; *Natchez Ins. Co. v. Stanton* 2 S. & M. 340.

3. *Universality of usage*. The usage of towing vessels by steamboats on the Mississippi river, unless shown to be so general as to raise a fair presumption that the parties contracted with reference to it, will not affect question of the liability of underwriters on a policy of insurance on goods for a voyage on that river; *Ib.*

Usce,

See NOMINAL PLAINTIFF. ACTION, 4, *et seq.*

Usurg.

See INTEREST AND USURY.

Valuation Law.

1. *When property fails to bring two-thirds of its value, no execution for twelve months*. After the levy of an execution and the benefit of the valuation law claimed and a return of no sale, because the property did not bring two-thirds of its appraised value, an alias execution cannot issue until the expiration of twelve months, even though it be expressly restricted to property not levied on under the first execution; *McGehe v. Handley*, 5 H. 625. But other executions might be levied within the twelve months, and a sale thereunder made, if the property would bring two-thirds of the valuation, as ascertained under them; *Doe v. Natchez Ins. Co.*, 8 S. & M. 197; *Natchez Ins. Co. v. Helm*, 13 S. & M. 182.

2. *Effect of suspension on the lien*. But the suspension of the execution for twelve months, did not affect the lien of the execution on the other property of the defendant, in the least; *Pickens v. Marlow*, 2 S. & M. 428.

3. *How valuation was to be made*. The

valuation required was not of the whole estate in the property, but only of so much as was subject to sale, under the execution under which the appraisement was made; and hence, it is the duty of the appraisers in making the valuation, to deduct therefrom the amount of all the incumbrances on the property, superior to the lien of the judgment under which they make their valuation; *Doe v. Natchez Ins. Co.*, 8 S. & M. 197; *Natchez Ins. Co. v. Helm*, 13 S. & M. 182.

4. *Effect of sale under another execution, when first is suspended.* Two executions against him, were levied on complainant's land, which was appraised, and it failing to bring two-thirds of its appraised value, the sale was according to law postponed for twelve months. During this postponement another execution was levied, and an appraisement had, on the basis of deducting first from its value the amount of two executions already levied, and the defendant in this bill bid two-thirds of this appraisement, and bought the land. The defendant then bought the two executions which had been previously levied, and was proceeding to enforce collection of them out of other property of the defendant; and, thereupon, the complainant (who was the judgment debtor), filed this bill to enjoin the two executions first levied, and have them entered satisfied; and to recover back what he had been forced to pay on one of them: *Held*, that he was entitled to the relief; the defendant having bought the debtor's property subject to these liens, and received a deduction in the price therefor, could not enforce their collection out of other property; and if he retained the land bought, he was bound to pay off the encumbrances, and to refund complainant what he had paid on them; *Natchez Ins. Co. v. Helm*, 13 S. & M. 182.

5. *Notice of the appraisement.* Whether a failure to serve notice of the appraisement would affect the validity of the sale if the property brings two-thirds of its appraised value; *Quere?* *Id.*

6. *Constitutionality of the valuation law.* Whether the valuation law is constitutional; *Quere?* *Clayton, J.*, held it was unconstitutional when applied to contracts made before its passage; *Pickens v. Marlow*, 2 S. & M. 428.

7. *Repeal of the act.* The act repealing the valuation law, contained a provision that it should not apply to judgments rendered before its repeal, and the old law is still in force as to such judgments; *Jennings v. Hammond*, 1 S. & M. 176.

8. *Forfeiture of bond given under valuation law.* The forfeiture of a bond given under the valuation law, is a satisfaction of the original judgment, and a discharge of all the defendants therein who did not join in the execution of the bond; *Davis v. Hoopes*, 4 G. 173.

Variance.

See EVIDENCE, 313 to 328a.

Vendor and Vendee.

See BOUNDARIES, SURVEYING. FRAUDS, STATUTE OF.

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I. The Writings Necessary to, and Parol Agreements for a Sale.

1. *The agreement must be in writing.* See FRAUDS, STATUTE OF, 16 to 27.

2. *Effect and consequences of a parol sale.* See FRAUDS, STATUTE OF, 16 to 21. DAMAGES, 28.

3. *Parol trusts in land.* See FRAUDS, STATUTE OF, 28 to 36. TRUSTS AND TRUSTEES, 5 to 9.

4. *What the writing must be: Its execution and necessary certainty.* See FRAUDS, STATUTE OF, 39 to 44.

II. The Deed.

5. *The deed.* See DEED. REGISTRATION.

III. Executory Agreements for the Sale of Land; Title Bonds.

1. *Whether the Covenants are Dependent or Independent.*

6. *Whether the covenants are mutual and dependent or independent.* See MUTUAL AND DEPENDENT AND INDEPENDENT COVENANTS.

2. *Rights of Vendor as to Possession and Title.*

7. *Who entitled to possession where sale is executory.* Where a sale of land is made by the bond of the vendor, conditioned to make title on the payment of the purchase money, if nothing be said in the contract as to when vendee shall have possession, the vendor is entitled to retain the possession until all the purchase money is paid; *Scales v. Anderson*, 4 C. 94.

8. *Right of vendor to retain title till payment of purchase money.* A vendor who has given a bond to make title without fixing any time or condition in, or on which a deed is to be made, may retain the title till the purchase money is paid, or he may convey before that time at his election. And if he make an imperfect deed before payment of the purchase money, this will not release him from his obligation in the bond to make a good deed; and hence, the execution of such imperfect deed is no defence to an action for the purchase money; *Hazlip v. Noland*, 6 S. & M. 294.

9. *Same.* Unless in pursuance of a clearly expressed intention of the parties, a court of equity will not compel a vendor to part with his title till he has received the purchase money. Hence, where the vendor executed an agreement, in which he stated that in consideration of \$24,000, to be paid by S. in four equal annual instalments due on the first days of January in each of several years named, he bound himself to convey to R. & S. in fee simple, certain land, it was held that the vendor was not bound to convey until all the purchase money was paid; *Stone v. Buckner*, 12 S. & M. 73.

3. *Vendor's Obligation to make a Deed.*

See post, 217, et seq.

10. *Covenant to make deed, "with the usual covenants."* &c. The condition of a title bond, which binds the vendor to make, or cause to be made, a good and sufficient title to the land, "with the usual covenants of warranty," is not complied with by the execution of a deed with a special warranty against the claim of the grantor, and his heirs and those claiming under him; *McAllister v. Moye*, 1 G. 258.

11. *Covenant to convey a good title: Meaning of.* But, as a warranty does not pass title—being a mere indemnity against a defective title—if the covenant of the vendor be, "to make a good title" to the land, he complies with the covenant when he makes a deed, actually conveying a good title, though it contain no covenant of warranty; *Hazlip v. Noland*, 6 S. & M. 294.

12. *Covenant to make a perfect deed: Meaning of.* If the covenant, however, be to "make a good and perfect deed," it means the conveyance of a perfect title, and it is not complied with by the making of a good deed with warranty of title, there being an outstanding encumbrance on the land, not extinguished; *Greenwood v. Ligon*, 10 S. & M. 615; *Feemster v. May*, 13 id. 275.

13. *Covenant to make a general warranty deed: Breach of.* Where the covenant of the vendor is "to make a general warranty deed," it is no breach of it, if the deed executed by the vendor be defectively acknowledged by his wife, so as to leave her a right of dower in the land; *Hudson v. Watson*, 4 C. 357.

14. *Rule as to the demand and preparation of a deed.* In New York, the rule is, that when a party covenants to convey, he is not in default until the party, who is to receive the conveyance, being entitled thereto by the terms of the contract, has demanded it of the vendor, and having waited a reasonable time to have it drawn and executed, has made a second demand. In England, the vendee must prepare the deed and present it for execution. The court, in this case, did not decide which of these was the correct rule here, but held, that a vendor who had given a bond to convey title on payment of the purchase money, was not in default, where the vendee had merely paid the purchase money and had not complied with either rule; *Johnston v. Beard*, 7 S. & M. 214.

15. *Same.* In such a case, the demand for the deed must be made, and a reasonable time given for its execution; but the vendee need not prepare the deed; *Stanlifer v. Davis*, 13 S. & M. 48; and the vendor is not in default, until after waiting a reasonable time after the first demand for the preparation of the deed, a second demand is made; *Hudson v. Watson*, 4 C. 357.

16. *What is a reasonable delay after first demand.* What is a reasonable time for the preparation of the deed must be determined from all the circumstances attending the transaction. The sickness of the vendor when the demand is made, and his consequent inability to attend to the preparation of the deed, is a matter also to be considered in determining upon the reasonableness of the delay; *Id.*

17. *The nature of the demand.* The demand for such a deed must be positive and unequivocal, so as to give the vendor notice that it is intended for a demand. A conversation between the parties, in which the vendor proffers to make a deed, and the vendee says it is immaterial that it be then made

and in which it was finally agreed that the parties should meet at a place named, on a specified day, when and where the deed should be delivered, is not a demand; *Id.*

18. *Conveyance of other land by agreement.* A plea to an action on a bond to convey title to lands therein named, that the defendant had executed a deed to other lands and delivered to the plaintiff, which he accepted in satisfaction of the bond, is good; *Johnston v. Beard*, 7 S. & M. 214.

19. *Duty of vendee to point out defects.* If the vendor tender a deed which on its face appears to conform to his contract, objections on account of encumbrances, as an excuse for not receiving it, must be pointed out by the vendee; *Bright v. Rowland*, 3 H. 398.

4. Each Party must Tender Performance to put the other in Default.

20. *As to this*, see MUTUAL AND DEPENDANT AND INDEPENDANT COVENANTS, 9, 10. See *post*, 173. *et seq.*

21. *Where vendor is dead, upon whom demand shall be made.* It seems that the administrator, and not the heir, of a deceased vendor, is the proper party from whom a demand should be made for a deed, and to whom the purchase money should be tendered, *sed quære?* *Herndon v. Harrison*, 5 G. 486.

5. The Essentiality of Time of Performance.

22. See TIME. *Post*, 23, 181, 187, 188.

6. The Obligation of Vendor in Reference to the Title.

23. *Same.* The vendor will be in no default if he be able to make title at the time his covenant obliges him to make it; *Wiggins v. McGimpsey*, 13 S. & M. 532; *Gibson v. Newman*, 1 H. 341. In the absence of fraud, the vendor is not in default for a failure to have a complete title before the time he has contracted to convey, for the taking of the time may have been intended to enable him to procure it in the interim: *Hanna v. Harper*, 3 S. & M. 793. At all events, the vendee cannot, where the covenants are independent, ask for a title, or a rescission of the contract, before the time when the title is to be made, without having paid or offered to pay the whole purchase money; *Harris v. Bolton*, 7 H. 167; *Bird v. McLaurin*, 4 S. & M. 50.

After the purchase money is all due (where the covenant is to convey on payment of the last instalment, and therefore independent), the vendee may tender the whole and demand a title, and if it be not made, it is a good defence to an action for the purchase money; *Mobley v. Keyes*, 13 S. & M. 677; *Wiggins v. McGimpsey*, 13 S. & M. 532. But this is overruled in *McMath v. Johnson*, 41 M. 439; which follows the rule in *Coleman v. Rowe*, 5 H. 460, for which see *post*, 148.

24. *Same: Where vendee has a complete equity.* Where the vendee knew that the legal title was outstanding, and that judicial proceedings were necessary to enable vendor to get it, and the vendee has a complete equity, the vendor will not be in default in

not having the legal title which he is bound to convey, if his failure was occasioned by necessary delay in the judicial proceedings; *Green v. Finucane*, 5 H. 542.

25. *Ability to make title.* See MUTUAL AND DEPENDENT AND INDEPENDENT COVENANTS, 5.

See further on this subject, *post*, sub-division Rescission, &c.

7. Right of Vendee in Title Bond to Resist Collection of Purchase Money.

26. *Same: When title is defective.* Suit was brought for the last instalment of the purchase money of land sold by bond conditioned to make title upon payment of the purchase money, and vendee relied on the fact that vendor had no title, as a defence to the action: *Held*, if he had accepted a deed and gone into possession, he could not defend until there was an actual eviction; but where a bond is executed, the covenants are mutual and dependent, and the vendee cannot be forced to part with his money until the vendor is ready to make title; *Feemster v. May*, 13 S. & M. 275. And this is the rule generally where the covenants are mutual and dependent; the inability of the vendor to make title being considered as a failure of consideration for the promise to pay the purchase money; *Wiggins v. McGimpsey*, 13 S. & M. 532. The rule was held the contrary in *Miller v. Owens*, W. 244.

As to the right to make the defence when the covenants are independent, see *ante*, 23.

For the rule on this subject where vendee has accepted a deed, see *post*, 29. *et seq.*

27. *Same: Where vendee had notice of the defect.* Encumbrances of which the vendee had notice at the time of the sale, and which have not been enforced, do not constitute a failure of the consideration of the promise to pay. And the vendee is bound to take notice of judgment liens duly enrolled. Hence, the existence of such a lien, even where the covenants are mutual and dependent, cannot be set up as a defence to an action for the purchase money. But it seems if a sale of the land had been made under it, whereby the title had passed out of the vendor, the rule would be different; *Wiggins v. McGimpsey*, 13 S. & M. 532. See *post*, 150.

28. *Same; Sale under such lien, after a rescission.* But a sale under such a lien, made after a rescission of the contract by the vendor and vendee, would not be a good defence to an action for the purchase, brought by an assignee. The vendee having full notice of the assignment at the time of the rescission. For having such notice, the rescission could not affect the assignee's rights, and the judgment lien of which the vendee was bound to take notice, being not of itself a good defence. The assignee's right to recover, was perfect at the time of the rescission; and a subsequent sale under the lien, could not be held to constitute a failure of consideration, since at that time, the interest of the vendee in the land had been re-vested in the vendor by his own act, and he cannot complain of

the sale of another man's property in which he had no interest; *Ib.* See *post*, 197.

IV. Right of Vendee having Deed to resist Collection of the Purchase-Money.

1. Necessity for Eviction.

29. *Same.* A vendee in possession under a deed with covenants of general warranty of title *only*, cannot, when sued at law for the purchase money, set up the defence of a failure of consideration, by showing the title to be bad, unless he has been actually evicted, or there was fraud in the sale; *Hoy v. Taliaferro*, 8 S. & M. 727; *Duncan v. Lane*, 1b. 744; *Johnson v. Jones*, 13 S. & M. 580; *Heath v. Newman*, 11 S. & M. 201; *Dennis v. Heath*, *Id.* 216; *Wiggins v. McGimpsey*, 13 S. & M. 532; *Glenn v. Thistle*, 1 C. 42; *Wailes v. Cooper*, 2 C. 208; *Winstead v. Davis*, 40 M. 785; S. P., *Burrus v. Wilkinson*, 2 G. 537; *Anderson v. Hill*, 12 S. & M. 679; *Miller v. Lamar*, 43 M. 383; *Guice v. Sellers*, 43 M. 52.

30. *Same; Rules in equity.* And in cases free from fraud, the rule is the same in equity; *Witty v. Hightower*, 6 S. & M. 345; *Vick v. Percy*, 7 S. & M. 256; *Anderson v. Lincoln*, 5 H. 279; *Johnson v. Jones*, 13 S. & M. 580; unless it be shown that the vendor is insolvent, which fact constitutes the exception, and authorizes the interposition of a court of equity; *Johnson v. Jones*, *supra*; S. P., *Kilpatrick v. Dye's Heirs*, 4 S. & M. 289; *McDonald v. Green*, 9 S. & M. 138; *Wailes v. Cooper*, 2 C. 208; *Garlman v. Jones*, 1b. 234; *Miller v. Lamar*, 43 M. 383. See *post*, 154, *et seq.*

31. *What is eviction under this rule.* There is no breach of a general warranty of title without an actual eviction; but where at the sale a third person is in possession under a paramount title, this is equivalent to eviction, if he refuses to surrender; and so if vendee be ousted by one having paramount title, but in that case the vendee must show the title to be paramount; *Witty v. Hightower*, 12 S. & M. 478; *Glenn v. Thistle*, 1 C. 42; *Dennis v. Heath*, 11 S. & M. 206. And the government of the United States is always considered as in possession of its own land, and a sale of it carries possession. And hence, the vendee may defeat a recovery for the purchase money, by showing that the land was public land, and has, since the sale to him, been sold by the government to another; *Glenn v. Thistle*, *supra*.

32. *Same.* A sale by the sheriff, under an execution against the vendor, older than the sale to vendee, followed by a voluntary abandonment of the possession by the vendee, is not equivalent to an eviction; *Hoy v. Taliaferro*, 8 S. & M. 727; *Duncan v. Lane*, 1b. 744; *Heath v. Newman*, 11 S. & M. 201; *Dennis v. Heath*, 1b. 206.

A voluntary surrender by vendee, to one having paramount title, is not a sufficient eviction; nor is a judgment in ejectment, without execution or entry under it by plaintiff, an eviction; *Dennis v. Heath*, 11 S.

& M. 206. Nor is a sale under a valid decree in chancery, to satisfy a prior encumbrance, without ouster, an eviction; *Wilkinson v. Burns*, 2 G. 537.

But where the contract is executory, a judgment in ejectment would have the same weight as an actual eviction under it; *Green v. McDonald*, 13 S. & M. 445.

For tortious evictions, see *post*, 222, 223.

33. *Same: Encumbrances known to vendee.* A purchaser who has taken a conveyance is entitled to no relief in equity against encumbrances of which he had notice. His remedy is on his covenant of warranty of title. Nor can he recover on his warranty against his vendor, for encumbrances of which he (vendee) held on the land, for he cannot evict himself; *Stone v. Buckner*, 12 S. & M. 73.

34. *Where sale is void.* But the rule which requires eviction, before defence can be made for defective title, does not apply where the sale itself is void, and for that reason confers no title (see EXECUTOR AND ADMINISTRATOR, 264, 265). But this defence of illegality in the sale, can only be made when the action is against the purchaser, on the contract of sale itself, and is not available where a vendee or sub-vendee, from the purchaser at the illegal sale, resells with a general covenant of warranty of title; for in that case the action is not on the illegal contract, but on a subsequent contract between other parties, and the illegality of the precedent sale, when shown, is but a mere defect in the title. And this rule was applied when the administrator had purchased from his vendee (the sale to the vendee being illegal), and then, as an individual, resold to another, who undertook to set up the defence; *Duncan v. Lane*, 8 S. & M. 744; S. P., *Green v. McCarroll*, 2 C. 427; *Williams v. Children*, 2 C. 427.

See EXECUTOR AND ADMINISTRATOR, 365, also, *post*, 220.

2. Defence of Fraud in the Sale, and failure of Consideration.

35. *Same.* Though a vendee having a deed and in possession cannot defend an action for the purchase money, upon the ground of failure of consideration arising from a defect of title, yet he may defend for any fraud arising in the contract independent of and apart from any defect in the title; *Hill v. Anderson*, 12 S. & M. 679; *Johnson v. Jones*, 13 *id.* 580. And if a vendee be sued at law for the purchase money, and fail to set up such fraud in the sale, being unconnected with the title, as a defence, he cannot be heard to complain of it in equity; *Johnson v. Jones*, *supra*.

36. *Same.* The trustees of a small village promised in their public advertisement giving notice of the sale of lots in it, at auction, that they would build a male and female academy therein. They failed to do so, whereby the lots became worthless; *Held*, that this failure constituted a failure of consideration as to the purchasers of the lots, and they were not bound to pay for the lots purchased by them; *Brewer v. Harris*, 2 S. & M. 84.

See FRAUDS, &c., 6, 7, 10.

37. *Same.* If the vendor of a lot in a small village represent to the purchaser that the Methodist Conference had determined to build a college there, and would build it, and the vendee, relying on the representation, make the purchase; and if the representations be untrue, and no college be built, the vendee cannot be compelled to pay the purchase money; *Ellis v. Martin*, 2 S. & M. 187.

38. *Fraudulent representation as to title: Duty of the vendee to show it, &c.* A vendee, seeking to avoid payment of the purchase money, upon the ground that the vendor had made a fraudulent representation, that there was no encumbrance on the land, when in fact there was a mortgage lien in favor of a prior vendor, must not only show the existence of the lien at the time of the sale, but he must show that he has been injured by it. He must, therefore, show that a lien still exists. Fraud without injury is no ground for relief (citing *Davidson v. Moss*, 5 H. 673; *Hall v. Thompson*, 1 S. & M. 443; *Moss v. Davidson*, 1 S. & M. 112); *Harris v. Ranson*, 2 C. 504. See FRAUDS, &c., 12, 12a, 25.

39. *Same.* Vendee cannot resist the payment of the purchase money by showing that the vendor represented he had a good title (when he had not), the representation being made in good faith. Such representation is nothing more than is contained in the covenants of warranty, in a more solemn form; *Winstead v. Davis* 40 M. 785.

See FRAUDS AND FRAUDULENT REPRESENTATIONS, 12.

40. *Partial failure of consideration.* Whether a partial failure of consideration arising from a breach of warranty of title, can be set up against an action for the purchase money; *Quære?* The safer rule is to leave a party to his action on the covenants in the deed; *Phipps v. Tarpley*, 2 G. 433.

41. *Same: From deficiency in the quantity.* The court in this case incline to the opinion, that where the quantity of acres warranted in a deed is not to be had, the failure of consideration arising therefrom, being only partial, cannot be set up as a defence at law, unless there were fraud in the transaction; *Kerr v. Calvit*, W. 115. See DEED, 25a, *et seq.*

42. *Warranty as to quantity: Case in judgment.* Where the vendor agrees merely to assign certificates of entry from the United States land office, which describes the land by legal sub-divisions, and contains a statement of quantity, he will not be responsible if, on a survey, there should be a deficiency in quantity; and a conveyance of a single tract without specification as to quantity, does not bind the vendor to warrant the particular number of acres, though there may have been an expectation of both parties, founded on documents and other evidence known to both, that the quantity would be greater than what it appeared to be on a subsequent survey; *Moore v. Vick*, 2 H. 746.

43. *Deficiency where conveyance is for*

"more or less." Where in a deed or bond for title, the number of acres is specified, with the superadded words, "more or less," no deduction will be made from the price for an inconsiderable deficiency. These words mean, that the parties will mutually risk the number stated to be the true amount, unless the variation be considerable. And a deficiency of eighty acres in a tract stated to contain one thousand acres, was held to be inconsiderable, the deficiency being only about one-twelfth of the amount sold; *Phipps v. Tarpley*, 2 C. 597.

44. *Deficiency occasioned by failure of title as to part.* Where a part of the land sold is in the adverse possession of another, the sale is void as to that part, and the vendor will be entitled to a deduction of the purchase money for that part; *Ib.*

V. Bona Fide Purchases for Value.

1. Must be a Purchaser for Value.

45. *Same.* A purchaser cannot set up the defence of a *bona fide* purchaser for value, if he be a mere volunteer; he must have paid a valuable consideration; *Doss v. Armstrong*, 6 H. 258.

46. *What is a valuable consideration.* To constitute a purchaser for a valuable consideration, the purchaser must have advanced some new consideration, either in money or property, or must have relinquished a pre-existing security for his debt, or done some act on the faith of the purchase which cannot be retracted (citing *Robbins v. Callender*, Freem. Ch. R. 295; *Rowan v. Adams*, S. & M. Ch. R. 40; *Emanuel v. White*, 5 G. 56; *Pope v. Pope*, 40 M. 516); *McLeod v. First National Bank*, 42 M. 99.

See BILLS OF EXCHANGE, &c., 12, 116, 145, 233.

46a. *Mortgagee.* A mere mortgagee when the debt secured is an antecedent one, is not a purchaser for value, but an absolute purchaser who paid the purchase by an antecedent debt is, where he surrendered a judgment lien; for in case he is deprived of his purchase he cannot be placed in his former position, but must be in a worse one, and that is the reason of the distinction between the two cases; *Brown v. Barnes*, 1 C. 136.

47. *Satisfaction of pre-existing debt.* It is now well settled that a purchaser who takes the property, or a security on it, in satisfaction of a pre-existing debt, which is thereby discharged and extinguished, is a purchaser for value within the rule which protects *bona fide* purchasers for value, and this rule also applies to the transfer of negotiable securities (citing *Upshaw v. Hargrove*, 6 S. & M. 286; *Love v. Taylor*, 4 C. 567.) But if he takes the property as a mere security for a pre-existing debt, which remains unsatisfied and in full force, he is not a purchaser for value; *Perkins v. Swank*, 43 M. 349. In this last case, *Pope v. Pope*, 40 M. 516—so far as it gives countenance to the idea that a mortgagee for a present coterminous consideration is not a *bona fide* purchaser for

value—is overruled, the doctrine being that a mortgagee, as well as an absolute purchaser, is a purchaser for value if he pay or advance a new consideration, or extinguish absolutely an antecedent debt.

See FRAUDULENT ASSIGNMENT, 14, 15; *post* 99.

2. Must be a Purchaser of the Legal Title.

48. *Same.* The words “purchasers for a valuable consideration without notice,” in our statute of registration, mean that class of persons whom the courts have declared to be *bona fide* purchasers for value without notice, and the statute protects that class, and no others. It is well-settled that none can claim that protection except purchasers of the legal title, and that in all cases where the purchaser gets a mere equity, then, as to other equities even, which are prior in time to his equity, he will be postponed according to the maxim *qui prior est in tempore potior est in jure*; *Wailes v. Cooper*, 2 C. 208; S. P., *Walton v. Hargroves*, 42 M. 18.

A party who does not get an apparent good legal title cannot set up the protection of a *bona fide* purchaser; *Lisloff v. Hart*, 3 C. 245; *Perkins v. Swank*, 43 M. 349; and the legal title must also be vested in him by a completed conveyance; *Kilcrease v. Lum*, 7 G. 569; S. P., *Parker v. Foy*, 43 M. 260.

49. *Same: Example.* Therefore, when a purchaser had notice of an outstanding unregistered mortgage at the time of the purchase, and whereby he only acquired the equitable title remaining in the mortgagor, he would be postponed to a second outstanding unregistered mortgage of which he had no notice, for this mortgage is prior in time to the purchase; *Wailes v. Cooper*, 2 C. 208.

3. The Want of Notice.

50. *What is notice.* A vendee is bound to take notice of all encumbrances which are recited in the title deeds of his vendor, and under which he derives title, and he cannot insist on want of notice of such recitals, by denying that he read them; *Wailes v. Cooper*, 2 C. 208; *Chew v. Calvert*, W. 54; *Gordon v. Sizer*, 10 G. 805. And so when a purchaser cannot make out his title, but by a deed which leads to another fact, he is chargeable with notice of that fact; *Martin v. Nash*, 2 G. 324. If the deed or outstanding encumbrance be registered, the purchaser is bound to take notice of it; *Leonard v. Corley*, 43 M. 687. See NOTICE, 1, and *post* 102, 110b.

51. *As to notice arising from possession,* see NOTICE, 2, 13; from want of possession same title, 3; from inadequate price, same title, 5, 6; from want of deed by vendor, see *post*, 56.

51a. *Putting party on inquiry.* Whatever puts a party on inquiry, is notice of whatever that inquiry, conducted with reasonable and ordinary diligence, would lead to a knowledge of, and it is the duty of the purchaser to make the inquiry; *McLeod v. First*

National Bank, 42 M. 99; S. P., *Parker v. Foy*, 43 M. 260.

51b. *Notice to agent.* Whenever a party purchases property through the agency of another, notice of the rights of third parties to the property communicated to that agent during the negotiation, will be held in any controversy in relation to it, with such third parties, as equivalent to direct notice to the principal; *Ross v. Houston*, 3 C. 591. See PRINCIPAL AND AGENT, 10, 90, 91, and *post*, 137, 138.

52. *Notice from vendor.* Where the only notice that a purchaser has of a previous executory agreement by the vendor to sell the land to another, is the statement of the vendor, who at the same time told him that the sale had been rescinded, he will be justified in acting on the statement as if the whole were true, the land being wild and unoccupied; *Curtis v. Blair*, 4 C. 309.

53. *Same.* Notice given by the vendor to the vendee, of an outstanding unregistered encumbrance is good, though the vendee did not believe the communication, and thought that it was made by the vendor as a pretext for breaking up the trade; *Wailes v. Cooper*, 2 C. 208.

54. *Notice to principal does not affect a surety.* Where a party, about becoming surety for another for the purchase money of land, stipulates at the time, that the vendor shall convey the land directly to him, in order to indemnify him as surety, and it is accordingly done, he can defend on the title so procured, as a *bona fide* purchaser for value, notwithstanding the principal, for whose use the land was bought, has notice of an outstanding encumbrance; *Id.*

55. *When notice may be given: Before payment or conveyance.* If notice be given before payment, though after a purchase in good faith, the purchaser cannot claim the protection of a *bona fide* purchaser; *Lisloff v. Hart*, 3 C. 245. And so if the vendee get notice before payment, or before he has received a conveyance for the land; *Kilcrease v. Lum*, 7 G. 569.

56. *Same: Case in judgment.* A father bought land, and took a deed in the name of an infant son; but resided on it, claiming title and ownership, the son being a member of his family. The deed to the son was not recorded. The father sold the land to another, and received payment. When the conveyance was to be made, he stated to the vendee, that the deed to his son had been made to him by mistake; and he destroyed that deed, and caused another to be made, so as to convey title to the vendee, who afterwards, in opposition to the son's claim, set up as a defence, that he was a *bona fide* purchaser for value. *Held*, that the defence could not avail him, as the father had no title whatever; that if he did not pay the money, until he knew the deed was made to the son, then he had notice; if he paid before, he should have asked for the father's title deed, and this would have led to notice. Having trusted to the father's word, he could not claim the pro-

tection of a *bona fide* purchaser: *Lisloff v. Hart*, 3 C. 245.

57. *Notice after partial payment.* The rule that payment of a part of the purchase money, before notice, although not sufficient to invest the vendee with the character of a *bona fide* purchaser, as it regards the estate purchased, yet gives him the right to require reimbursement from the owner, as the condition of giving way to his title, seems to accord with the principles of justice and reason, and should, therefore, be recognized by the courts of this State. And when such partial payment, so made before notice, is equal to the value of the estate purchased, at the time of the final decree, a bill to enforce the encumbrance, which is a mere lien on the land, will be dismissed; *Servis v. Beatty*, 3 G. 52.

See post, 98

4. Miscellaneous.

58. *Purchaser from fraudulent purchaser.* A *bona fide* purchaser from a fraudulent purchaser, will be protected; *Boon v. Barnes*, 1 C. 136.

59. *Same: Instance.* A vendee for a valuable consideration without notice, from the original purchaser from an administrator, where there was a want of power in the administrator to sell, will not be protected in a case where the administrator sold the certificate of entry from the United States to his intestate; and the purchaser from him, before his sale to the vendee, obtained a patent in his own name from the United States government; *Williamson v. Williamson*, 3 S. & M. 715.

60. *Purchaser from agent whose power has been revoked.* A person taking a deed from an agent whose power of attorney is of record, is, nevertheless, bound to notice a deed made by the principal directly, and put on record subsequent to the recording of the power of attorney; *Skipwith v. Robinson*, 2 C. 688.

61. *Waiver of rights in favor of purchaser by acquiescence.* In 1815, C. sold his possessory right, as a settler on land ceded by Spain to the United States, and in 1817, the land was confirmed to him. His vendee went into possession, and C. never afterwards claimed the land. His vendee afterwards sold to K., who occupied the land till 1837, when he sold to N. Both K. and N. made valuable improvements on the land. C. in his life time, and his heirs afterward residing in the neighborhood, and some of C.'s heirs bought part of the land from K. The heirs acquiesced in the title of the occupants till 1843. The conveyance from C. to his vendee, was defective in not having a seal: *Held*, that under the circumstances, it was a *bona fide* purchase, and that C.'s heirs were estopped by their silence and acquiescence; *Nixon's Heirs v. Carco's Heirs*, 6 C. 414. See post, 66, 67.

62. *Judgment creditor and purchaser at execution sale as bona fide purchaser.* A judgment creditor (and the purchaser at sheriff's sale who stands exactly in his shoes) is not a *bona fide* purchaser for value, but a mere volunteer. The judgment is a lien only on

the actual interest of the debtor, and that is all the creditor or purchaser at sheriff's sale gets. The rule is different where the creditor gets a conveyance of the legal title by mortgage, or a particular assignment for his benefit. Judgment creditors and general assignees—the assignees of bankrupts and insolvents—take by operation of law, and the law gives them only the interest of the debtor (criticising and explaining *Kilpatrick v. Kilpatrick*, 1 C. 124, for which see *SHERIFF &c.*, 130; *Kelly v. Mills*, 41 M. 267.

See *SHERIFF AND SHERIFF'S SALE*, 129, 130, 131. Post, 94, 95.

63. *Same.* Hence, when the debtor holds the legal title by an absolute deed, but is a mere trustee by implication of law, a judgment against him does not bind the beneficial interest of the *cestui que trust*, though the creditor has no notice of it; *Kelly v. Mills*, *supra*; and his rights are subordinate to the secret lien of the vendor of the debtor; *Walton v. Hargroves*, 42 M. 18; for which see *SHERIFF AND SHERIFF'S SALE* 131.

64. *The rule as affected by the Registry Acts.* But this rule does not extend to cases within the operation of the Registry Acts; thus where a debtor having sold his land, and his vendee having failed to record his deed within the time limited, a judgment was rendered against the debtor, after the sale and before record of the deed, the creditor being without notice of the sale, it was held that the creditor was entitled to subject to his judgment, the actual interest of the debtor in the land at the date of the judgment, unaffected by the unrecorded conveyance (citing *Henderson v. Downing*, 2 C. 106; *Harper v. Tapley*, 6 G. 506); *Kelly v. Mills*, *supra*. See *REGISTRATION*, 15, 16, 20. DEED 45, 46, 53. JUDGMENT 113. HUSBAND AND WIFE, 38a.

65. *Mala fide purchaser.* If vendor sells again to another who has notice of the first sale, the last vendee will be a trustee for the first purchaser; and a court of equity will compel him to convey to the first purchaser; and in a bill by the first vendee for specific performance, the last vendee is a necessary party; *Stone v. Buckner*, 12 S. & M. 73.

65a. *Same.* A *mala fide* purchaser of land from an administrator in chief, is not entitled to have refunded the purchase money which he has paid, upon a nullification of the sale by the administrator *de bonis non*; *Forniquet v. Forstall*, 5 G. 87.

65b. *Bona fide purchaser entitled to have his bid refunded.* A *bona fide* purchaser of realty, at a sheriff's sale, when the execution was issued after the defendants' death, is entitled, upon the sale being set aside, to have his bid refunded, if the judgment were a lien on the land; *Cook v. Towns*, 7 G. 685.

65c. That the rule extends to purchasers of personalty, see *CHANCERY*, sub-division *Bona Fide Purchaser*.

VI. Estoppels to Owner to set up his Title.

66. *Allowing one to improve land.* If one

knowingly, though he acts passively by looking on, suffer another to purchase and expend money on land under an erroneous opinion that he has title, without making his claim known, he shall not afterwards be permitted to exercise his legal rights against such purchaser; *Nixon's Heirs v. Carcos' Heirs*, 6 C. 414; *S. P. Dickson v. Green*, 2 C. 612; digested in ESTOPPEL 4.

67. *Same*. And this rule is applied with more stringency when the acquiescence is so long as to be fortified by legal pre-emptions arising from possession for a great lapse of time without interruption; *Nixon's Heirs v. Carcos' Heirs*, *supra*. See *ante*, 61.

VII. Specific Performance.

See CHANCERY, sub-division Specific Performance, for the matter of this title generally, and *post*, 171, 163, 190, 196, 204.

68. *Vendor's right to, for collection of purchase money*. A vendor who has given a bond to make title upon payment of the purchase money, may, upon the failure of his vendee to pay at maturity, maintain a bill in equity for a specific performance, and on failure of the vendee to comply, may have the land sold to pay the purchase money; *Dollahite v. Orne*, 2 S. & M. 590; *Tanner v. Hicks*, 4 S. & M. 294; *Burke v. Gray*, 6 H. 527; *Pitts v. Parker*, 44 M. 247; *Smith v. Wells*, 44 M. 296.

69. *Same: Right of assignee of purchase money*. And in such a case, if the purchase money has been assigned, the assignee may, either jointly with the vendor as co-complainant, or by making him a co-defendant with the vendee, maintain a bill for specific performance, and on default of the vendee to pay, may have a sale of the land to pay the debt (citing *Dollahite v. Orne*, *supra*); *Tanner v. Hicks*, 4 S. & M. 294; *Pitts v. Parker*, 44 M. 247.

70. *Where interest sold is uncertain*. A bill to enforce a vendor's lien bears a strong resemblance to a bill to foreclose, and to a bill to enforce specific performance, neither of which can be maintained, where it is utterly uncertain what interest in the land has been sold; *Allen v. Bennett*, 8 S. & M. 672.

71. *As to duty of vendor to tender a deed, and of vendee to pay the money precedent to filing the bill*, see MUTUAL AND DEPENDENT, AND INDEPENDENT CONVENANTS, 9, 10, and *post*, 172 to 192.

72. *Filing of bill prematurely: Case in judgment*. S. bought a tract of land, and took a bond for title upon payment of the purchase money, for which he executed his notes. S. afterwards sold a portion of the land to E., upon the same credit, and executed a similar bond for title. M. was afterwards admitted as an equal partner with S. in the remainder of the land not sold to E., and the joint notes of S. and M., and a title bond to them substituted in the place of the original bond and notes given. Afterwards, S. assigned his interest in the title bond to M., who agreed to pay the joint notes for

the purchase money, and to make a title to that portion sold to E., when he paid therefor. The right, however, to the proceeds of E.'s notes was reserved to S., who endorsed two of them to others, retaining the one last falling due.

M. procured a title to the land and paid the purchase money therefor before the last note fell due, but refused to make a title to E. on the request of S., who thereupon filed this bill to compel M. to make title to E.: *Held*, that the bill was prematurely filed; *May v. Sullivan*, 8 G. 541.

73. *Same: Parties*. Where the vendor in a title bond conditioned to make title on payment of the purchase money, has transferred one of the notes for the purchase money, and retained the others, he must, in a bill filed to procure the title to be made to his vendee by a third party in whom it is vested, so that he may collect the purchase money, make both his vendee and the holder of the transferred notes parties; *Id.*

VIII. Vendor's Lien.

1. Its Nature, Derivation and Policy when it Exists Between the Original Parties.

74. *Whence and how derived*. In a sale of realty, payment constitutes a part of the contract, and therefore when the whole or any part of the purchase money remains unpaid, it is a rule derived from the Roman law, that the vendor has a lien on the estate for the payment of the unpaid price. The lien is a part of the contract of sale (raised by implication of law), and constitutes the vendor's security, and it subsists against the vendor and his heirs, and all who claim under him with notice; *Clower v. Rawlings*, 9 S. & M. 122; *S. P., Pitts v. Parker*, 44 M. 247.

75. *Vendee a trustee for the lien*. From the time of the sale the vendor becomes a trustee of the title for the vendee, and the latter becomes a trustee of the purchase money for the former. Each has a lien on the estate, the vendor for the unpaid purchase money, and the vendee for the money paid or for the title; *Money v. Dorsey*, 7 S. & M. 15. The vendee does not hold the land adversely to the lien, but as a trustee for vendor, until payment of the purchase money; *Walt v. Hargroves*, 42 M. 18; *Dodge v. Evans*, 43 M. 570.

76. *Same: Exists between vendor and vendee alone*. The vendor's lien is founded upon an implied trust between vendor and vendee, and exists between them alone, being incapable of assignment, and incapable of existence, except where the relation of vendor and vendee is created by the contract. It is not created by express agreement, but is implied from a sale on a credit. Where, therefore, a third party pays the purchase money at the request of the vendee, with the understanding and agreement that the vendee's debt to him thus created, shall be considered as for the purchase money of the land, and that the lien shall exist as if he were vendor, no lien will be created. The creditor in such a case is

not a vendor, which is necessary to the creation of the lien, and the parol agreement, that he should have the lien, is void by the statute of frauds; *Skaggs v. Nelson*, 3 C. 88; *Pitts v. Parker*, 44 M. 247.

76a. *No lien, if sale void.* There can be no lien if there be no vendor and vendee, or if the sale be void by the statute of frauds; and hence, if the writing be so uncertain as to the interest conveyed, that the sale is a nullity, there will be no lien; *Allen v. Bennett*, 8 S. & M. 672.

77. *Who is vendor: He need not be grantor.* In this case, E. made a sale by title bond to C., but the title being in S., the latter, at E.'s request, made the deed directly to C.; and on this state of facts, the vendor's lien was enforced in favor of E., without question; *Holloway v. Ellis*, 3 C. 103.

78. *Same.* There is a distinction between the meaning of the terms "grantor" and "vendor." The former means he who makes the deed and the grant; the latter includes also one who, having a beneficial interest in the land, contracts to sell it, and procures the person who has the legal title to convey to his vendee; and in such case the seller is the real vendor to whom the vendor's lien results (citing *Ellis v. Holloway*, *supra*); *Russell v. Watt*, 41 M. 602.

79. *Same: Case in judgment.* The father gave, by parol, land to his daughter, who afterwards sold it by parol sale; the father, at her request, making the deed: *Held*, that the daughter was vendor, and could enforce the lien; and that a parol gift of land is not void, but only voidable at the election of the donor, and if he affirm it by making a deed to the vendee of the donee, it cannot afterwards be questioned; *Ib.*

80. *The nature of the debt: Collateral obligation.* In order to create the vendor's lien, there must be a debt for unpaid purchase money to a fixed amount due directly to the vendor. If the obligation of the vendee, though given in consideration of the sale of land to him by vendor, be a collateral covenant, or be for the discharge of a liability of the vendor to a third party, there is no lien, unless one be expressly reserved; for, in that case, the obligation of the vendee appears to be taken as a substitute for the purchase money; *Patterson v. Edwards*, 7 C. 67.

81. *Same: Purchase money payable in specific articles.* The vendor's lien exists, notwithstanding an agreement appended to the note for the purchase money (it being for money) that it might be discharged by the delivery of specific articles. *Patterson v. Edwards*, *supra*, is not contrary to this. That case held only that where the vendor took from the vendee a covenant to pay the vendor's notes to a third party, no lien existed as a security for the damage resulting from a breach of the covenant; *Harvey v. Kelley*, 41 S. & M. 490.

82. *Exists when no security taken.* The vendor who takes no security for the payment of the purchase money, has a lien on the land for its payment, and this lien remains, unless

waived, as long as the land remains in the hands of the original purchaser; *Stewart v. Ives*, 1 S. & M. 197; *Upshaw v. Hargrove*, 6 M. 286.

82a. *Lien released: Case in judgment.* Brigg & Williams bought land on a credit and took a bond for title on payment of the purchase money. Williams sold his interest to one Nathan, by endorsing on the title bond a direction to the vendor to make title to Nathan for his one-half interest, whenever Nathan should discharge to the vendor the liability of Williams for the purchase money. The vendor recovered judgment against Brigg & Williams for the purchase money, and Nathan then made a verbal sale of his interest to Thompson, who, through Brigg, prevailed on the vendor to make him a deed for Williams' interest, \$1,000 of the purchase, however, still remaining unpaid. Brigg & Williams filed this bill to enforce the vendor's lien for that amount against Thompson and the heirs of Nathan: *Held*, that B. & W. had no lien, as they had never paid the amount claimed, to the vendor; and that Williams' remedy for the making of the deed to Thompson, contrary to his directions written on the bond, was to file a bill to be relieved of his liability to the vendor for the balance of the purchase money, as the deed was authorized by him to be made only on the condition of his discharge; *Thompson v. Williams*, 10 S. & M. 173.

83. *Lien extends to the purchase money.* The vendor's lien, where there has been a resale to a sub-vendee with notice, extends to the purchase money in the hands of the sub-vendee, as well as to the land; but his right to the money is no higher than his right to the land. If the purchase money be paid before notice, or if, before notice, the vendee has come under an obligation to a third person, from which he cannot be relieved, the lien is lost; *Ib.*

83a. *There must be a title to which it can attach.* The vendor's lien is not founded upon matter of record or express contract, but is merely implied from the presumed intention of the parties; and whether it be treated as a trust or natural equity, its very nature implies the existence of a title, either legal or equitable, in the vendee, on which it may attach; and hence, where the vendor executes only a bond to make title on payment of the purchase money, retaining the title in himself, there is no vendor's lien; *Servis v. Beatty*, 3 G. 52; *S. P., Burke v. Gray*, 6 H. 527. See post, 90.

83b. *Same.* Notwithstanding, if the vendor die, or by fraud and collusion between his administrator and the vendee, the latter execute a deed under the order of Probate Court, when the purchase money is not paid, the deed, not being absolutely void, but only voidable at the election of the parties interested, vests a *de facto* title in the vendee, upon which the vendor's lien will attach; *Ib.*

2. **Waiver of the Lien by taking Security for the Purchase Money.**

84. *Waiver by taking security: Rule on*

this subject. The vendor's lien may be waived or relinquished. The court inclines to favor the rule that where an absolute deed is made, and independent security taken for the purchase money, that this is *per se* a waiver of the lien — the vendor having carved out his own security. But it was held, that if the true rule were that the taking of independent security was a waiver or not, according as the circumstances would show, or not show, an intention of the parties to waive the lien, that then, if after a sale with security, but without a deed, the vendee make a deed in order to enable the vendor to mortgage the estate to raise money to pay for it, this would be a waiver of the lien; *Clower v. Rawlings*, 9 S. & M. 122. A vendor making an absolute deed, and taking personal security, thereby waives the vendor's equitable lien (citing *Clower v. Rawlings*, as supporting this view): *Johnson v. Sugg*, 13 S. & M. 346; S. P., *Burke v. Gray*, 6 H. 527. *Sed vide post*, 86.

85. *Same: Case in judgment.* The vendor executed a title bond to the vendee, obligating himself to make a deed when the purchase money was paid; after the death of the vendee, his administrator transferred to the vendor, in discharge of the purchase money, a note on a third party, and guaranteed its payment; and, at the same time, received a deed from the vendor, which he promised not to place on record until the vendor was satisfied as to the payment of the note so transferred to him. The collection of this last mentioned note was afterwards defeated by reason of a failure in the consideration thereof, and the vendor thereupon filed this bill to enforce his lien for the unpaid purchase money: *Held*, that the reception of the note, and the guaranty of the administrator, in discharge of the purchase money, was a waiver of the vendor's lien, the court saying, it is too well settled to admit of controversy, that where a distinct and independent security is taken for the purchase money, the lien is discharged; *Johnston v. Union Bank of Tennessee*, 8 G. 526.

86. *Same: Case in judgment.* Vendor made an absolute deed, and took from vendee his note, with personal security. Vendor filed his bill to enforce the vendor's lien, alleging that it was distinctly understood at the sale, that the vendor's lien should be retained as a security for the purchase money, and that the personal security taken was merely additional thereto: *Held*, on demurrer to the bill:

1. That the rule is, to sustain the vendor's lien whenever the vendor has taken the mere personal security of the vendee only, unless there is an express agreement between the parties to waive the lien; and, on the other hand, to consider the lien as waived, whenever any security is taken on the land or otherwise, for the whole or any part of the purchase money, unless there is an express agreement, that the equitable lien shall be retained.

2. The taking of the note of the purchaser

with a third person as surety thereon, is *prima facie* evidence only of a waiver of the lien; and the burden is on the vendor to show, by the most urgent and irresistible circumstances, that it is not to have that effect, and the demurrer was therefore overruled; *Fonda v. Jones*, 42 M. 792; S. P., *Parker v. Foy*, 43 M. 260; *Foxworth v. Bullock*, 44 M. 457.

86a. *Security no waiver when title bond is given.* The taking of an independent security for the purchase money, where no conveyance of the title is made, is not a waiver of the vendor's right to resort to the land for his purchase money; *Clower v. Rawlings*, 9 S. & M. 122.

86b. *Subsequent deed no waiver.* A vendor, who in the first instance executed a bond to convey on payment of the purchase money, does not waive his lien by afterwards executing a conveyance, upon the promise of the vendee to give security, if the latter fail to comply with his promise; *Dunlap v. Burnett*, 5 S. & M. 702.

86c. *Waiver by sale under execution.* If, under the order of the Probate Court, the administrator of the vendor make title to the vendee without payment of the purchase money, and afterwards recover a judgment at law against vendee for the purchase money, and cause the land to be sold thereunder, this, it seems, is a waiver of the right to file a bill to enforce the vendor's lien. But, however this may be, he cannot, as against a *bona fide* purchaser from the vendee at the sheriff's sale, enforce the lien, nor can he have the decree of the Probate Court, and the deed thereunder, annulled. The decree may have been erroneous, but the administrator acquiesced in it, and afterwards sold the land under a judgment for the purchase money, and he cannot now complain; *Boon v. Barnes*, 1 C. 136. See PROBATE COURT, 16e.

86d. *Lien waived by parol.* The vendor's lien may be waived or modified by parol, even in a case where there is only a bond given to make title on payment of the purchase money; *Wilkins v. Humphreys*, 1 C. 311.

86e. *Same: Case in judgment.* The vendor gave a bond for title, and after recovering two judgments against the vendee, each for one-half the purchase money, the vendee sold a half interest in the land to A., and the other half to B., each of these purchasers agreeing to pay one of these judgments as the price of his purchase. Accordingly, A. and B. each executed a forthcoming bond, as the surety of the vendee on the judgment which he had agreed to pay. Both A. and B. were unable to pay when the forthcoming bonds were collectable, and each of them applied to H., to advance him the money and to take an assignment of the judgments on the forthcoming bonds as security, which H. did, on being assured that he would retain a lien on the land. A. paid his judgment to H., but B. failing, this bill was filed by H., to subject the whole land to the payment of the judgment against B., as surety on the forthcoming bond for the vendee: *Held*, that under the cir-

circumstances, it was fairly inferable that there was an agreement with H. (the complainant), when he made the advances to A. and B., severally, that he was only to hold the share of each in the land for the judgment for which he was liable, and that H. could only enforce his lien against B.'s share in the land; *Ib.*

86f. *Who may set up the waiver.* None but a *bona fide* purchaser for value can set up an implied waiver of the vendor's lien; and to constitute such purchaser with the privilege of setting up the waiver, he must have advanced some new consideration or relinquished some security for a pre-existing debt; *Upshaw v. Hargroves*, 6 S. & M. 286.

86g. *Same: Case in judgment.* The husband, by written agreement, bought land, which was, in pursuance of that agreement, conveyed by the vendor to the wife. The price of the land was, by the agreement, to be paid by the conveyance of other lands claimed by the husband, if the titles could be perfected, and if not, then to be paid by the husband in money. The titles were not perfected, and the vendor filed his bill to enforce his lien on the lands conveyed to the wife, and it was insisted by her that the lien was waived or lost: *Held*, that the lien could be enforced for the reasons stated in 86f, *ante*: *Ib.*

The husband negotiated for lands, took the deed in the name of the wife, and gave his own note for the purchase money: *Held*, that the lien was not waived; *Davis v. Pearson*, 44 M. 508.

(The reasons stated in 86f, *ante*, are too broad, if intended to mean that the vendee, himself, cannot set up an implied waiver of the lien, where, in fact, such waiver has taken place.—G.)

3. Assignment of the Purchase Money, its Effect on the Lien.

87. *Lost by assignment.* The vendor's lien is the mere creation of a court of equity, and raised in favor of the vendor only, and it does not pass to the assignee of a note given for the purchase money; but it seems that if the vendee endorse the note and afterwards take it up, he will be remitted to his old lien which will then revive in his favor; *Briggs v. Hill*, 6 H. 362; *Lindsay v. Bites*, 42 M. 398; *Tanner v. Hicks*, 4 S. & M. 294; see *post*, 88. That the lien is lost by assignment, is also decided in *Walker v. Williams*, 1 G. 165; *Stratton v. Gold*, 40 M. 778; *Harvey v. Kelly*, 41 M. 490; *Skuggs v. Nelson*, 3 C. 88; *Pitts v. Parker*, 44 M. 247.

And the rule is the same though the vendee retains the legal title to the note for the purchase money, upon an agreement with the transferee, that he will enforce the vendor's lien for his benefit; *Pitts v. Parker*, 44 M. 247.

See HUSBAND AND WIFE, 112.

88. *Same: Right of assignor to enforce the lien before taking up the note: Case in judgment.* A bill was filed in the joint names of the vendor and his assignee by endorsement of the note for the purchase money, to enforce

the vendor's lien, and the vendee demurred to the bill: *Held*, that the demurrer should be sustained, the court recognizing the doctrine that where the vendor is compelled by his endorsement to take up the note, he is remitted to his lien; but stating, that, if the vendor, having parted with his entire interest in the note (and not having transferred it merely as collateral security) still had such lien in virtue of his mere liability as endorser, yet it was necessary to show that the proper steps had been taken to hold him liable as endorser; *Lindsay v. Bates*, 42 M. 398.

89. *Not lost by assignment, if express lien be reserved.* The vendor's lien, raised by mere implication of law, in favor of the vendor, where there has been an absolute conveyance, is a mere personal right of the vendor, and does not pass to the assignee of the security given for the purchase money; but where, in the deed, the vendor expressly reserves a lien for the payment of the purchase money, this is an express lien, and is equivalent to an equitable mortgage, and the lien will pass to the assignee of the note. And, if the deed reserve the "statutory lien" for the purchase money, it will be understood to mean the "vendor's lien," and will be good as an equitable mortgage; *Stratton v. Gold*, 40 M. 778; S. P., *Harvey v. Kelly*, 41 M. 490. But a mere recital in the note for the purchase money that it was given for land, does not create an express lien; its effect is simply proof of the consideration of the note; *Pitts v. Parker*, 44 M. 247.

90. *Not lost by assignment, where title bond only is given.* There is no vendor's lien strictly, where vendor has given a bond for title, on payment of the purchase money; it is a reservation of the title as security for the price of the land; *Burk v. Gray*, 6 H. 527; *Servis v. Beatty*, *ante*, 83a, 83b. In such a case, the remedy of the vendor, or of his assignee of the purchase money, is not a bill to enforce the lien, but a bill for specific performance, whereby if the vendee refuse to comply with his engagement, the land may be sold for the purchase money; *Burk v. Gray*, *supra*; S. P., *Dollahite v. Orne*, 2 S. & M. 590; *Tanner v. Hicks*, 4 S. & M. 294; *Pitts v. Parker*, 44 M. 247. The giving of a title bond is in effect the same, so far as relates to the securing of the purchase money, as a conveyance of the title, and taking a mortgage for the purchase money; and hence, the assignee of the purchase money, may, either jointly with vendor as co-complainant, or by making him a co-defendant with the vendee, maintain a bill for a specific performance, and compel a sale of the land for the payment of the purchase money; *Tanner v. Hicks*, *supra* (citing *Dollahite v. Orne*, 2 S. & M. 590); S. P., *Parker v. Kelly*, 10 S. & M. 184; *Wilkins v. Humphreys*, 1 C. 311; *Robinson v. Harbour*, 42 M. 795; *Davidson v. Allen*, 7 G. 419; *Pitts v. Parker*, 44 M. 247.

And the right to sell the land for the payment of the purchase money, passes to the assignee of a note for the purchase money,

though the transfer be without recourse on the vendor; *Davidson v. Allen*, *supra*.

91. *Assignee's right cannot be defeated by subsequent making of a deed.* And, in such a case, if, after the assignment, the vendor make a deed to the vendee, the assignee's debt being unpaid, this deed does not affect the assignee's rights. And, if after the deed be made, a judgment be recovered against the vendee, this lien will be subordinate to the prior equity of the assignee. And, in such a case, a court of equity has jurisdiction at the instance of the assignee, to enjoin a sale of the land under the judgment; and to settle all the rights of the parties, by directing a sale of the land first, to pay the assignee, and then the remainder to go to the judgment creditor; *Parker v. Kelly*, 10 S. & M. 184; *Pitts v. Parker*, 44 M. 247.

92. *Pro rata distribution where there are several assignees.* Where the vendor assigns a portion of the purchase money, and retains the balance, in cases where the right to resort to the land passes to the assignee, the proceeds of the sale of the land, if insufficient to pay all, will be distributed *pro rata* among the holders of the securities for the purchase money; *Davidson v. Allen*, 7 G. 419.

See MORTGAGES, 54, *et seq.*

4. Against whom the Lien may be Enforced.

93. *Against vendee and purchaser, with notice.* The vendor's lien, where it exists, may be enforced against the vendee, his heirs, volunteers under him, and purchasers from him with notice; *Stewart v. Ives*, 1 S. & M. 197; *Dunlap v. Burnett*, 5 S. & M. 702; *Clower v. Rawlings*, 9 S. & M. 122; *Walton v. Hargroves*, 42 M. 18; *Parker v. Foy*, 43 M. 260.

94. *Against purchasers at sheriff's sale, and general assignees.* The lien of the vendor is superior to the lien of a judgment creditor of the vendee, or purchasers under the judgment, and general assignees for the payment of debts. They are volunteers, and get only the actual interest of the debtor, and are not *bona fide* purchasers for a valuable consideration; *Dunlap v. Burnett*, 5 S. & M. 702; *Holloway v. Ellis*, 3 C. 103; *Parker v. Kelly*, 10 S. & M. 184 (for which see 91); *Walton v. Hargroves*, 42 M. 18. See *ante*, 62.

95. *Same.* But in *Kilpatrick v. Kilpatrick*, 1 C. 124, the court expressed an opinion in favor of the rights of a purchaser at sheriff's sale, without notice of the vendor's lien; but without deciding that question, held, that if the consideration was by mistake mentioned in the deed as \$50, when, in fact, it was \$5,000, the vendor could assert his lien against a purchaser, under a judgment against vendee only for \$50, if such purchaser were ignorant of the mistake. And in *Nailor v. Fisk*, 5 C. 256, the court note a difference in authorities on this subject, and that there had been two prior decisions of the court, sanctioning the vendor's right (*viz.*, *Dunlap v. Burnett*, 5 S. & M. 702; *Money v. Dorsey*, 7 S. & M. 15); but decline to decide the point, as the purchaser had notice. The ven-

dor's right was also doubted in *Taylor v. Strong*, 10 S. & M. 63. But the later decisions establish the rule as stated in 94. See *ante*, 62.

96. *Same.* In this case, the court expressed the opinion, that so far as the right of a vendor to a lien for his purchase money, was already engrafted on our jurisprudence, they were willing to sustain it; but they were rather inclined to limit than extend it. That it may be consistent with the principles of natural equity, that a vendee should not be permitted to hold the land without paying for it; but it is inconsistent with those principles, that the vendor should invest his vendee with the highest evidence of unconditional right on which the public may be supposed to confide and act, and at the same time hold a secret and invisible lien, arising by implication, against the purchaser, even at sheriff's sale; and that it is the fault of the vendor that he does not take an express lien; *Kilpatrick v. Kilpatrick*, 1 C. 124.

97. *That the lien cannot be set up against a purchaser under a judgment at law for the purchase money, see ante*, 86c.

98. *Not enforceable against bona fide purchasers.* The vendor's lien will not be enforced against a subsequent purchaser of the legal title, for a valuable consideration, and without notice; *Walton v. Hargroves*, 42 M. 18; *Dunlap v. Burnett*, 5 S. & M. 702; *Holloway v. Ellis*, 3 C. 103; *Upshaw v. Hargroves*, 6 S. & M. 286. But if he have notice, the lien will be enforced; *Parker v. Foy*, 43 M. 260.

And if the notice be given after a partial payment of the purchase money, the lien will attach, as to the unpaid balance; in which case, if the land be sold, the sub-vendee has a paramount equity to be reimbursed for the payments made before notice; *Parker v. Foy*, 43 M. 260. See *ante*, 57, and *post*, 110b.

99. *Same: Mortgagee.* A vendor's lien as to creditors, will not be protected against a mortgage given by the vendee, to secure a debt created *since the conveyance* to him, when the creditor had no notice of the existence of the lien. A mortgage is something more than a lien on the mortgaged estate; it is a transfer of the property itself, and differs from a general lien or assignment created by operation of law; against these the vendor's lien will prevail; *Holloway v. Ellis*, 3 C. 103; *Dunlap v. Burnett*, 5 S. & M. 702. But if the mortgage, being a mere security for the debt, no new consideration being advanced, and no new credit given, were for a debt created before the sale and conveyance, would it be good against the vendor's lien; *Quære?* See *ante*, 45, 46, 47, and references there made.

100. *Mortgagee of equitable title only.* The lien would be enforced against a mortgagee who got only an equitable title, upon the maxim that *qui prior est in tempore potior est in jure*; *Walton v. Hargroves*, 42 M. 18.

101. *Against substituted vendee: Case in judgment.* The vendor sold and conveyed

the title to his vendee, who died without paying the purchase money. The vendor then, being administrator of the vendee, by consent of the heirs, sold the land to S. for the balance of the purchase money then unpaid, and took S.'s notes therefor. Afterwards, the heirs of the vendee procured an annulment of the sale to S., by a decree in chancery, the heirs of the vendor (who was then dead), but not his administrators, being made parties. The present bill was filed by the administrator of vendor against the administrator *de bonis non* and the heirs of the vendee, and against S., to enforce the vendor's lien for the unpaid purchase money: *Held*.

1st. That on the sale to S. and the taking of his notes, the lien which was on the land before, still remained. S. being but a substituted purchaser for the original vendee.

2d. That vendee's heirs having annulled the sale to S., thereby destroying the right of vendor to enforce the collection of S.'s notes, as against him personally, could not object to those notes being still a lien on the land, in the place of the notes of the vendee, for which they were substituted; *Power v. Gartman*, 7 C. 133.

This right of the vendor, when he had made a deed to the vendee, who had also conveyed to a sub-vendee, whose notes were taken, payable to first vendor in lieu of the first vendee's notes, to enforce his lien against sub-vendee, was sustained in *Gillespie v. Smith*, decided by the High Court, October term, 1869, and not reported.

102. *Notice of the lien by recital in deed.* When the deed made by an administrator shows that the purchase money was to be paid at a future day, this will be notice of the existence of the lien, to a sub-vendee purchasing before the day of payment fixed by the deed; *Huggatt v. Wade*, 10 S. & M. 143. See *ante*, 50, *et seq.*

102a. *Recital that purchase money is paid.* If the deed recite that the purchase money is paid, this authorizes a sub-vendee to purchase, if he have no other notice; *Gordon v. Manning*, 44 M. 756.

5. Miscellaneous.

103. *Vendor may sue at law and in equity at same time.* The vendor may sue at law to enforce the personal responsibility of the vendee for the purchase money, and in equity to enforce the lien, at the same time, the remedies being separate and distinct; *Payne v. Harrell*, 40 M. 498; *Stratton v. Gold*, 1b. 778.

104. *Exists in sale of leasehold property.* The vendor's lien exists as well in the sale of leasehold, as in case of freehold; *Richardson v. Bowman*, 40 M. 782.

105. *Proof that note was given for purchase money of land.* In a bill to enforce a vendor's lien, proof that the notes held by complainant were given for the purchase of land in this State, and as witness thinks, in the county in which the land sought to be subjected to the lien lies, and that these lands were sold by vendor to vendee, is, in the ab-

sence of all proof showing that the vendee bought other lands lying in this State from the vendor, sufficient to show that the notes were given for the purchase money of the land as claimed in the bill; *Glasscock v. Robinson*, 13 S. & M. 85.

106. *Resisting bill to enforce lien for defective title.* The vendee cannot resist the vendor's bill to enforce his lien on the ground of want of title in vendor, unless he show an eviction, or point out and specify the defects. And it is no obstacle to enforcing the lien, that there is an outstanding mortgage on the land, unless it be shown that the mortgage was executed by a person having power to convey title; *Ib.*

107. *Same: Inconsistent defences.* To such a bill against the widow and heirs of the vendee, the widow set up in her answer the following defences: 1. That the vendor had no title, and the vendee, in consequence thereof, abandoned the land. 2. That vendee had paid the purchase money. 3. That she had, since the vendor's death, acquired a good title under a deed in trust executed by her husband: *Held*, that the defences were inconsistent, and constituted no defence to the bill; *Ib.*

108. *For rule as to enforcing the lien when the interest sold is uncertain*, see *ante*, 76a.

109. *Dower subordinate to the lien.* The wife's right of dower is an emanation from the ownership of the husband, and subject to all its burdens and qualifications, and subordinate to the lien of the vendor of the husband for unpaid purchase money; *Cocke v. Bailey*, 42 M. 81.

110. *Parties to bill to enforce vendor's lien.* In a bill by the vendor to enforce his lien, where there is a sub-vendee, who has died, the heirs and administrator of the sub-vendee, and also the original vendee, should all be made defendants; *Mullins v. Sparks*, 43 M. 129.

110a. *Vendor's lien on land sold to married women.* Although a married woman is not allowed to bind herself by a purchase of real estate on a credit, yet if she make such purchase, she will not be permitted to keep the property without paying for it. The vendor may enforce his lien in equity, and have the land sold to pay the debt, but if there be any balance, she will not be liable therefor; *Gordon v. Manning*, 44 M. 756.

See HUSBAND AND WIFE, 60.

110b. *Estoppel to set up the lien.* An administrator sold land on a credit, and then made a final settlement, reporting the notes for the purchase money as paid, and distributed the proceeds. His vendee then sold the land to a purchaser, who had no notice of the non-payment of the notes, and the land was then sold under execution against the vendee, and bought by A. The administrator then filed a bill to enforce his lien: *Held*, that A. had a right to presume, from the decree on the final settlement, that the purchase money had been paid; that there was no law requiring an entry on the record of the administrator's deed, of satisfaction of the statutory mort

gage for the purchase money; that the same record (viz., the proceedings of the administration of the estate in the Probate Court) which showed the lien, also showed satisfaction of it; and that the administrator, as to the innocent purchaser, was estopped now to deny that the notes were paid; *Lambeth v. Elder*, 44 M. 80.

110c. *Sale by Probate Court to pay purchase money.* Under section 138, p. 458, of Rev. Code of 1857, an administrator of a vendee, where the land has not been fully paid for, may proceed in the Probate Court to sell the land for the payment of the purchase money. In such a proceeding, the vendor is a necessary party. The sale, if the estate be insolvent, is not for a *pro rata* distribution of the proceeds among the general creditors. And the sale may be made whether the vendee had a deed, or only a bond for title; *Wells v. Smith*, 44 M. 296.

IX. Vendee's Lien.

111. *The lien of the vendee.* From the time of the sale of land, the vendee becomes the trustee of the title for the vendor, and the latter becomes a trustee of the purchase money for the former. Each has a lien on the estate—the vendor for the unpaid purchase money, and the vendee for the money he has paid on the title. And this lien of the vendee is superior to the lien of a judgment against the vendor, rendered subsequent to the sale, and before the conveyance of the title; *Money v. Dorsey*, 7 S. & M. 15.

112. *Same.* In such a case if any portion of the purchase money is paid before the rendition of the judgment against the vendor—he still retaining the title—it will be no lien on the land, whatever may be the rule, in case no part of the money is paid; *Ib.*

113. *Same.* And if the vendor has made a deed subsequent to the judgment to another, as against whom the judgment would be a lien on the land, still the vendee may go into equity, and show that the original purchase was prior to the judgment, and that his deed, though taken from the said grantee, was but a compliance with the original contract of purchase; *Ib.* See *post*, 206.

114. *Rule.* Where the vendee has paid money upon a contract for the purchase of land, which is rescinded on account of the fault of the vendor, he has an equitable lien on the land for the reimbursement of the money advanced, similar to that of the vendor for the unpaid purchase money. The natural equity and intrinsic justice of this lien, commends it to the favorable consideration of a court of equity; *Davis v. Heard*, 44 M. 50.

115. *Case in judgment.* In this case the court, at the instance of the vendee, rescinded the contract on the ground of the fraud of the vendor in making false representations as to boundary and title, and on final decree, ordered that vendee had a lien on all the land to which vendor had title for the return of the purchase money, and in default of the

payment thereof, directed the land to be sold to pay the same; *Ib.*

See EXECUTORS AND ADMINISTRATORS, 368, 368a.

X. Rescission of the Contract of Sale.

See CONTRACT, 84 to 92.

1. For Fraud.

A. FRAUDULENT MISREPRESENTATION AND CONCEALMENT.

116. *Same.* Any intentional misrepresentation or concealment in relation to the land, either as to its quality or title, by which the purchaser was imposed upon, is fraudulent, and a ground for rescission; and it is immaterial whether the misrepresentations were knowingly false or not, for if the vendor undertook to make representations, he is responsible for them; *Parham v. Randolph*, 4 H. 435; *S. P., Davidson v. Moss*, 5 H. 673; *Davis v. Heard*, 44 M. 50; *Halls v. Thompson*, 1 S. & M. 443. But to justify relief in equity, the misrepresentation must be in relation to some material thing, unknown to the purchaser, which want of knowledge must not arise from mere negligence, but from want of actual examination; for want of opportunity to be informed, or from an entire confidence placed in the vendor; *Halls v. Thompson*, 1 S. & M. 443. See FRAUDS AND FRAUDULENT REPRESENTATIONS, 1 to 9. *Ante*, 38, 39.

117. *Innocent representations, if false, are fraudulent.* The vendor who makes a positive statement, without knowing it to be true or false, but believing it to be true, and it turns out to be untrue, commits a fraud in law, and he must make his statements good; *Parham v. Randolph*, 4 H. 435; *Davidson v. Moss*, 5 H. 673; *Rimer v. Dugan*, 10 G. 477; *Gilpin v. Smith*, 11 S. & M. 109; *Clopton v. Cozart*, 13 S. & M. 363; *Lindsey v. Lindsey*, 5 G. 432; *Halls v. Thompson*, 1 S. & M. 443; *Oswald v. McGehee*, 6 C. 340; *Davis v. Heard*, 44 M. 50; but this rule does not apply when the party making the representation expressly states that it is but a representation of what he has heard from others, and he expressly declines to be responsible for it; *Mississippi Union Bank v. Wilkinson*, 3 S. & M. 78; nor where the representation is that the defect extended so far, and if farther, the vendor did not know it. In the last case, to entitle the vendee to relief, he must show that the vendor had knowledge that the defect extended farther than he represented it; *Oswald v. McGehee*, 6 C. 340.

118. *Same: Expression of opinion.* Nor does the rule apply when the vendor fully discloses the nature of his title and the existence of an adverse claim, but expresses the confident opinion that his title is good; in such case the expression of opinion is not fraudulent, in case the title turn out bad; *Vick v. Percy*, 7 S. & M. 256 (see *Rimer v. Dugan*, *post*, 119). As to expression of opinion as to advantages, see FRAUD, &c., 13.

118a. *Opinion as to boundary.* Where

one of the boundary lines of the tract was pointed out by the vendor, and a statement made that it was an "open" or unsurveyed line, and that its precise location was not known; this must be considered as a statement of opinion as to the boundary, and a mistake in it by which twenty-five acres of good land, which the vendee thought he was getting, was lost, though the whole quantity of good land is not decreased, is so immaterial, besides being also a matter of opinion, as not to justify a rescission; *Halls v. Thompson*, 1 S. & M. 443. And so, if the vendor states there is from two hundred and fifty to three hundred acres of cleared land, when in fact there is much less, the vendee having full opportunity to determine for himself, and actually making the examination, it will be treated as mere matter of opinions and no cause for rescission; *Halls v. Thompson*, 1 S. & M. 443.

119. *Same*. Yet the rule, as stated in 117, *ante*, was applied in the following case: The vendor had a tax title only, and so stated to the vendee, who consulted a lawyer about its validity, and was informed that it was good if the law had been complied with in making the sale. When the trade was being made, the vendee stated to vendor he would "rely upon his word about it," and vendor replied, his "title was as good as any man's, and if not he would make it so, and if the vendee found a better owner than he was, he would cancel papers without any law about it." And it was held that the tax title being shown to be void, though without any proceedings threatened for eviction, the vendor was bound by his representation, and vendee was entitled to a rescission; *Rimer v. Dugan*, 10 G. 477.

120. *Same: Another instance*. The vendor, in selling a tract of 1200 acres of land, represented to vendee that a particular eighth, on which was a very fine spring, situated near the dwelling house, was a part of the tract, after having been informed by the vendee that he would not purchase unless he could get a good spring of water. There was no other spring on the tract, and the eighth on which the spring was located was not a part of it, though sold as such: *Held*, that the vendee was entitled to a rescission upon discovering that the land on which the spring was located was not a part of the tract, whether the vendor knew of his want of title to it or not; *Gilpin v. Smith*, 11 S. & M. 109. See *post*, 131.

B. RELIANCE BY VENDEE ON VENDOR, HIS DUTY TO EXAMINE, &c.

121. *Vendee's examination for himself*. But if the vendee do not rely upon the representations of the vendor, but having opportunity to examine, he does examine for himself, and act on his own judgment, the defect being open to observation, and no means being used to prevent its discovery, the contract will not be rescinded; *Oswald v. McGehee*, 6 C. 340; *Halls v. Thompson*, 1 S. & M. 443. Yet if the defect, though ordinarily open to observation, was, at the time

of the examination by the vendee, from any cause, so concealed that it could not be ascertained except by a very minute examination, which was not made, the rule would be different; *Oswald v. McGehee*, *supra*.

See *ante*, 116. FRAUDS, &c., 14.

122. *Same: Case in judgment*. In this case the vendor represented that there was no coco grass on the estate sold, except in the garden and in one of the negro patches, and that it might be in some other spot, but he did not know it. It was, in fact, on the estate in many other places, and to such an extent as materially to reduce the value of the estate. The vendor, in answer to a bill to rescind, stated that he did not know of its existence beyond what he had stated. It was shown that the vendee rode over the plantation twice, but this was done with a view to ascertain how much it was worn, and not with a view to ascertain the extent of the coco grass, and that he relied on the representations of the vendor as to that. It was also shown that he examined the estate only during very cold weather, in winter, which rendered it impossible to discover the extent of the grass without a very minute examination, though ordinarily it was easily discoverable. It was further shown, that the vendor resided four or five miles from the estate, and cultivated it, and that he frequently visited it, and that he was a shrewd and attentive man to business, and that the existence of the grass on the estate to a larger extent than represented was notorious in the neighborhood. The court held that the vendor knew of the extent of the grass; that his statement was false; that vendee relied on it, and had no sufficient opportunity to detect its falsehood, and that the contract should be rescinded; *Oswald v. McGehee*, 6 C. 340.

123. *Same: Another instance*. The vendor represented to the vendee, that the land sold lying in Pearl river bottom, was not subject to overflow, except from extraordinary freshets, and then only through a bayou, and that the overflow thus happening remained but a few days, and the land was "good" land for farming. The statement was false, the land overflowing nearly every year, whereby it was nearly useless for farming. The vendee was a stranger, and trusted to the statement of the vendor, and he made an examination of the land, but, at a period of the year when it was impossible to detect the falsity of the statement: *Held*, that the vendee was entitled to a rescission: *Held*, also, that though the above statement was not made directly to the vendee, but to another, in his presence, whilst the negotiations for the trade were going on, the effect was the same as if made to the vendee directly; *Alexander v. Beresford*, 5 C. 747.

124. *Duty of vendee to examine*. If the vendor make no representations, it is the duty of the vendee to examine for himself; but when representations are made in reference to doubtful matters material to the contract, the purchaser may protect himself by relying on the good faith of the vendor, and

on a breach of that, he will not be bound by the contract; *Oswald v. McGehee*, 6 C. 340.

See *ante*, 116.

125. *When defects are patent: Examination by vendee.* Misrepresentation as to patent defects in the estate sold, is no ground for a rescission, if the vendee had opportunity to examine and did examine the estate, and if there were no fraudulent means used by the vendor to prevent a discovery. Hence, if vendor represent that there are only sixty acres in a tract of nine hundred acres, which are unfit for cultivation, when in fact there were three hundred acre sunfit, and the vendee examined the land twice before he purchased, and it not appearing that it was shown to him in such a way as to prevent his making a fair examination of it, he cannot complain, as it was a matter about which he made a full examination; *Halls v. Thompson*, 1 S. & M. 443.

See *post*, 127.

C. WHERE VENDEE HAS NOTICE OF THE DEFECT.

126. *No fraud where there is notice.* False representations in relation to the condition of the estate in a material point, are not fraudulent, if the vendee knew the true condition of the estate at the time, for he is not deceived. Hence, where a vendor sold lots in a town, which he fraudulently represented as at the head of navigation on a certain river, and the vendee knew to the contrary there is no fraud, and the contract will not be rescinded; *Anderson v. Burnett*, 5 H. 165.

See *ante*, 27; *post*, 150.

127. *No fraud if defect be patent.* Fraud cannot be predicated of a representation in relation to a matter of a public and notorious character, as the situation and prospects of a town, which were open to the examination of the vendee; and if such representations are exaggerated, they are no ground for a rescission of the contract; *Bell v. Henderson*, 6 H. 311. See *ante*, 118, 125.

D. THE FRAUD MUST BE MATERIAL AND INJURIOUS.

128. *Same.* Fraud vitiates every contract into which it enters, but if it be without any consequent injury, no relief will be granted; *Davidson v. Moss*, 5 H. 673; *Halls v. Thompson*, 1 S. & M. 443; *Harris v. Ransom*, 2 C. 504; *Davis v. Heard*, 44 M. 50.

The vendee must show the materiality and the injury; *Ayres v. Mitchell*, 3 S. & M. 683; *Harris v. Ransom*, 2 C. 504.

129. *Same: Instances of immateriality.* The vendor represented his title to be good, but there was an outstanding title in favor of his wife and children which he did not mention. The vendor filed a bill on other grounds for a rescission, and afterwards discovered that encumbrance, and then filed an amended bill, seeking a rescission on the ground of a fraudulent concealment of that encumbrance. The vendor denied the fraud, stating, that having been informed that the title was good,

he forgot to mention the claim of his wife and children; but so soon as his attention was called to the matter, he procured a release from his wife and children, and tendered it to the vendee. It was not shown that the vendee had ever been injured by the encumbrance in any way: *Held*, that though the conduct of the vendor was fraudulent, yet it was without damage, and that as the title was completed in a reasonable time, the contract would not be rescinded; *Davidson v. Moss*, 5 H. 673.

130. *Same.* The encumbrance fraudulently concealed, must operate prejudicially to the vendee. And if he alleges that it prevented him from selling when lands were high, that will not be considered as being proven, if it appear that the encumbrance was for \$600 only, and that the vendee had from the vendor only a bond for title and owed \$18,000 for the purchase money, which was to be paid before the conveyance of title; *Halls v. Thompson*, 1 S. & M. 443.

See also, *ante*, 38.

131. *Same: Rule as to materiality.* Where there is a fraudulent misrepresentation as to the title of a part of the thing sold, if the part thus lost be essential to the perfect enjoyment of the remainder, in the manner intended, the contract will be rescinded. And in such a case it is not the quantity lost, so much as its importance on the whole contract that is to be considered; *Parham v. Randolph*, 4 H. 435; *Davis v. Heard*, 44 M. 50. But if the matter about which the representation is made be immaterial, then the vendee is entitled to compensation; *Davis v. Heard*, *supra*.

See *ante*, 120.

131a. *Same: Case in judgment.* H., being a non-resident, bought lands in this State from N., for \$13,400, for which he gave three notes falling due in 1860, 1861 and 1862; the first note was paid at maturity. H., being a stranger, relied on the representations of N. as to the title and boundaries, which afterwards turned out to be untrue. The lines shown by N. comprehended valuable land, which did not belong to the tract, including certain rich bottom land, which was well timbered, and excluding the lands so falsely represented to be in the tract, there was an insufficiency of timber left, and the tract was greatly depreciated by the exclusion: *Held*, that H. was entitled to a rescission; *Davis v. Heard*, 44 M. 50.

E. DUTY OF VENDOR TO DISCLOSE.

132. *Same.* As a general rule, the vendor must make every important disclosure of which the vendee is ignorant; but this rule is subject to some qualification, by limiting it to cases where there is an obligation to communicate the facts, or where there is a peculiar relation of trust and confidence between the vendor and vendee, which will justify the presumption that there has been undue concealment. This obligation to communicate ceases, whenever there is an opportunity, to the vendee to examine, and he does examine,

and does not rely upon the statement of the vendor. It is not the mere opportunity of examination, but the examination itself, which relieves the vendor of the duty of making the disclosure. An examination shows that the vendee trusted to his own judgment and not to the statements of the vendor, and he is presumed to have discovered patent defects. The opportunity to examine and the failure to do so, shows he trusted to the statements of the vendor; *Halls v. Thompson*, 1 S. & M. 443.

132a. *Same*. When the subject of the representation or concealment is not equally open to the observation of both parties, and so the vendee has not equal means of knowledge with the vendor, the latter is bound by the principles of good faith and common honesty to state nothing but what is true, and to conceal no material fact connected with the condition of the article. And if there be an intentional concealment of such material fact in cases where both parties have not equal means of information, it will be deemed fraudulent, and avoid the contract. And if the vendor sell an estate, knowing that he has no title, or that there are encumbrances on it, of which the vendee is ignorant, and he suppress such material fact, the vendee may compel a rescission of the contract; for the purchaser necessarily reposes a trust and confidence in the vendor, that no such defect exists; *Davidson v. Moss*, 5 H. 673.

See FRAUDS AND FRAUDULENT REPRESENTATIONS, 5.

133. *Same: Example where partial disclosure held fraudulent*. A vendor who represents that he is the purchaser of another's interest in land at a sale made under execution, and contracts to sell that interest by quit claim deed, is guilty of a fraud, if, in stating the circumstances under which the sheriff made a deed to the land, to a third party, instead of vendor, who was the highest bidder, he concealed the facts which make the transfer of his bid invalid; and if in such case the vendee can get nothing by virtue of the deed being so made, he will be entitled to a rescission; *Endicott v. Penny*, 14 S. & M. 144.

134. *Same: Forgetfulness as an excuse for not disclosing*. The answer of the vendor stated, that the existence of a certain encumbrance on the estate did not occur to him at the time of the sale, he not deeming it of any importance, having been advised that it was invalid. The court say, this is no excuse in law for the omission. For whether it be true or false can never be decided by any human tribunal; *Davidson v. Moss*, 5 H. 673.

135. *Obligation of vendee to take notice of recorded liens*. In a case of an executory agreement to sell, and where no representation is made in relation to the title, the vendee is bound to take notice of a judgment lien on the estate, which is duly enrolled; *Wiggins v. McGimpsey*, 13 S. & M. 532. See *ante*, 27.

But where there has been a positive misrepresentation as to title, it is no answer to

it to say that the outstanding title was on record, and might have been discovered by the vendee; *Parham v. Randolph*, 4 H. 435.

136. *Duty of an agent as to disclosures, &c.* If an agent be employed to sell an estate, and notice be given to such agent of the defects in the title or quality of the estate, which if known to the principal, it would have been his duty to communicate to the purchaser, the same duty rests on the agent; and his failure to do so will relieve the purchaser from the contract to the same extent as if the notice had been given to the principal, and he, making the sale himself, had failed to make the communication; and this is so, though the principal were ignorant when the sale was made of the defects complained of; *Ross v. Houston*, 3 C. 591.

137. *Knowledge of agent as it affects the principal in a purchase*. Notice given to the agent of any defect in the title or quality of the estate, will be equivalent to notice of these facts to the principal, in any controversy that may arise between him and the vendor in relation to the property; *Ib*.

As to notice to agent, see PRINCIPAL AND AGENT, 10, 90, 91, and *ante*, 51b.

138. *Same: When principal afterwards sells*. But notice given to the agent whilst purchasing property, though sufficient to bind the principal as to all controversies connected with the rights of third persons which are affected by the purchase, is not to be treated as actual knowledge on the part of the principal (when he was in fact ignorant), so as to bind his conscience and make it his duty to communicate it where he makes by himself a future sale of the same property to another; *Ib*.

F. MISCELLANEOUS.

139. *Fraud after the sale*. See FRAUDS AND FRAUDULENT REPRESENTATIONS, 16, 17, 18.

140. *Fraud in sale as affecting sub-vendee's rights*. If a vendor commit a fraud upon vendee, and the latter resell, and then transfer the note of the sub-vendee to the original vendor in payment of his purchase, the sub-vendee may set up as a defence to a recovery on the note by the original vendor, the fraud committed by the latter on the original vendee; otherwise where the transfer was not in payment of the purchase money; *Barringer v. Nesbit*, 1 S. & M. 22.

141. *Same: Case in judgment*. A proprietor of land conceived the idea of laying it off in town lots, and selling stock, in a scheme to build a town. He employed agents to sell the stock, and authorized them to make, and he made himself, fraudulent representations in regard to the eligibility of the site for a town. He induced leading and influential citizens to become subscribers for stock, by promising them that they might afterwards retain or give up their stock at their election. He succeeded in selling some of the stock, but afterwards abandoned the scheme, and declared his intention not to enforce the contracts he had made for the sale

of the stock: *Held*, that these facts constituted a failure of consideration of a note given by a sub-vendee for a transfer of stock in the town; *Ib.*

142. *Fraud a question of fact.* Whether misrepresentations amount to a fraud or not, is a question of fact for the jury; *Ferriday v. Selser*, 4 H. 506

143. *Proof of the fraud* Where a fraudulent concealment of an encumbrance on the title is complained of, both the encumbrance and the concealment must be made out by clear proof. Hence, if the answer deny the fraud, proof that the vendee in a conversation charged the vendor with the concealment, and the latter did not deny it, is not sufficient to establish it so as to entitle the vendee to a rescission, it being at best but doubtful and uncertain proof; *Halls v. Thompson*, 1 S. & M. 413.

144. *Same.* A rescission will not be granted on doubtful and uncertain proof; it should be clear and satisfactory; *Ib.*; *S. P., Ayres v. Mitchell*, 3 S. & M. 683. See post. 1.

144a. *Fraud by vendee as to the security: Femme covert.* If a party sell his land to a femme covert and take her note and security for the purchase money, he thereby elects to carve out his own surety; and if it fail, he will be without redress, though the femme covert rely upon coverture to defeat a recovery as to her. But if the vendee fraudulently represented that the sureties on the note were good, when in fact they were insolvent, and the vendor knew nothing of their condition, but relied upon the representation of the vendee in that respect, he is entitled to a rescission; *Foxworth v. Bullock*, 44 M. 457.

144b. *Rescission because femme covert refuses to pay.* But it seems when no security is taken, if the femme covert refuses to pay for land purchased on a credit, the court would rescind, it being iniquitous that she should retain the property, and, at the same time, deny her liability to pay for it; and in such case, the court would decree a sale of the land to pay the purchase money, but would give no relief against her, personally; *Ib.*

2. For Defective Title.

A. GENERAL RULE, AND THE INSTANCES.

145. *Rules as to relief for defective title.* The court announces the following rules, as settled in this State:

1. Where a contract for the sale of real estate has been executed, and the vendee has received a deed with covenants of warranty, and taken possession, he cannot, in a case free from fraud or misrepresentation, avoid a judgment for the purchase money, either at law or in equity, on account of failure or defect of title, unless he has been evicted; see ante, 29, 30.

2. If there has been fraud or misrepresentation in relation to the validity of the title, or the absence of encumbrances on it, a court of law or equity will relieve from the payment of the purchase money without evic-

tion, notwithstanding the vendee may have received a deed with covenants of general warranty and gone into possession of the land; See ante, 116, et seq., and post, 146.

3. When the vendee, at the time of the purchase, knew of the defects in the title, or the existence of encumbrances on the estate, and took a deed with covenants of warranty, he cannot at law avoid a recovery even after eviction, but must rely upon his covenants. Nor will a court of chancery, in such a case, grant any relief, but will remit the vendee to his covenants, such being the remedy he has provided for himself; See ante, 126, et seq.; *Willes v. Cooper*, 2 C. 208; *S. P., Gartman v. Jones*, 2 C. 234; *Stone v. Buckner*, 12 S. & M. 73. See ante, 27.

146. *Same.* As a general rule, the vendee of land must rely upon his covenants, if he has not been evicted; but in cases of fraudulent representations as to title, he can claim a rescission without eviction; *Gilpin v. Smith*, 11 S. & M. 109. See ante, 120, 134, 119, 38, 39, 27.

147. *Fairness required of complainant: Small encumbrance.* In this case (the sale being executory, and the defendant being indebted for the purchase money) the land was sold under a judgment against the vendor for \$154, the purchase money being \$4,500; the complainant showed no other judgments, though he alleged large outstanding judgments. The court notice this sale as one of the characteristics of unfairness and want of candor on the part of the complainant, and remark that he might have prevented it by paying the judgment out of the purchase money he owed. The court also animadvert on complainant's examination of his own witnesses in failing to propound questions necessary to bring out the whole transaction; *Ayres v. Mitchell*, 3 S. & M. 683.

148. *Vendee's rights: Where there is no eviction and no fraud.* Where the contract is executory, and the covenants are independent, the vendee in possession, without fraud or eviction, and there being no attempt to enforce the outstanding title, is not entitled to relief against the purchase money for a defective title, it not appearing that the vendor is insolvent; *Coleman v. Rowe*, 5 H. 460; *S. P., Gale v. Green*, W. 159.

149. *Same.* And the rule is the same where the vendee is in possession under covenants of warranty; for it is settled that if there be a mere failure of consideration, arising from a sale of a defective legal title, unconnected with fraud or bad faith on the part of the vendor, the vendee will be left to his covenants of warranty in the deed; *Willy v. Hightower*, 6 S. & M. 345. And in such a case, the vendee will not be permitted to call the vendor into equity to litigate an adverse title, the vendor not being shown to be unable to pay the damages that might be rendered against him for a breach of his warranty; *Vick v. Percy*, 7 S. & M. 256; *S. P., Walker v. Gilbert*, 7 S. & M. 456. Nor will he be relieved in a case free from fraud, when the vendor can make title at the hearing;

McLaurin v. Parker, 2 C. 509. See *post*, 152, 157, *et seq.*

150. *No rescission where vendee purchases with notice of the defect.* In this case it appeared that the purchase money was to be paid in three annual instalments, and a title was to be made upon payment of the last; that the vendor was one of six co-parceners entitled to the estate sold, four of whom were of full age, and two minors, and that the vendor could make title to the shares of the four adults, but not to the shares of the others; that the vendee knew the condition of the title when he bought, and that the vendor was insolvent. This bill was filed by the vendee to enjoin the suit on the first note, and before the last instalment fell due, and the prayer was for a specific performance; and in case vendor was unable to make title, then for a rescission: *Held*, that vendee was not entitled to any relief, as he was a purchaser with full notice, and had not performed, nor offered to perform, his part of the contract; and, moreover, that the bill was premature in being filed before the last instalment fell due; *Bird v. McLaurin*, 4 S. & M. 50; *S. P., Harris v. Bolton*, 7 H. 167; *City of Natchez v. Minor*, 9 S. & M. 544. See *ante*, 27, 126, *et seq.*

B. WHERE THE FAILURE IS IN THE LEGAL TITLE ONLY.

151. *Vendee entitled to legal title.* The taking of a title bond is of itself evidence of one of two things—either, first, that the title is imperfect, and that time is required to perfect it, or that the vendor retains the title for his own security. But if it be manifest that the vendee never can make title, or that he never can make more than an equitable title, the contract will be rescinded; *Halls v. Thompson*, 1 S. & M. 443.

152. *Same: Mutual and independent covenants: Where equitable title will do.* Where the covenant to pay and the covenant to convey are mutual and independent, and the payment is to be made before the conveyance, if the vendee tender the whole purchase money, and demand a title, he is entitled to have a title; and in cases of inability to make it, he may sue on the covenants, or demand a rescission. But this rule does not apply where the failure is simply to convey the legal title—the vendor having a complete equitable title, and the vendee being fully aware of its condition when he bought, and there being some necessary delay in procuring the legal title by judicial proceedings. In such a case, time is not required as essential, and the vendor will be allowed a reasonable time in which to procure the legal title; *Green v. Finucane*, 5 H. 542.

153. *Same: Where there has been an eviction.* And in such a case, if there has been a recovery in ejectment against the vendee, he will not be entitled to rescind, unless he show that the recovery was not on a naked legal title, and that his vendor has not a complete equity which he can enforce; *Green v. McDonald*, 13 S. & M. 445.

C. RELIEF AS AFFECTED BY THE INSOLVENCY OF THE VENDOR.

154. *Rule.* The rule that the purchaser will not be relieved for a defective title, where he is in possession under covenants of warranty, and where there was no fraud in the sale, does not apply where the vendor is insolvent, and his covenants worthless as indemnity to the vendee. In such a case, if the defective title be clearly shown, the vendee will be entitled to relief. See cases cited, 30, *ante*.

In such a case, it would be iniquitous to allow vendor to collect the purchase money, and remit the vendee to his action on the covenants for his indemnity; and on this ground equity will relieve, whether there has been eviction or not, or whether the vendee knew, when he purchased, of the defective title or not; *Wailes v. Cooper*, 2 C. 208; *Garman v. Jones*, Ib. 234. See *ante*, 30, 150, 148, and *post*, 182, 188.

155. *Same: Insolvency of vendor when purchase money has been assigned.* But if the vendor has transferred the note for the purchase money to an innocent holder for value, and he has recovered a judgment at law on it, as he certainly has a right to do in all cases where a deed has been made and there is no eviction or fraud, the vendee cannot on the ground of the insolvency of the vendor get relief against the judgment in equity; for the equity of the innocent holder is at least equal to the equity of the vendee, and in such cases the rule is always that the law shall prevail, and that equity will not interfere; *Wailes v. Cooper*, 2 C. 208.

156. *Same.* A court of equity will not rescind the sale *in toto*, so as to defeat the claims of a *bona fide* assignee of a note for one-half of the purchase money, the vendor and assignor being insolvent,—if the vendee can get a good title to one-half the land, and still owes the vendor one-half the purchase money, in a case where the covenants are independent, and there was no fraud in the sale, as in that case the vendor has full indemnity to that extent; *Green v. McDonald*, 13 S. & M. 445.

In such a case if it be clearly shown that the vendor has no title, then, possibly, if the vendee be insolvent, the court will give relief against the assignee of the purchase money; *McDonald v. Green*, 9 S. & M. 138.

But in a case of fraud in a sale, the right of the vendee to rescind is not affected by the assignment of the notes for the purchase money, though after the assignment he promised payment to the assignor; *Gilpin v. Smith*, 11 S. & M. 109.

As to right of assignee where there is a voluntary rescission, see *ante*, 28, and *post*, 197.

156a. *Same: When there are several assignees.* When the vendor is insolvent, and there is a lien or encumbrance, the vendee may be relieved of the purchase money to the extent of the lien; and if the notes for the purchase money have been assigned, each as-

signee must lose *pro rata*. And in this case the decree of the court was, that a commissioner should be appointed to ascertain the value of the land, and if it did not exceed the liens, the assignees were to have nothing, and if the valuation exceeded the liens, then the excess was to be divided *pro rata*; *Kilpatrick v. Dye's Heirs*, 4 S. & M. 289.

D. AT WHAT TIME VENDOR MUST HAVE TITLE

157. *When title at the filing of the bill will do.* When there is no fraud, and vendor had a good title when he sold, and also a good title when the bill to rescind was filed, the vendee will not be entitled to relief, merely on the ground that between the sale and the filing of the bill, the vendee was for a time entirely divested of title. *Jenkins v. Whitehead*, 7 S. & M. 577. See *ante* 149.

158. *Title at the hearing.* Where a purchaser at an administrator's sale (which was void for want of notice to the heirs) was not deceived in relation thereto, by any fraudulent representation of the administrator as to his power to sell, and failed to make his defence at law, and then came into equity for relief, it was held that he must submit to take a good title at the hearing, if the heirs, being of age, will make it; *McLaurin v. Parker*, 2 C. 509.

See *ante*, 152, and *post*, 161, 188.

E. THE COMPLAINANT MUST SHOW THE DEFECT, AND THE PROOF.

159. *Same.* A complainant who is in the undisturbed possession of the land under a conveyance, must show clearly the defect of the title, or the fraud complained of, or he will not be entitled to a rescission. He cannot compel the vendor to disclose his title, but must show the defect himself; *Moss v. Davidson*, 1 S. & M. 112; *McDonald v. Green*, 9 S. & M. 138; *Green v. McDonald*, 13 S. & M. 445; *ante*, 153; *Ayres v. Mitchell*, 3 S. & M. 683. And he must show the condition of the title, so that the court may judge of its validity; *Ayres v. Mitchell*, *supra*.

160. *Same: Application of the rule.* If the defect complained of be a title in the wife of vendor, under a marriage settlement, and it appeared that the personalty had been removed to another county than the one in which the marriage contract was made and registered, and had there remained more than twelve months previous to the purchase, the bill should also show that the marriage contract was recorded in the county where the sale was made; since, under the Act of 1822, a sale by the husband to a purchaser without notice, in a county to which the property conveyed in the settlement had been removed, and in which it remained for twelve months without registration of the settlement, would have conveyed a good title; *Moss v. Davidson*, 1 S. & M. 112.

161. *Same.* And if, in such a case, the complainant had received notice of the wife's right, before he completed payment, he would have been affected by it, and therefore entitled to a rescission; but if, on such discovery

of her title, she disclaims, then he is not entitled to rescind; *Ib.*

162. *Same: Another instance.* If one necessary link in the chain of the vendor's title, should be a conveyance by a deceased person, and it is alleged in the bill that this party sold by parol only, inasmuch as the executors of the vendor can find no evidence of any title to their testator, this will not be a sufficient showing of a defective title, it not appearing that any search had been made in the registration office for a conveyance, nor that the heirs of the decedent were setting up any claim to the land; *McDonald v. Green*, 9 S. & M. 138.

3. The Necessary Promptness in Complaining, and statu quo.

163. *Rule on this subject.* In applications for a rescission (as well as for specific performance), there must be no unnecessary delay. If there has been negligence in this respect, and there has been a change of circumstances affecting the contract in any material particulars, the court will not interfere, as it is the duty of the court, in decreeing a rescission, to restore the parties, as nearly as possible, to the situation they respectively occupied when the contract was made. And if, from the conduct of one of the parties, this *status quo* cannot be attained, the court will not interfere at his instance; (citing *Ayres v. Mitchell*, 3 S. & M. 683; *Liddell v. Sims*, 9 S. & M. 596; *Fitzgerald v. Reed*, *Ib.* 94); *Johnson v. Jones*, 13 S. & M. 580; *S. P.*, *Jones v. Smith*, 4 G. 215.

The remedy must be prosecuted in good time after the injury is discovered; *Halls v. Thompson*, 1 S. & M. 443. Generally, he who seeks a rescission, should apply for it as soon as the defective title or fraud is discovered. But where the complaint is of a defective title, if vendor be unable to make title at the hearing of the bill to rescind, a rescission will be granted, notwithstanding an unreasonable delay; *Ayres v. Mitchell*, 3 S. & M. 683.

165. *Same: Case in judgment.* The sale sought to be rescinded was made in 1836, and in 1840, the vendor removed to Texas, and in the same year, the vendee discovered the fraud, and a bill was filed in 1841, to enforce a mortgage for the purchase money. In February, 1842, the vendor filed his cross bill, asking for a rescission: *Held*, that the delay was not unreasonable; *Gilpin v. Smith*, 11 S. & M. 109.

165a. *Same: Case in judgment.* The vendee in this case was a married woman, and her note, with her sureties, was taken for the purchase money. Two years after the sale, vendor filed a bill to rescind, upon the ground that the sureties were insolvent, and that the vendee fraudulently represented to him that they were solvent: *Held*, that the right to rescind was much weakened by the delay; *Foxworth v. Bullock*, 44 M. 457.

166. *Same: Another instance.* C. purchased a tract of land, and gave J. as his surety for the purchase money. The vendor

transferred these notes, and C. (the vendee) being insolvent, J., the surety, was sued for the purchase money, and the suit was compromised by J.'s giving the notes of other persons in payment, which he guaranteed, and the holder surrendered the notes for the purchase money to J., who also took an indemnity from C., which, however failed. Judgment was obtained against J. at law, on his guaranty, notwithstanding his plea of failure of consideration in the original sale to C. Eight years after the sale, J. filed his bill for a rescission of the contract, setting up a failure of consideration as to the title, and in addition, fraud in the vendor, in concealing encumbrances, and misrepresenting the true state of the title: *Held*, the delay, and the impossibility of placing the vendor in *statu quo* (he having surrendered his claim against C.), and the compromise, precluded J. from getting relief; *Johnson v. Jones*, 13 S. & M. 580.

See *ante*, 150, for premature complaint.

166a. *Same: Case in judgment.* In October, 1859, H. bought of N. a tract of land. In September, 1860, H. filed his bill, charging certain material misrepresentations of N. as to the boundary and title to the land, and seeking compensation therefor. In December, 1860, N. answered, denying the fraud, and offering to rescind the contract, but there was no evidence in the record that this answer was filed till 1866. In March, 1866, the suit was revived against the administrator and heirs of N., and on 19th April, the administrator answered, revoking the offer to rescind, in consequence of the change in the condition of things produced by the war. On 24th April, 1866, H. filed a supplemental bill, asking for a rescission of the contract, charging an additional misrepresentation as to boundary, which he alleged he did not discover till within two years before the filing of the bill. He gave as a reason for not accepting the offer of N. to rescind, that the counsel on both sides were engaged in the war, and the courts virtually closed, and that he did not know of the offer till after the war ended, when he promptly accepted it: *Held*, that under the circumstances, the bill to rescind was filed in due time; *Davis v. Heard*, 44 M. 50.

4. Rescission for Mutual Error, and Mistake.

167. *Same: Case in judgment.* B. was in possession of land which A. represented as within a survey belonging to him, and threatened to oust B., unless he purchased A.'s interest, which B. did. It afterwards appeared that the land did not belong to A.: *Held*, that B. was entitled to a rescission, and to recover back the purchase money, upon the ground of mutual error of the parties as to the ownership; and this, though B. had purchased the land from the United States for one-half the purchase money he had paid to A.; *Harrison v. Stowers*, W. 165.

168. *Same.* If the real owner of land, being in possession of it, purchase a claim to it from another, but which claim is invalid, and

take a deed with covenants of warranty, he will not be entitled to relief if the vendor were not guilty of fraud; *Willy v. Hightower*, 6 S. & M. 345.

169. *Same: Mistake.* A court of equity will relieve against a contract, where both parties entered into it under a mutual mistake as to a material fact, and without which the contract would not have been made. Therefore, when A. purchased land at an administrator's sale, and afterwards the land was sold under a judgment purporting to be against the intestate and a lien on the land, and A. bought again from the purchaser at sheriff's sale, and took, by agreement, the sheriff's deed to him directly, all the parties supposing that the intestate had signed the forthcoming bond from which the execution emanated, and it was afterwards discovered that he was no party to the bond; it was held that A. was entitled to be relieved from the contract; *Nabours v. Cocke*, 2 C. 44.

170. *Same: Another instance.* Willy had bought land and procured a good title to it, but there was a judgment against his vendor, which it was erroneously supposed was a lien on the land, and a sale was made under this judgment at which H. became the purchaser. W. afterwards bought from H., and took a warranty deed, and then discovering that he had a good title, superior to the title under the sheriff's sale, he filed his bill to rescind his contract with H.: *Held*, that he had not made out a case of plain and palpable mistake, or of fraud, and was not entitled to relief; *Willy v. Hightower*, 6 S. & M. 345.

171. *Same.* It has been holden, that where a purchaser of the whole interest from one of two tenants in common, knows at the time that the vendor has only a half interest, and is incompetent to convey the whole, except by consent of the other tenant, and the latter refuse to convey, then the agreement is to be considered as made by mistake, and that the vendee cannot claim a specific performance as to the one half interest of the vendor; *Stone v. Buckner*, 12 S. & M. 73.

5. Right of Parties to Rescind under Executory Agreements.

A. VENDOR'S RIGHT TO RESCIND FOR FAILURE OF VENDOR TO PAY.

172. *Same.* If a vendee who purchases land upon a credit, taking a bond conditioned that the title shall be conveyed when he pays the purchase money, fails to pay according to its terms and stipulations, the vendor may upon his mere failure to pay, consider the contract at an end, and convey a good title to another. In this case, however, it must be noted, that the party complaining was the second vendee, who was in possession under a deed, which he got without notice of the prior sale, and that the original vendee had died, and that his heirs had never made any offer to comply; *Holloway v. Moore*, 4 S. & M. 594.

173. *Vendor must offer to perform, and make demand.* Where a vendor sells partly for cash, and the balance of the purchase

money is payable in instalments, secured by the notes of the vendee, and gives a bond to make title "on the punctual payment of the said notes," the covenants are so far mutual and dependent, that the vendor upon the mere failure of the vendee to pay the notes, or any of them, at maturity, has no right to treat the contract as at an end, without first making a demand for payment, and offering to perform his part of the contract (citing *Wadlington v. Hill*, 10 S. & M. 560; *Peques v. Mosby*, 7 id. 340; *Mobley v. Keys*, 13 id. 677); *Johnson v. Jackson*, 5 C. 498.

174. *Same*. The condition of a title bond, "that if the vendee complies promptly with his contract, that the vendor will execute a deed," does not make time the essence of the contract, and a failure by the vendee to comply by the payment of the purchase money, when it falls due, will not, therefore, authorize the vendor to rescind without an offer to perform on his part (citing *Johnson v. Jackson*, 5 C. 498; *Stewart v. Gates*, 1 G. 100; *Eckford v. Halbert*, 1b. 273; *Walton v. Wilson*, 1b. 576; *Arther v. Pearson*, 3 id. 131; *Prophit v. Robinson*, 5 id. 141); *Jones v. Loggins*, 8 G. 546.

See *TIME*, 2, et seq.

175. *Same*. A vendor who has executed a bond conditioned to make title on the payment of the purchase money, cannot elect to abandon the contract upon the mere failure of the vendee to pay the purchase money, without having made a valid offer to perform his part of the agreement (citing *Johnson v. Jackson*, 5 C. 498); *Walton v. Wilson*, 1 G. 576. Nor can he rescind by a mere notice to the vendee that the contract is at an end, without an offer to perform his part of the contract; *Arther v. Pearson*, 3 G. 131.

176. *Same*. And such a vendor who has received two of the three instalments of the purchase money, will not be permitted to assert rights, except to accomplish the object of retaining the title, viz.: to secure the purchase money. He will not be permitted to use the title retained in himself for the unconscientious purpose of possessing himself of the land and retaining the instalments already paid. And if he, upon failure of vendee to pay the last instalment at maturity, immediately demand possession, and commence proceedings by unlawful detainer to recover it, and if the vendee, before the trial in that proceeding, tender all the purchase money and the costs, which vendor refused to take, and prosecuted his suit to judgment, then the vendee may maintain a bill in equity to restrain further proceedings under that judgment, and to enforce specific performance of the contract; *Bellamy v. Shelton* 4 C. 250.

177. *Same*. Where, by the terms of the title bond, the vendor binds himself to make title upon the payment of the purchase money on a day specified, and that he will give the vendee another year in which to make payment, if he should be unable to pay on the day named; if vendor, after the expiration of the additional year and the failure of the ven-

dee then to pay, without any new agreement between the parties, voluntarily indulge the vendee for an indefinite period, he cannot then elect to consider the contract at an end on account of the previous default of the vendee; there must first be a demand made for the money and a refusal by the vendee. Such a stipulation for indulgence is for the benefit of the vendee, and his failure to pay at maturity will not operate as a forfeiture of his rights, under a clause in the contract which declares the obligation of the vendor to be void unless payment be made at maturity; *Stewart v. Gates*, 1 G. 100.

178. *Same*. If the vendor decline the offer of the vendee to surrender possession of the land, in accordance with a right secured to the former by the provisions of the title bond, it will be a waiver of the previous defaults of the vendee in making payment of the purchase money, and he cannot afterwards insist on his right without having first demanded payment; *Prophit v. Robinson*, 5 G. 141.

179. *Same: Inability of vendor to convey as an excuse*. It is a sufficient excuse for the vendee's failure to pay the purchase money at maturity, in a case of mutual and dependent covenants, that the vendor was unable to convey according to his covenant, and his failure under such circumstances, will not prevent him from afterwards insisting upon the vendor performing his contract; *Walton v. Wilson*, 1 G. 576.

And if he has no title to part of the land sold, his mere offer to convey such title as he has, is no answer to an offer to perform by the vendee, and a demand of title according to the agreement. He must be able to make a valid title according to his bond; *Matthews v. Patterson*, 2 H. 729.

180. *Same: What is necessary to put an end to the contract*. Where the sale is by bond to make title on payment of the purchase money, for which the vendee has given his note, due on a day named in it, a mere tender of a deed after the maturity of the note and demand of the money, without notice to the vendee that the vendor considers the contract at an end, do not of themselves avoid the contract, so as to enable the vendor to recover possession. To enable him to do this he must put an end to the contract, by a distinct notice to the vendee to that effect; *Johnson v. Tuggle*, 5 C. 836.

181. *What is a good performance: Time allowed: Case in judgment*. A., through his agent, applied to B., who was also an agent, to buy a tract of land, and a verbal agreement was made between them for this purpose, and B. thereupon wrote to A. stating the terms of the contract, and a description of the land, also stating that the sale was made, provided he, A., should come to close the contract within two weeks. The letter was signed in the individual name of B. A. sent his agent with the cash payments, but without the notes for the credit instalments, and with no authority to execute them, with instructions to close up the trade, and between 11 and 12 o'clock, P. M. of the

last day of the two weeks, it being Saturday, after B. had retired to bed, the agent of A. called at B.'s residence, which was one-half mile from his office and known place of transacting all land business, and the agent then offered to comply for A., but B. refused, stating that the agent had come too late: *Held*,

1st. That the letter of B. was a sufficient contract within the statute of frauds, and the signing by B. in his individual name, was also sufficient.

2d. That B.'s authority to sell need not be in writing.

3d. That the title, though a mere proposition until accepted, was binding, if A. should accept within the time limited.

4th. That in computing the time "within two weeks" from the date of the letter, the date was to be excluded.

5th. That, although A. had until the last moment of the last day in which to comply, yet he must offer to comply at a reasonable hour of that day, so as to allow the other party sufficient time to act with caution, and due consideration to protect his own interest in the completion of the contract, and that under the circumstances, the offer came too late, as there was not reasonable time left for B. to repair to his office and complete the trade before Sunday and the expiration of the time allowed.

6th. That the offer of the cash payment alone was not sufficient; *Curtis v. Blair*, 4 C. 309.

182. *Failure of vendee to give security.* If land be conveyed to the vendee upon his promise to procure another to stand as his surety for the purchase money, which he fails to do, and the land be levied on for the vendee's debts, and he is insolvent, the vendor is entitled to a rescission of the contract; *Taylor v. Strong*, 10 S. & M. 63.

183. *Rescission where there is a sub-vendee.* In a case where the covenants are mutual and dependent, if the vendee sell to another, a contract afterwards rescinded by the vendor and vendee alone, cannot defeat the rights of the sub-vendee; and in such a case, the vendor having notice of the sale, the vendee must make demand of, and offer to perform to the sub-vendee; and on a bill for a specific performance by the sub-vendee, the decrees should provide for payment by him on a day named, and for a conveyance of the title to him; *Johnson v. Jackson*, 5 C. 498.

184. *When vendor has reserved right to rescind.* A vendor who covenants to make a conveyance to the vendee upon payment of the purchase money, reserving, however, the right to rescind in case a good title cannot be procured, and promising in that event to refund the purchase money which may have been paid, cannot maintain a bill for a rescission of the contract, upon the ground that a good title cannot be procured, without showing that he has used reasonable efforts to procure the title, and that his efforts have been fruitless; *Bibb v. Wilson*, 2 G. 624.

B. VENDEE'S RIGHT.

185. *Vendee cannot rescind without offer to perform.* A purchaser who has paid part of the purchase money, and is to receive title upon payment of the balance, cannot recover back what he has paid, unless he show that he has offered to pay the balance, and demanded title which was refused; *Sims v. Boaz*, 11 S. & M. 318; *S. P., Hill v. Samuel*, 2 G. 307; *Ayres v. Mitchell*, 3 S. & M. 683. Unless the contract has been rescinded either by agreement, or the act of the vendor; *Sims v. Boaz*, *supra*. And so if the vendor remove from the State before he has opportunity to do so, no demand is necessary; *Ayres v. Mitchell*, *supra*.

186. *Same: Instance of rescission by act of vendor.* The vendor received a part of the purchase money, and covenanted to make title on payment of the balance. The person from whom he bought, filed a bill against him, to enforce the lien for the purchase money due to the complainant in that bill. The last vendor, for a consideration paid him by his vendor, made no defence, and allowed a decree to be entered under which the land was sold, and the purchaser put in possession; *Held*, that these acts of the vendor amounted to a rescission of the contract, and that the vendee, without doing more, could recover back the money he had paid on the contract; *Sims v. Boaz*, *supra*. See *post*, 190.

187. *Vendee's right when vendor cannot convey title.* The vendee in a title bond, may elect to abandon the contract if the vendor should be unable to convey according to the terms of the bond, but he cannot abandon it so as to enable him to purchase the land from another party, and hold it adversely to vendor, without having first put the vendor in default, by a demand for a title, and without a return of the possession of the land to the vendor, when he has received possession from him, although by the terms of the bond, the vendor was bound to make title within a limited time (citing *Standifer v. Davis*, 13 S. & M. 48; *Johnston v. Beard*, 7 Id. 214; *Hudson v. Watson*, 4 C. 357; *Hardeman v. Cowan*, 10 S. & M. 486; *Champlin v. Dotson*, 13 Id. 553); *Hill v. Samuel*, 2 G. 307.

See *TIME*, 3. *Post*, 207.

188. *Same: When rescission is asked before time for making title.* A vendee who has agreed to pay by instalments, and has taken a bond for title, on the payment of the purchase money, is not entitled, in the absence of fraud on the part of the vendor, to have the collection of the first instalment of the purchase money enjoined, where the vendor is insolvent, upon the ground that the vendee will be unable to make title at the time he agreed to do so; unless the defect in the vendor's title be clearly shown; for the taking of the bond to make title, might have been intended to give the opportunity to the vendor to procure the title by the time agreed on; *Hanna v. Harper*, 3 S. & M. 793. See *ante*, 23, 24, 158, 150.

As to damages of vendee, when vendor refuses to convey, see DAMAGES, 10, *et seq.*

C. MISCELLANEOUS AND GENERAL PRINCIPLES ON RESCISSIONS IN EXECUTORY CONTRACTS.

189. *Bills for, at discretion of the court: Complainant must comply.* Bills for specific performances, or for a rescission, are addressed to the sound discretion of the court. No certain and definite rules can be laid down which would determine in all cases when a party was or was not entitled to relief. But where a complainant, seeking a rescission of a contract, has not placed himself in a situation to comply with his part of the contract upon a compliance by the vendee, the court will not interpose in his behalf; *Hester v. Hooker*, 7 S. & M. 768. See *post*, 204.

190. *Same: An instance.* Where a vendor had given a bond for title, and had stipulated also to deliver possession of the land, upon payment of a part of the purchase money by a particular day, and the vendee failed to pay the money at the time, and asked for a rescission upon the ground of his inability to make payment; and soon thereafter the vendor re-sold and delivered possession to another, and after this the last sale was rescinded; it was held, that the bill of the vendee for a rescission, and the cross bill of the vendor for specific performance, should be both dismissed, and the parties left to their remedies at law; *Ib.* See *ante*, 186; *post*, 196, 204.

191. *Which party has a right to rescind.* A stipulation in an executory assignment for the sale of land, that in case the vendor cannot convey, or if the purchaser fail to pay at the appointed day, then the contract shall be void, does not enable either party to avoid the contract against the consent of the other by a mere failure to perform his part of the contract. The right to avoid the contract exists only in favor of that party who is ready and willing to perform his part, and against the other party failing to do so; *Betty v. Harkey*, 2 S. & M. 563.

192. *Complainant must offer to return what he has received.* In a bill for a rescission, the complainant must offer to return what he has received under the contract; *Harrison v. Field*, 41 M. 712; S. P., *Jagers v. Griffin*, 43 M. 134; *Martin v. Tarver*, *Ib.* 517.

6. Rescission for Inadequacy of Price.

193. *No ground for rescission.* Inadequacy of price, without fraud, is no ground for setting aside a sale under execution. In this case, land worth \$8,000 was sold for \$290; *Delafield v. Anderson*, 7 S. & M. 630; S. P., *Clement v. Reid*, 9 S. & M. 535. Yet it is a good ground for the court to refuse its aid in compelling a specific performance; *Clement v. Reid*, *supra*, or, in removing clouds from the title; *Huntington v. Allen*, 44 M. 654.

7. Rescission for Weakness of Intellect.

194. *Same.* Weakness of mind, short of

legal incapacity, unconnected with fraud in the opposite party, is no ground to set aside a contract; yet when combined with other circumstances, it is an important consideration, and has a material influence upon the validity of the contract; *Liddell v. Sims*, 9 S. & M. 596.

195. *Same: Case in judgment.* L. bought of S. in November, 1837, a tract of land, the purchase money to be paid on the first days of January, 1839, 1840, and 1841, and was secured by mortgage on other lands of the vendee. Vendor gave a bond to make title on the request of the vendee, after the 1st of January, 1839; and to surrender possession on that day. He represented his title as good. Vendee made a payment of about one-seventh of the purchase money, and requested title and possession, but the vendor declined to surrender possession, and did not make title. At the time of the sale, the vendor had only one-sixth undivided interest in the land, and did not procure any other, until the year 1842, after the bill for rescission had been filed, when he procured all but one-sixth interest. The vendee was weak-minded, and easily imposed on. The land had greatly deteriorated in value. The vendee only discovered the defects in the title a short time before he filed his bill; *Held*, that the contract should be rescinded; *Ib.*

8. Rescission by Mutual Act of Parties.

196. *Agreement to refer to arbitrators.* An agreement between the vendor and vendee, after a failure of the latter to pay the purchase money in pursuance of the stipulation of the title bond, to rescind the contract, according to the determination of the arbitrators, who were to assess the value of the improvements made by the vendee, and the amount of the rent to be charged to him, is not a valid rescission, if the arbitrators be not appointed, and the vendee still retain possession of the land, and the vendor keep the notes for the purchase money; *Jones v. Loggins*, 8 G. 546. See *ante*, 190.

197. *Right of assignee of purchase money, where there has been a voluntary rescission.* Where there has been a voluntary rescission by vendor and vendee, and one of the notes for the purchase money had been assigned, a stipulation in the agreement to rescind that the vendor shall "take up" said note, is a recognition by the vendee of its validity; *Wiggins v. McGimpsey*, 13 S. & M. 532. See *ante*, 28, 155, 156.

198. *Voluntary rescission where there is a sub-vendee.* See *ante*, 183.

9. Waiver of Right to Rescind.

199. *Mere renewal of notes for purchase money no waiver: Compromise.* A mere renewal, by the vendee, of his note for the purchase money, will not debar him of the privilege of seeking a rescission; but if, being sued at law for the purchase money, he compromise the matter and give the notes of other persons in payment of his note, it will be a waiver, though he guarantee the trans-

ferred notes; *Johnson v. Jones*, 13 S. & M. 580. For the instance see *ante*, 160.

200. *Making new agreements in affirmance.* If a party, with a knowledge that he has been defrauded, make new engagements, in affirmance of the original contract, he thereby waives the fraud, and loses his claim to relief; *Hanson v. Field*, 41 M. 712.

201. *Same: Case in judgment.* H. sold land to F. and alleged that F.'s conduct was fraudulent in this, that F. represented he had a claim against the United States government, and would get the money thereon soon, and would then pay for the land; it being understood that the sale was for cash, as H. wanted the money to go into business; that F., when he came to get possession, still represented that he would get the money in a few days, and that H., relying thereon, made a deed and surrendered possession, and took from F. a note for the balance of the purchase money, payable out of F.'s interest in the proceeds of a saw-mill; that H. objected to receiving this, but F. said he would make it all right: *Held*, that as it was not shown that H. did not understand the contents of the note given when he made a deed, the taking of it was a waiver of the previous fraud of F. about making the payment; *Ib.*

202. *Same: Another instance.* A vendee commenced an action on the title bond of his vendor for fraud in relation to the title; and then the parties submitted the matter in dispute to arbitrators, who could not agree; then the vendor and vendee agreed to divide the sum which represented the difference in the judgment of the arbitrators, and, in pursuance of this agreement, the vendee executed a new note for the purchase money so ascertained, and dismissed his suit: *Held*, that this new engagement, after a knowledge of the fraud committed, was a waiver of it, and vendee could not now have relief; *Edwards v. Roberts*, 7 S. & M. 544. See *ante*, 178.

10. Miscellaneous.

203. *Party cannot have partial rescission.* A party cannot seek a rescission of a contract and at the same time claim a benefit under it. He must rescind, or affirm *in toto*. Hence, a party who claims an interest in the proceeds of a sale of property, cannot set up that the sale was fraudulent, and at the same time assert his claim to the proceeds; *Comm'l Bank of Manchester v. Lewis*, 13 S. & M. 226.

204. *Specific performance and rescission: Sometimes both refused.* A bill for a specific performance, and one for a rescission, do not stand on the same ground in equity. A decree for performance will generally be granted, if the applicant has not been guilty of negligence, and there has been no change of circumstances during the delay, materially affecting the character and justice of the contract. On the other hand, a decree for a rescission will not be made unless there has been fraud practiced, or a plain and palpable mistake has occurred. Hence, it does not follow that because the one party is not en-

titled to a specific performance, the other is entitled to a rescission, or *vice versa*; but it may happen that relief will be denied to both parties, and they left to their remedies at law; *Liddell v. Sims*, 9 S. & M. 596. See *ante*, 189, 190.

205. *Vendee's rights on rescission: Improvements.* Where a party had improperly obtained the legal title, and his deed was cancelled, and the property ordered to be restored to the true owner, it was held that he was entitled to the costs of valuable improvements made on the land by him, and also to what he had paid in removing legal encumbrances on the land; *Ellis v. Ward*, 7 S. & M. 651.

206. *Same: Improvements, rents, lien.* Where a sale of land made by an executor is set aside on the ground of fraud in the sale, the fraudulent purchaser will be entitled to a lien on the land for the amount of the purchase money he has paid, and interest on it; and will be chargeable with reasonable rent, and be allowed for permanent and valuable improvements, not to exceed the value of the rent. And if the decree of the Probate Court for the sale be valid, it will be resold under that order, subject to these rights; *Grant v. Lloyd*, 12 S. & M. 191.

See FRAUDULENT ASSIGNMENT, 80, *et seq.* CHANCERY, 131.

207. *Vendee in possession after rescission: Cannot dispute vendor's title.* A defendant in ejectment, who is in possession under a contract of purchase which has been rescinded and the purchase money refunded, cannot set up an out-standing title acquired by him against the vendor; nor can he dispute the vendor's title; *Walker v. Williams*, 1 G. 165. See *ante*, 187.

208. *Rescission on complaint of surety.* A contract of sale of land will not be rescinded on the complaint alone of the surety for the purchase money, for fraud committed in the sale, the vendee making no complaint, and not being even a party to the suit; *Walker v. Gilbert*, 7 S. & M. 456. Whether the surety can successfully complain when there is a defect in the title, the vendee being insolvent and taking no interest in the litigation; *Quære?* *Johnson v. Jones*, 13 S. & M. 580; but *Montgomery v. Dillingham*, 3 S. & M. 647, was cited with approbation: and that case holds that the surety is bound by a waiver of a defence made by the principal, for which see PRINCIPAL AND SURETY, 75.

XI. Buying Adverse Titles, and Paying Encumbrances.

1. Vendee has no Right to Buy in Title, and set it up adverse to Vendor.

209. *Same.* The rule is well settled, that where a purchaser has been put in possession, he cannot afterwards acquire a title and set it up against the vendor, and if he extinguish an encumbrance, or buy in an outstanding title, all he can require is the repayment of the money he has so paid out; *Hardeman v. Cowan*, 10 S. & M. 426; *Hill v. Samuel*, 2

G. 307; *Taylor v. Eckford*, 11 S. & M. 21; *Champlin v. Dotson*, 13 S. & M. 553; and this rule applies when the vendee's wife purchases an outstanding title, or extinguishes an encumbrance. In such cases the husband and wife are regarded as identical. To allow her to purchase when the husband is forbidden, would be a mere evasion of this rule. And the rule is the same when a third person purchases with his own means, but in reality for the wife; *Hardeman v. Cowan*, 10 S. & M. 486. And so, if another party buy in the title, and substitute the vendee to his contract; *Champlin v. Dotson supra*.

210. *Same: Case in judgment.* The vendee agreed to pay \$600 towards the extinguishment of certain judgments, which were liens on the estate, and the remainder of the purchase money was to be paid in instalments, and the vendor agreed to discharge the other judgment liens by a stipulated time, and before any instalment of the vendee's debt was due. The vendee was put in possession, and paid the \$600, as he had agreed, and the vendor neglected to pay off the other judgments; and before any other instalment of the purchase money was due, the land was sold under these judgments for about one-tenth of the amount of the purchase money, and was purchased by a brother of the vendee's wife, with his own means, but exclusively for the use of his sister. The vendor then offered the vendee a deed, which he refused, on the ground that the vendor could not make a title, on account of the sale under the judgment: Held that the purchase at the sheriff's sale was in reality the purchase of the vendee's wife, and that she could not set up this title against the title of the husband's vendor, and that the land was subject to the payment of the balance of the purchase money due to vendor, after deducting the amount paid for the wife's bid at the sheriff's sale; *Hardeman v. Cowan*, 10 S. & M. 486.

211. *Same: Another instance.* Calhoun executed a deed in trust, conveying land to secure Eckford in a debt he owed him; the deed in trust was closed by a sale, at which Eckford became the purchaser, leaving Calhoun in possession. The following contrivances to defeat Eckford's title were adjudged fraudulent and illegal:

1. The land was sold under an execution against Calhoun, older than the deed in trust, and purchased by a brother of C. for C.'s wife; and the rule laid down in *Hardeman v. Cowan, supra*, and as stated in 209, was held to apply.

2. The land being leasehold, M., who owned an adjoining lot, proposed to C. to forfeit the lease, which was done by a non-payment of the rent, and M. got a new lease for all the land, including his own lot, and conveyed to C.'s wife the part which Eckford had bought.

3. Eckford, having filed a bill to set aside all these conveyances to C.'s wife, C. died *pendente lite*; and after his death, the land was again levied on under a judgment against C., older than the deed in trust, and bought by C.'s brother, who was his administrator,

and conveyed to C.'s widow; but, at the sheriff's sale, C.'s brother was notified that the judgment, under which the sale was made, was satisfied. The land was worth \$6,000, and C.'s brother paid \$70; *Taylor v. Eckford*, 11 S. & M. 21.

2. Vendor has no Right to buy Title adverse to Vendee.

212. *Same.* A vendor or mortgagor will not be permitted to purchase in and set up an outstanding title, in derogation of the title conveyed by the deed and the assurances contained in it; and if he buy such title, it will enure to the benefit of the vendee or mortgagee; and this rule is the same, though the mortgagor has been discharged from the mortgage debt by the Bankrupt Act of 1841; for, by the terms of the act, the mortgage is considered in force after the discharge; and the covenants of warranty of title and quiet enjoyment, and against encumbrances, remain still binding on the vendor, since they are not provable against his estate under that act; *Bush v. Cooper*, 4 C. 599.

213. *Same.* A covenant to convey, with warranty of title, deprives the covenantor of the right to acquire an interest in the premises, in derogation of the rights of the covenantee. But the rule is otherwise, where the covenant is to convey, by quit claim deed, the interest which the covenantor has at the time of making the covenant; *Mitchell v. Woodson*, 8 G. 567. But, by Rev. Code of 1857, p. 369, art. 17, the rule allowing a vendor, in a quit claim deed, the right to purchase, is changed.

214. *Same: Sale of inchoate interest.* A party who has an inchoate interest in public land, by donation from Spain, may sell the same; and if title be confirmed, it will enure to his vendee; and if such sale is not a mere quit claim, but is intended as a valid and sufficient sale, it will prevent the vendor, or his heirs, from afterwards acquiring a title to the land adverse to the vendee; *Nixon's Heirs v. Carco's Heirs*, 6 C. 414. See post, 223.

3. Miscellaneous.

215. *Several encumbrances: Purchase of one.* When a purchaser pays off encumbrances, he is entitled, as against another encumbrancer seeking to enforce a sale of the estate to satisfy his debt, to be substituted to the rights of the encumbrancer whose debt he has discharged; *Planters' Bk v. Dodson*, 9 S. & M. 527.

216. *Covenant of general warranty of title, does not cover encumbrances bought in.* Where the vendee has only a general covenant of warranty of title, and no covenant of seisin, or against encumbrances, and is in possession, and buys in a paramount and superior title from a third person, he cannot recover on the warranty, for there is no eviction and can be none, since he has purchased in the only title which can evict him; and he is also without remedy for the money paid, in purchasing in the outstanding title, because he has failed to protect himself by the proper

covenants; *Wilty v. Hightower*, 12 S. & M. 478.

XII. Covenants of Title.

See DRED, sub-division Warranty, 88a, et seq. Ante. 10. 13.

217. *Where there is no covenants.* A purchaser without covenants takes the risk of the title; *Smith v. Winston*, 2 H. 601.

218. *The covenant of general warranty.* A covenant in a deed "to warrant and defend the title" of the land sold, is a covenant of general warranty of title only, and is not a covenant of seisin; *Wilty v. Hightower*, 12 S. & M. 478; and this is so, notwithstanding the use of the words "grant, bargain and sell," for these do not have the force of the warranty fixed on them by statute, when there is an express covenant of warranty; *Hoy v. Taliaferro*, 8 S. & M. 727; *Duncan v. Lane*, lb. 744; *Weems v. McCaughan*, 7 S. & M. 422; *Wilty v. Hightower*, supra.

219. *Breach of the covenant of general warranty.* There can be no breach of the covenant of general warranty of title, without eviction. The purchase of an outstanding superior title, gives no right to the vendee to recover on the covenant; see ante. 216, see also ante. 29, et seq. Actual eviction is necessary to enable vendee to maintain an action on it for a breach; *Burrus v. Wilkin-son*, 2 G. 537.

220. *Covenant of general warranty: Special covenant to remit price.* The vendor, besides an express covenant of general warranty of title, stipulated in the deed, that as he had not a complete title to a portion of the land conveyed, he would remit to the vendee, at a price stated per acre, for as many acres as he should not be able to show title to, when the last note for the purchase money should become due. The vendee assigned this deed, and all his rights and title under it, to a third party, and the vendor assigned the note for the last instalment of the purchase money. The assignee of the note sued the original vendee on it: *Held*, that the defendant could make the defence of a failure of vendor to show title as stipulated in the deed; and that his right to do so was unaffected by the assignment of the note for the purchase money, or the assignment of the deed; that the covenant to remit for the land to which the vendor had no title, was a personal covenant, and did not pass with an assignment of the land, nor was it at all affected by the covenant of general warranty; *Chaplain v. Briscoe*, 11 S. & M. 372.

221. *Covenant for quiet enjoyment: What is.* A covenant by the lessor that the lessee paying rent, &c., shall and may lawfully and peacefully hold, occupy and enjoy the demised premises, and every part thereof, for and during the term, "free from all eviction, interruption and molestation to him, the lessee, from or by any person," is nothing but a covenant for quiet enjoyment; *Surget v. Aright*, 11 S. & M. 87.

222. *Same: Not broken by tortious eviction.* The rule that a general covenant of

warranty of title is not broken by a forcible eviction, applies to covenants for quiet enjoyment, in all cases of disturbance or eviction by a stranger, even though the party so forcibly disturbing or evicting the lessee, is induced to the act by feelings of animosity or revenge against the covenantor. And if, in any case, the covenantor would be liable on such a covenant for a tortious eviction, it would be only where it is done by him personally, or is brought about by his personal act, done with a view to that end; *Id.*

223. *Same: Plea.* Where to a declaration against a covenantor for breach of the covenant of quiet enjoyment, in which the eviction was alleged to have been done by a mob, moved to do the act by the defendant, the latter pleaded that the mob was composed of persons unknown to him, who without his knowledge, privity or consent and against his will, did the act; it was held that the plea was good, and being a denial of the declaration, it should conclude to the country; *Id.*

XIII. Miscellaneous.

223a. *Assignee of purchase money buying outstanding encumbrances: Case in judgment.* A. and B. sold a tract of land, and made a deed with special warranty to C., who paid part of the purchase money, and gave his notes for the remainder, which were not to be paid until he obtained title, by sale to be made under a decree, which was to be rendered in a suit then pending, in which A. was complainant and B. the defendant. The decree was obtained and the sale advertised; C. attended for the purpose of bidding, but being informed that Y. had filed a bill, setting up a title paramount to that of A. and B., and that he would likely succeed, C. declined then to have the sale made, but A. who held part of C.'s notes for the purchase money, directed the sale to proceed, with the view of making C. title; P., who had become assignee of part of the notes of C. for the purchase money, and knew all the facts, and A.'s purpose in making the sale, bought the land, at the sale, for about one-fifteenth of its value; Y.'s bill having been afterwards dismissed, P. claimed to hold the land under his purchase: *Held*, that the sale was made with a view of completing C.'s title, and that P. could not claim to hold adversely under this purchase; and that C. was entitled to a conveyance from P. upon his paying all the purchase money remaining due and unpaid; *Petrie v. Pin-card*, 5 O. 624.

224. *Sale of right of donation under Spanish government.*

See SPANISH CLAIMS, 8.

225. *Declarations of vendor to impeach title.* The declarations of a vendor made after the conveyance, are not admissible to impeach the *bona fides* of the transaction; and this rule is applicable when there is an attempt to impeach the conveyance on the ground that it is fraudulent as to creditors; *Ferri-day v. Selzer*, 4 H. 506. And it is incompetent to impeach the deed by showing that the

grantor had previously said, that he had made a deed of the same property to another, under whom the party offering the evidence claimed title; *Harman v. James*, 7 S. & M. 111.

See FRAUDULENT ASSIGNMENT, 77. EVIDENCE, 78.

226. *Ratification of a sale by party interested: Case in judgment.* Land was conveyed to the president of an unincorporated company, and his successors in office, for the benefit of the stockholders and their heirs; and the president, by the authority of the stockholders, sold a portion of it, and took from the vendee his notes for the purchase money. The stockholders afterwards sold their stock to S., who, as such assignee, received from the president the notes of the vendee, and allowed the vendee to renew one, and then assigned all of them to a third person; and subsequent to this contracted with the vendee for a purchase of the land in consideration of the surrender of the notes for the purchase money, which S. agreed to take up from the assignees, and deliver to the vendee: *Held*, that these acts of S. and the vendee were all in affirmance of the sale by the president, and prevented them from asserting that S. had disaffirmed the sale; *City of Natchez v. Minor*, 9 S. & M. 544.

227. *Making deed contrary to title bond: Right of obligee to resist.* B. and C. owned a tract of land jointly and equally. C. gave an obligation in his own name to R. and S. to convey the whole to them in consideration of \$24,000, to be paid by S. B. and C. subsequently made a deed of the whole to S. and took from him a mortgage to secure the purchase money originally agreed to be paid: *Held*, that if R. could resist at all the foreclosure of the mortgage on the ground of the agreement of C. to convey to him and S. jointly, his right in this respect was limited to a resistance as to one fourth of the land, as his equity extended alone to one-half of the half interest of C.; *Stone v. Buckner*, 12 S. & M. 73.

228. *Same: Waiver by receiving deed with knowledge of encumbrance.* In this same case, after S. had executed the mortgage to secure the purchase money, he conveyed to R. an undivided half interest in the land, and after that he conveyed to R. the other half interest, together with S.'s half interest in certain slaves, with which R. and S. had cultivated the land jointly, R. agreeing in consideration of this last conveyance, to pay all the unpaid purchase money due to B. and C., except one note. B. and C. then filed this bill to foreclose the mortgage, and R. resisted, claiming a half interest in the land under the first agreement made by C. to convey to R. & S. jointly: *Held*, that R. by voluntarily receiving a deed from S. with a full knowledge of the mortgage executed by him to secure the purchase money, waived his right to demand from C. a conveyance, and that the mortgage would be foreclosed; *Id.*

229. *Stipulation as to improvements to be made by vendee.* The vendor and vendee of

land situated in a town may lawfully stipulate for certain improvements to be made by the vendee in a specified time on the lot sold; and in case of failure to make the improvements, that an additional sum shall be paid by the vendee to the vendor for purchase money, and for liquidated damages. The interest which the vendor has in his remaining property would alone be a sufficient consideration for a stipulation to improve that which was sold; *Bessinger v. Brewer*, 3 C. 86.

230. *Possession for twenty years as evidence of payment.* The possession of land for twenty years, under a decree in chancery, confirming to the possessor the legal title, and establishing a lien on the land for the payment of the purchase money, is presumptive evidence of payment; *Doe ex dem. Stark, v. Gildart*, 5 H. 606.

231. *Possession as notice.* Possession of land is notice of the title of the possessor; *Jones v. Loggins*, 8 G. 546; *Dixon v. Lacoste*, 1 S. & M. 70; *Halls v. Thompson*, 1b 443; *Witty v. Hightower*, 6 id. 345; *Walker v. Gilbert*, 7 id. 456. See EVIDENCE, 61.

232. *Presumption in favor of title from long possession.* See EVIDENCE 54, 56.

233. *Assignment of certificate of entry.* See REGISTRATION, 9.

234. *Assignment of title bond.* The assignment of a bond by which the obligor is bound to make title, conveys an equitable title to the assignee, and is a good consideration to support a promise; *Montgomery v. Dillingham*, 3 S. & M. 647.

235. *Title by relation.* See RELATION.

236. *Vendor's right to defend the vendee.* A vendor with covenant of warranty may use any means to defend the title of his vendee that the latter can, and may therefore file a bill in equity to defend the vendee's title; *Huntingdon v. Grantland*, 4 G. 453.

237. *Bill to reform deed.* In case the deed by the fraud of the vendor state the contract incorrectly, the vendee may maintain a bill in equity to reform it, so as to make it express the true agreement, which may be proven by parol; *Howell v. Gibson*, 1 G. 464.

238. *Damages for breach of warranty of title.* See DAMAGES, 10, et seq.

239. *Quit claim de d.* See DEED, 85, et seq. QUIT CLAIM.

240. *What registered deeds a purchaser is not bound to notice.* See DEED, 44b.

249. *Provision in deed to revert title.* If a deed of conveyance provide that the vendee shall have a stipulated time in which to complete the contract, or rescind, and in case of rescission, that the land shall revert to the grantor; a rescission within the stipulated time may be proven by parol, and it will revert the title in the grantor without any formal act of conveyance; *Hughes v. Wilkinson*, 8 G. 482.

250. *Construction of agreement to convey, Parol proof a waiver, &c.* An agreement to convey lands must be construed according to the terms used in it; it is not subject to be varied by parol; nor can an agreement be

partly in writing and partly in parol. But this rule does not prevent a party to a written agreement from waiving by parol, provisions in his favor, so as to enable the other party to defend on that ground a bill for specific performance; *Stone v. Buckner*, 12 S. & M. 73.

251. *When contract of sale of land executed.* A contract for the sale of land is executed when the deed is executed, the purchase money paid and possession is given; *Frazer v. Robinson*, 42 M. 121.

Venue.

See CRIMINAL LAW, sub-division Venue. CHANCERY, sub-division Venue.

1. *Venue as affected by the residence of defendant.* The Circuit Court has no jurisdiction to entertain a suit against a defendant (there being no resident co-defendant), who is not found in the county, nor resided in it at the commencement of the suit; and hence, if an original writ be issued to the county in which the court is held, and a duplicate is issued to another county, upon the return of "*non est inventus*," on the first, and "executed," on the second, the defendant will have the right to have the cause dismissed, by showing that he did not reside in the county when the court was held; *Bank of Vicksburg v. Jennings*, 5 H. 425. S. P., *Read v. Renaud*, 6 S. & M. 79.

Ejectment and trespass *qua e clausem fregit*, are the only actions which can be brought in a county where the defendant does not reside, and is not found. These two are local, and are brought in the county where the land is situated. And if a suit not local be brought in a county where the defendant is not found, and is not a resident, it will be dismissed; *Elder v. Hiltzheim*, 6 G. 231. If found in the county where he is sued, he is entitled to have the venue changed to the county of his residence and freehold; *Spain v. Winter*, W. 152; *McLeod v. Shelton*, 42 M. 517.

See CIRCUIT COURT, 25, 26. PROCESS 6.

2. *Same: Change of venue.* Whether an administrator of a deceased defendant has the right, upon *scire facias* issued against him to revive a pending suit, to change the venue to the county of his residence: *Quære?* *Neely v. Planters' Bank*, 4 S. & M. 113.

3. *Change of venue by consent.* Parties in a civil case may legally consent to a change of venue: *Choat v. Billingsly*, W. 420.

4. *Order for change of venue.* An order for a change of venue in a civil case, made in vacation, must be under the hand and seal of the judge, directed to the clerk of the court where the cause is pending, and commanding him to send the papers to the clerk of the court to which the venue is changed. If application be made in term time, an order of the court is necessary. The statement of the clerk that the venue was changed, is insufficient, and gives no jurisdiction; *Saunders v. Morse*, 3 H. 101.

5. *Motion to change venue.* A motion entered on the docket for a change of venue,

will, after judgment on the merits, be considered as waived, if it do not appear that the attention of the court was called to it, and a decision on it asked; *Grant v. Planters' Bk*, 4 H. 326.

6. *No change of venue in appeal cases.* The statute authorizing a change of venue in the Circuit Court has no application to cases taken to that court by appeal; and if granted in such a case, though by consent of parties, the order will be void, and confer no jurisdiction on the court to which the venue is attempted to be changed; *Yalabusha Co. v. Carbry*, 3 S. & M. 529.

Verdict.

See JUDICIAL, as to effect of verdict in curing defects, and JURY, 28 to 30, as to the swearing of the jury essential to a verdict.

See PRACTICE 98 to 105.

1. *Form of verdict: In favor of one defendant and against another.* A verdict in an action *ex contractu*, in favor of a part of the defendants, and against a part, on the general issue, will be erroneous; *Jones v. McGahey*, 1 H. 128.

See ATTACHMENT, 103.

2. *Same: Omission to find on one issue.* If upon *non assumpsit* and payment pleaded the verdict be, "that the defendant did promise," &c., and then proceed to assess the plaintiff's damages, it will be good, though there be no express finding on the plea of payment, which, however, is necessarily included in the finding for the plaintiff; *Chewning v. Cox*, 1 H. 130.

3. *Same: Instance.* The following verdict is good: "We, the jury, find for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of the sum of," &c.; *Maulding v. Rigby*, 4 H. 222.

4. *Same.* If there be two plaintiffs, and the verdict be for the plaintiff in the singular number, it will be a mere technical error, and good; *Henry v. Halsey*, 5 S. & M. 573.

5. *Same: Variance from the issue.* A verdict is bad if it vary from the issue in a substantial matter, or if it find only a part of that which is in issue; and if it find matter outside of the issue, it will be void as to that. Hence, when the issue was as to the right and title to two slaves, Charles and Fanny, and the verdict was a finding as to Charles and Lucy, it is bad, and no judgment can be rendered on it. In this case, there was a levy on Charles and Fanny, on 18th November, 1840, and claim by a third party was made for them. The verdict on the trial of the claim, was: "We, the jury, find the following described property, levied by said Rives, under his execution on 18th November, 1840, and claimed by McCoy, was not at the time of said levy, and is not now, the property of said McCoy, in manner and form as he has claimed them, but then was, and now is, subject to said Rives' execution thereon levied; and that said property is of the value below carried out, and set after each article, viz.: Slave Charles, value \$400;

slave *Lucy*, value \$300; and that said claim of McCoy is fraudulent;" *McCoy v. Rives*, 1 S. & M. 592.

See ATTACHMENT, 102.

6. *Verdict exceeding damages laid in declaration and writ.* If the verdict in an action of assumpsit, exceed the damages laid in the declaration, it is bad; *Potter v. Prescott*, 2 H. 686. But it is no objection, that it exceed the amount demanded in the writ, if it correspond with the declaration; *Williams v. Williams*, 11 S. & M. 393 (citing *Fall v. Com. of Sinking Fund*, 3 S. & M. 127; *Walker v. Tunstall*, 3 H. 259; *Pharis v. Conner*, 3 S. & M. 87).

See PRACTICE, 104.

7. *Where verdict is for too little.* Where the verdict is for too small an amount, the court cannot correct it, by adding thereto what was omitted. The damages on a protested bill are to be included in the verdict, and are not to be added by the court; *Buck v. Little*, 2 C. 463.

7a. *Verdict embracing too much.* Where the verdict contains all the law requires, it will be good, although the jury may have found as to a matter not submitted to them. The illegal finding will be surplusage, and will not vitiate that which was well found; *Wintham v. Williams*, 5 C. 313.

8. *Correcting verdict.* Where a verdict is substantially good, it may be put in proper form by the court; *Montgomery v. Tillotson*, 1 H. 215; *Hoggatt v. Montgomery*, 6 H. 93.

9. *Allowing jury to correct verdict.* Jurors cannot impeach their verdict, but they may fortify and sustain it, and show by their affidavits the verdict they actually intended to give. Where a verdict is returned by mistake, so as not to express the true meaning of the jury, it may be corrected by calling them back, even after they have separated for a short time. In this case, on the suggestion of one of the jury, who remained in the court room, they were called back immediately after they left, and allowed to correct their verdict, by finding in favor of two of the defendants, in an action of trespass—it having been returned at first against all—they stating it was not their intention to find against these two; *Prussell v. Knowles*, 4 H. 90.

The rule is now, they are incompetent to sustain the verdict. See JURY, 40.

10. *That the court cannot amend verdict in matter of substance.* See AMENDMENT 26.

11. *Verdict by compromise, and without deliberation.* If the jury (even in a case sounding in damages, where there is no certain rule to fix the amount of the verdict), without consultation or deliberation, immediately upon their retirement, make a verdict, by each juror setting down the amount of damages he is willing to find, and then adding these amounts together, and then dividing that sum by twelve, it will not be permitted to stand. This mode substitutes the uncertain hazard of a lottery, for the deliberate conclusion of the jury; *Parham v. Harney*, 6 S. & M. 55.

12. *Verdict by eleven.* A verdict of eleven jurors is bad; *Dixon v. Richards*, 2 H. 771.

13. *Verdict without issue.* A verdict without an issue or judgment by default and writ of inquiry, is bad; *Hendricks v. Snodgrass*, W. 86. See PRACTICE, 94.

14. *Court may inquire the meaning of the jury.* If there be any doubt or uncertainty in the language employed by a jury in returning their verdict, the judge may make such inquiry of them as will enable him to understand their will and intention, and may direct the verdict thus ascertained to be recovered; *Gipson's Case*, 9 G. 295.

15. *Failure of court to enter judgment on part of a verdict.* The failure of the court below to enter a judgment on a part of the verdict, does not raise the presumption that there was no evidence to sustain that part. A verdict upon matters properly submitted will be presumed to be based on proper evidence, and if objection be made on that ground, it should be by motion to set it aside; *Abbey v. Merrick*, 5 C. 320.

16. *Verdict without judgment.* A verdict, though no judgment be rendered on it, is competent evidence of the plaintiff's demand, unless it be stayed or set aside; and the plaintiff is entitled to judgment on it at any time before it is barred by the statute of limitations; *Person v. Barlow*, 6 G. 174.

17. *Where such verdict collectable in equity.* The assignee of a verdict in favor of a bank which was afterwards dissolved on *quo warranto* proceedings, has a mere equity in the debt, which cannot be enforced at law in his name; nor can judgment be rendered on it in the name of the bank, because it has been dissolved; and hence, in such a case, the assignee may go into equity to enforce the collection of the verdict; *Id.*

18. *Finding of judge.* If an issue of fact be submitted to the judge "in lieu" of a jury, the decision of the judge will have the force and effect of a verdict; *Kelley v. Miller*, 10 G. 17.

Vested Estate.

See LIMITATION OF ESTATES.

Vicksburg, City of.

1. *Mayor of, a justice of the peace.* The mayor of the city of Vicksburg has the power, by its charter, of a justice of the peace in "criminal and penal cases;" and hence, has power to take a recognizance in a criminal case; *Dean's Case*, 2 S. & M. 200.

2. *Power to tax.* The mayor and council of the city of Vicksburg have power, under their charter, to pass an ordinance levying an *ad valorem* tax on the sales of merchandise made by traders in flat-boats, within the limits of the city. Such an ordinance is not in restraint of trade, nor a violation of the 10th sect., of art. 1, of the Constitution of the United States, which prohibits the States, without the consent of Congress, from levying imposts, or duties on imports or exports, &c., *Harrison v. Mayor, &c., of Vicksburg*, 3 S. & M. 581.

Wager of Law.

Is abolished by the constitution of this State; *Jennings v. Gibson*, W. 234.

Waiver.

1. *By recital in record.* A statement in the record, that "this day came the parties by their attorneys, and defendant waives all service of any writ and pleadings," estops the defendant from objecting to the want of a writ, declaration, and pleadings, or the want of authority in the attorney of record; *Walker v. King*, 1 H. 17.

See **APPEARANCE**, 8.

2. *Waiver of defence.* The maker of a note may waive his right to set up a defence to it in favor of a party about to purchase it, and if such party apply to the maker before his purchase, to know if he has any defence, and he be answered that there is none and the note will be paid, and on this he buy it, the maker is estopped to set up any defence he may have to the note as against such purchaser; *Land's Alm'r v. Lacoste*, 5 H. 471; *S. P., Hamer v. Johnston*, 5 H. 698.

But in order to bind the maker by such waiver, he ought to be distinctly informed of the object of the inquiry, so that he may know the interest the applicant has in knowing the truth; *Hamer v. Johnston*, *supra*.

3. *Waiver enures to assignee of the purchaser.* This waiver will enure to the assignee of such purchaser, though he took it without recourse on him, if he were informed at the time he purchased it, of the declarations of the maker; *Ib.*

4. *Presumption as to knowledge of the applicant's interest.* If a stranger apply to the maker of a note to know if he has any defence to it, and the maker answer that the note was good, and that there would be no difficulty about it, and that it would be paid at maturity, these facts are sufficient to warrant the inference that the object of the applicant in making the inquiry was to buy the note; *Ib.*; *S. P., McMurran v. Soria*, 4 H. 154; *Montgomery Dillingham*, 3 S. & M. 647; *Ayres v. Mitchell*, lb. 683; for which, see **ESTOPPEL**, 2.

6. *Waiver of notice.* It is competent for parties in the Probate Court to waive notice by citation or publication, but a minor cannot make such waiver; *Pollock v. Buie*, 43 M. 140.

7. *Waiver by recital in decree.* Where the decree on final settlement in the Probate Court, recites that all the parties were of full age, and had due notice and waived citation, this is sufficient to give jurisdiction and sustain the decree; *Ib.*

8. *Waiving election.* A failure of a distributee to elect expressly in his petition for distribution, whether he will take the net profits of the plantation, illegally carried on by the administrator, or hire and rent, is a waiver of his right to hire and rent; *French v. Davis*, 9 G. 167.

Warranty.

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I. Warranty of Quality.**1. What is a Warranty of Quality.**

1. *Same: The rule.* No particular form of words is necessary to make a warranty of quality; any express affirmation as to the quality of the thing sold is sufficient; *Kinley v. Fitzpatrick*, 4 H. 59.

Any affirmation or representation in relation to the article sold, if it be intended to have the effect of a warranty, or if it be intended to induce the purchaser to rely on it in order to effect a sale, and he actually does rely on it, is sufficient to create a warranty, although the seller endeavored by the use of the language he employed, to guard against making a warranty; *Otto v. Alderson*, 10 S. & M. 476.

2. *Caveat emptor is the rule as to quality.* As a general rule, a purchaser of personal property buys at his own risk, unless the seller give an express warranty, or the law implies one from the circumstances of the case, or unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale; *Ib.*; *S. P., Simmons v. Cutreer*, 12 S. & M. 584.

3. *Fraudulent representations as to quality.* If the vendor make any representation as to the soundness of the chattel sold, he must disclose all he knows on the subject; *Patterson v. Kirkland*, 5 G. 423.

4. *Collateral representations where there is express warranty.* The authorities are conflicting as to whether a vendor is liable for collateral representations as to certain particulars, where there is an express verbal warranty in regard to other particulars; and the question is left open in this case; *Mizell v. Sims*, 10 G. 331.

5. *Same: Where there is an express written warranty.* Where an express written warranty in relation to certain qualities of the article sold is made by the vendor and accepted by the vendee, verbal representations made by the seller at the time of the sale in relation to other qualities, do not amount to a warranty. The written agreement must be taken to contain the contract, and to exclude the parol representations. And the vendor will not be liable for such representations, unless he knew, or had good reason to know, they were false; *Ib.* See *post*, 14, 40.

6. *Instances of words held to amount to*

warranty. A bill of sale contained a receipt for the price of two slaves, "Sam and Jim, aged about thirteen years, sound in body and mind, and slaves for life," and it then contained an express warranty of title: *Held*, that there was a warranty of soundness; *Kingley v. Fitzpatrick*, 4 H. 59.

And in a bill of sale, these words were held to constitute a warranty of soundness, absolute and unlimited, "which negroes I warrant sound and healthy, in body and mind, so far as I know or believe;" *Collins v. McCargo*, 6 S. & M. 128.

7. *Printed representations in advertisement for sale.* Whether representations in a printed advertisement of sale amount to a warranty or not, is a question of fact for the jury; *Anderson v. Burnett*, 5 H. 165. And it was said in *Kinly v. Fitzpatrick* (*ante*, 6), that whether the bill of sale in that case amounted to a warranty, was a matter for the jury.

8. *Effect of assigning bill of sale.* If the seller of a slave assign to the purchaser the bill of sale which he received when he bought the slave, and that bill of sale contain a warranty of soundness, this does not constitute a warranty by the assignor. But if, at that time, he make a parol warranty and refer to the warranty in the bill of sale so assigned for its terms, it will be good; *Houston v. Burney*, 2 S. & M. 583.

2. Implied Warranties as to Quality.

A. WARRANTY BY MANUFACTURER.

9. *Implied warranty of fitness.* A mechanic undertaking to do work, undertakes to do it in a workmanlike manner, and makes an implied warranty to that effect; *Leftore v. Justice*, 1 S. & M. 381.

See CONTRACT, 98.

10. *Same.* In an executory contract to manufacture an article, or to furnish it for a particular purpose, the law implies a warranty that it will be reasonably fit and proper for such purpose or use so far as an article of that kind can be. And so where a manufacturer or producer undertakes to furnish an article in answer to an order; *Otto v. Alderson*, 10 S. & M. 476.

A manufacturer impliedly warrants that machinery built by him will answer the purpose for which it was constructed; and if it but imperfectly do so, he cannot recover the purchase money; *Brown v. Murphee*, 2 G. 91.

B. WARRANTY BY SAMPLE.

11. *Same.* When the sale is by sample, the law implies a warranty that the goods sold correspond with the sample; *Otto v. Alderson*, 10 S. & M. 476.

C. IMPLIED WARRANTY THAT GOODS ARE MERCHANTABLE.

12. *Same.* The law implies a warranty that goods sold are merchantable, when, from their nature and situation at the time of the sale, an examination by the purchaser was impracticable; *Ib.*

D. WARRANTY AS TO LATENT DEFECTS.

13. *When warranty implied against.* The law implies a warranty against latent defects, 1st. Where the seller knew the buyer relied on the judgment of the seller, who knew or ought to know the existence of the defects. 2d. Where a manufacturer or producer undertakes to furnish his goods in answer to an order; *Ib.*

14. *Duty of seller to disclose latent defects: Sound price.* The law does not imply a warranty of soundness of a slave from the fact that a sound price was paid; but if it be shown that a sound price was paid, and that the slave was an idiot, and therefore worthless, and this was known to the seller, and he concealed it, and the defect was not open and apparent to the buyer, this would be a fraud which would vitiate the sale, notwithstanding there was a written bill of sale warranting title only; *Simmons v. Cutreer*, 12 S. & M. 584. (See *ante*, 5.) Where the sale is for a fair price, the seller is bound to disclose a latent defect, if it be known to him, and be of such a character as would cause the buyer to decline the purchase; *Patterson v. Kirkland*, 5 G. 423. But if the seller do not know of the latent defect, he is not bound, though he received a sound price; *Otto v. Alderson*, 10 S. & M. 476. See *ante*, 5, and *post*, 40.

E. WARRANTY AS TO PATENT DEFECTS.

15. *Same.* A warranty does not cover palpable and patent defects, which the buyer could discover by a proper inspection of the thing sold; *Anderson v. Burnett*, 5 H. 165. But this rule excludes from the warranty such imperfections only as are plain and palpable, and cannot but be perceived and understood to their full extent by the purchaser, such as the want of an ear, an arm, a leg, or an eye. It does not extend to a case where, though the purchaser was aware of the existence of disease, yet its precise character not being obvious to the senses, its extent was uncertain and unknown; *Shewalter v. Ford*, 5 G. 417; *Herndon v. Bryant*, 10 G. 335.

And where the defect is secret and internal, it will be error for the court to instruct the jury, that if it was plain and palpable at the time of the sale, it is not embraced in the warranty; *Herndon v. Bryant*, *supra*.

F. IMPLIED WARRANTY THAT THE THING EXISTS.

16. *Same.* The seller impliedly warrants that chattel sold is in existence, and this rule extends to the assignment of a debt, the assignor impliedly warranting in such case that a valid debt exists; *Lile v. Hopkins*, 12 S. & M. 299.

See ASSIGNMENT, 29.

3. The Proof of Unsoundness.

17. *Declarations of a slave as to his disease.* The declaration of a slave made to his master, whilst the slave was laboring under a disease, that "he was sick and had a pain

in the chest," is admissible in evidence in a suit by the master against the vendor of the slave, for a false warranty of soundness. Such declarations are not hearsay, but verbal acts, indicating the nature of the disease under which the slave is laboring, and being made to the master, who is interested in the welfare of the slave, they are presumed to be honest; and though not conclusive, are yet competent evidence, and are entitled to such weight as the nature of the case and all the circumstances, show them entitled to; *Fondren v. Durfee*, 10 G. 324.

18. *Proof: Case in judgment.* In an action for a breach of warranty of soundness of a slave, it was proven that shortly after the sale, the slave was attacked with dysentery, and died, notwithstanding careful treatment; and the attending physician testified that, for reasons stated by him, he believed the slave was of scrofulous habits, and died of scrofula existing at the time of the sale. On the other side was the testimony of several witnesses, that they had known the slave in Virginia for years, and he was sound and healthy, and with no development of scrofula, and that the slave had been brought from Virginia to Natchez, in this State, a few months before the sale: *Held*, that the verdict of the jury, finding the unsoundness of the slave, at the time of the sale, was greatly against the preponderance of the evidence, and unwarranted by it; *James v. Herring*, 12 S. & M. 336.

4. The Breach and the Damages, and offer to Return.

19. *Where the thing sold is wholly worthless.* Where the thing sold and warranted sound, is unsound and wholly worthless, the vendee may recover back the entire purchase money and interest. And it is no defence to such an action, that the vendee has resold with warranty of soundness, and that there has been no recovery against him; *Texada v. Camp*, W. 150.

20. *Same: Where the thing perishes.* The purchaser of a slave will be entitled to recover from the vendor, as for a total loss, if the slave be, at the time of the warranty, laboring under a disease, which is not mortal, but which conduces to and results in a mortal disease; *Shewalter v. Ford*, 5 G. 417.

21. *Offer to return: Effect of.* Damages for a breach of warranty of the qualities of a chattel sold, may be recovered, and a defence on that account set up to an action for the purchase money, without an offer to return the chattel to the vendor; an offer to return is necessary, only where the vendee desires a rescission, and to recover the entire purchase money, or where there was a sale conditioned, that the vendee should return the chattel in a given time, if he disliked the purchase; *Ferguson v. Oliver*, 8 S. & M. 332.

22. *Same: Right of vendee.* The purchaser of unsound property, warranted sound, has the right either to annul the contract *in toto*, by an offer to return the property, or to keep the property and recover the

difference between the value of the property, if considered as sound, and its value in its unsound condition. And when sued for the purchase money, he may set up either a total or partial failure of consideration arising from the unsoundness; *Westmoreland v. Walker*, 3 C. 76.

23. *Effect of return, where the warranty is not broken.* In a sale of a chattel with warranty, whether there be a special agreement or not, that in case of unsoundness, the purchaser may return the chattel after trial for a specified time, the return of the chattel as unsound, contrary to the fact, does not divest the title of the vendee, and is no defence to an action for the price. Where such a return is made, it is the duty of the vendor to notify the purchaser that he holds the property, at his risk and expense; and upon doing this, if the purchaser refuse to take it away, the vendor may resell as the agent of the vendee, and credit him with the price he receives. In such case, the letter of the seller to the buyer, giving him the notice, are competent evidence; *Swann v. West*, 41 M. 104.

24. *What is a breach of warranty of soundness.* Every species of unsoundness, which occasions loss or expense to the purchaser, is a breach of the warranty of soundness; *Shewalter v. Ford*, 5 G. 417. And so it is a breach of the warranty of soundness, if the thing be, at the time of the sale, laboring under a disease, which is not then fully developed, but of which it afterwards died, or which conduces to or results in a disease, which afterwards proves mortal; *Fondren v. Durfee*, 10 G. 324. But a mere predisposition or liability of a slave, at the time of the warranty, to a particular disease, arising from his form or ancestry, is not unsoundness; *Herndon v. Bryant*, 10 G. 335.

5. Defence to an Action for the Purchase Money, Plea, Replication, &c.

25. *As to the right to make the defence, see ante*, 21, 22.

26. *Plea: Setting up the breach.* Where a breach of a special warranty is relied on to defeat a recovery of the price, it is unnecessary that the plea should aver, that the note sued on, was given in consideration of the bill of sale, or warranty; or that the warranty was made previous to the making of the note; *Williams v. Harris*, 2 H. 627.

27. *Replication: Proof.* If the replication to a plea setting up warranty of soundness, and alleging unsoundness, merely deny the warranty, the issue will be on the warranty only, and unsoundness need not be proven; *Collins v. McCargo*, 6 S. & M. 128.

II. Warranty of Title.

1. Implied Warranty of Title.

28. *Same.* The law implies a warranty of title in the sale of a chattel, where the seller is in possession at the time of the sale; *Ottis v. Alderson*, 10 S. & M. 476; *Brown v. Smith*, 5 H. 387. See *post*, 31. But if the pos-

session be in another at the time of the sale, and there be no covenant of warranty of title, the rule of *caveat emptor* applies, and there is no warranty; *Storm v. Smith*, 43 M. 497; *Long v. Hickingbottom*, 6 C. 772.

If the seller has possession, and sells the property as *his own*, and not as agent for another, and for a fair price, he is understood to warrant the title. And if he has possession and sells as agent, he is understood to warrant that he has authority to sell, and if the alleged principal disavow the sale and recover back the property, the agent will be responsible; *Long v. Hickingbottom*, *supra*.

29. *Same: In trust sales.* It is well settled that in trust sales of any kind there is no implied warranty of title, or unsoundness. And even if vendee is put in possession and protected by covenants of warranty of title, he cannot defeat an action for the purchase money, without a previous eviction, except in cases of fraud; *Storm v. Smith*, 43 M. 497.

See EXECUTOR AND ADMINISTRATOR, 341b, 347a.

30. *No implied warranty where there is an express one.* There is no implied warranty of title where there is an express one; *Brown v. Smith*, 5 H. 367.

And the rule is the same with reference to the warranty implied by the use of the words "grant, bargain and sell," in sales of realty; *Weems v. McCaughan*, 7 S. & M. 422.

2. Express Warranty of Title, Breach and Damages.

31. *Breach of warranty of title, express or implied.* Where there is an express warranty of title in the sale of personality, and the vendee is put in possession, the vendee cannot resist payment of the purchase money, until he has been evicted. The rule is otherwise where there is only an implied warranty of title, which arises from the fact that the vendor is in possession when he sells. The implied warranty is that the vendor has title, and if he have none, the implied warranty, like the covenant of seizin, is broken as soon as made; *Brown v. Smith*, 5 H. 367.

A judgment against the vendee for the recovery of slaves under a paramount title, is a breach of the warranty of title; *Pickett v. Ford*, 4 H. 246.

32. *As to damages for breach of warranty of title, see DAMAGES, 10.*

III. Miscellaneous.

33. *Warranty of servitude.* A warranty in a bill of sale of a slave, that "he is a slave for life," relates to the *status* of the slave at the time of the sale, and is fulfilled if he were at that time in that condition which, by the then existing laws, rendered him a slave for life, and it is not broken if he be afterward emancipated by the action of the government; *Bradford v. Jenkins*, 41 M. 328. This is so well settled, that it is no longer the subject of debate in this court; *Whitworth v. Carter*, 43 M. 61; *Wilkinson v. Cook*, 44 M. 367.

34. *Warranty void where the sale is illegal.*

The contract of sale of a slave introduced illegally into this State, including the warranty of soundness, is illegal and void; *James v. Herring*, 12 S. & M. 336. *Sed vide Merrill v. Melchior*, 1 G. 516.

35. *Warranty when sale complete.* A warranty after the sale is complete, and without any new consideration passing, is not binding; *Munn v. Perkins*, 1 S. & M. 412.

36. *Representations not heard by vendee.* The seller of a slave at auction is not bound by the representations of the seller, as to quality, made by him privately to some of the bidders, unless the purchaser heard him; because, in that case, the buyer did not rely on the representations, but on his own judgment; *Lindsey v. Lindsey*, 5 G. 432.

37. *Proof of distinct value of two articles warranted.* Where two articles are sold in *solido*, with written warranty not specifying the separate price of each, parol proof is admissible to show the estimated price of one of them alleged to be unsound; *Tutt v. McLeod*, 3 H. 223.

38. *New trial for excessive damages.* A new trial was granted because the damages for false warranty of soundness were excessive—three slaves being sold for \$2500, one being idiotic, and one having small pox, from which he recovered, and the damages assessed being \$2200; *Ingraham v. Russell*, 3 H. 304.

39. *Scienter unnecessary.* In an action for a false warranty, it is unnecessary to allege or prove a *scienter*. And so if the action be in tort on a false warranty; *McLeod v. Tutt*, 1 H. 288; *Williams v. Harris*, 2 H. 627.

40. *When scienter necessary.* But where the action is for a deceit in making fraudulent representations in relation to quality, the *scienter* must be alleged and proven; *Mizell v. Sims*, 10 G. 331. See *ante*, 5, 14.

41. *Law of Louisiana on warranties.* By the law of Louisiana, where the act of sale of a slave introduced into the State is passed before a notary public, there is a guaranty by law against redhibitory vices for sixty days, and if in that time such vices are developed, the vendor is bound to refund the purchase money; *James v. Kirk*, 7 C. 206.

Widow.

See HUSBAND AND WIFE. DOWER.

1. *As to widow's right to administration.* see EXECUTOR AND ADMINISTRATOR, 1, 2.

2. *As to renunciation of her rights,* see same title, 3, 5, and DESCENT AND DISTRIBUTION, 50, 51.

3. *Her right to distribution in her husband's estate.* See DESCENT AND DISTRIBUTION, 50, 51, 52, 53, 60. DOWER, 32, *et seq.*, 28, 29.

4. *Statute of limitations as a bar to her distributive right.* See LIMITATION OF ACTIONS, 49.

5. *Widow not affected by advancements.* See DESCENT AND DISTRIBUTION, 35.

6. *As to her right to property exempt by*

law from execution, see EXEMPT PROPERTY, 10, *et seq.*, and EXECUTOR AND ADMINISTRATOR, 230.

7. *Her right to a year's support: Act of 1839.* Under the Act of 1839 (H. & H. 421, § 123), the widow's allowance for one year's support for herself and family, may, if absolutely necessary, be set aside in money, and not in specific articles, and her claim for it may be presented at any time before final settlement of the estate. And if the estate be insolvent, the claim must be paid in full; *McNulty v. Lewis*, 8 S. & M. 520. See *post*, 9.

8. *Same: Allowance in money.* Under the statute of this State, as they existed in 1849, the year's allowance to the widow may be made in money; and it is no objection to this that the deceased left provisions, as these go to the administrator; *Nelson v. Smith*, 12 S. & M. 662.

9. *Entitled in all cases.* The widow is entitled to her allowance for herself and children in all cases, whether of testacy or intestacy of the husband; a bequest in the will in favor of the widow, is no bar to it; *McReary v. Robinson*, 12 S. & M. 318; also, whether the estate be solvent or insolvent; *Turner v. Turner*, 1 G. 428. See *ant*, 7.

10. *Policy of the law.* The policy of the law allowing a widow and her children a year's support after the death of her husband, is sound, and the law should be liberally construed, so as to carry out the intention of the Legislature; *Edwards v. McGee*, 5 G. 92.

11. *Allowance goes to children if there be no widow.* The allowance is not lost by the death of the widow, the right is vested in the children as well as in her; and if she die without making application for it, the guardian of the children may make it; *Id.*

12. *Posthumous child.* A posthumous child is entitled to share in the year's allowance for the support of the widow and children; *Womack v. Boyd*, 2 G. 443.

13. *Apportionment between widow and children.* If there be children of the husband by another marriage, and they live separate from her, and under the control of a guardian, they are entitled to an equitable division of the allowance. It is the duty of the Probate Court to make such apportionment, as under the circumstances would be just, taking into consideration the sum necessary to support each, and this may be done either by the court directly, or through the agency of commissioners; *Id.*

If there be a confirmation of the commissioner's report, setting apart the allowance, and the claims of any of the children be overlooked, they are barred; it is the duty of each claimant to present his claim and have it allowed; *Dease v. Cooper*, 40 M. 114.

14. *Remedy for.* If the appraisers fail to make the allowance, the widow may object, and the court may appoint others to do it; *Calvit v. Calvit*, 3 G. 124.

15. *Proceeding for, ex parte.* A proceeding by a widow to secure the allowance, is *ex parte*, and the administrator is no party to

it, and not authorized to contest or litigate her claim; *Morgan v. Morgan*, 7 G. 348.

16. *Setting aside the allowance as excessive.* The High Court will not set aside the allowance as excessive, when the amount allowed is the lowest reported by the commissioners, there having been two reports, and the lowest has been confirmed by the Probate Court; *McReary v. Robinson*, 12 S. & M. 318.

17. *Objections to.* If the commissioners to set apart the allowances to the widow, allot her more than she is entitled to, a creditor cannot by petition cause her (she being also administratrix) to return the articles so allotted in her inventory as a part of the assets of the estate; objections should have been made to the report before confirmation, or the decree of confirmation should be attacked directly; *Williams v. Hale*, 12 S. & M. 562.

See PROBATE COURT, 161, 162.

18. *Devise to widow during widowhood.* A devise to the testator's widow "so long as she shall continue my widow; but in the event of her marriage, then her interest to go to my heirs above named," is good, and the widow's interest terminates with her widowhood. It is not a devise in restraint of marriage, nor is the condition one in *terrorem*. The limitations over relieve it from this last objection; *Pringle v. Dunkley*, 14 S. & M. 16; *S. P., Dillard v. Connaway*, 3 G. 230.

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See BRQUESTS TO CHILDREN.

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I. Statutes.

1. *Act of 1821; H. C. 649, § 14.* This act provides that every person aged 21 years, if a male, or 18, if a female, or upwards, being of sound and disposing mind, and not a married woman, shall have power at his or her will and pleasure, by last will and codicil in writing, to devise all his or her estate and interests which he or she hath, or at the time of his or her death shall have in lands, &c., and personalty, &c., so as such last will and testament be signed by the testator, or by some other person, in his or her presence, and by his or her express directions; and, moreover, if not wholly written and subscribed by himself or herself, be attested by three or more credible witnesses, in case of the devise of real estate, and one or more credible witnesses in case of the devise of personal estate, in presence of the testator, saving the widow's dower.

2. *Same: Revocation, § 15.* "No devise so made, or any clause thereof, shall be revocable but by testator destroying, cancelling or obliterating the same, or causing it to be done in his presence, or by subsequent will, codicil or declaration in writing, made as aforesaid." It then proceeds to make provision for a posthumous child, and for children born after the will is made, when testator had none at the making of the will; and section 16 provides for a child born after the making of the will, testator then having children.

3. *Same.* Section 17 provides for no lapse where child, being devisee, dies leaving issue.

4. *Same statute, §§ 18, 19, 20, 21.* "No nuncupative will shall be established unless it be made at the time of the last sickness of the deceased, at his habitation, or where he has resided for ten days next preceding his death, except where such person is taken sick from home, and dies before returning to such habitation; nor when the value exceeds \$100, unless it be proved by two witnesses that the testator called on some person to take notice or bear testimony, that such is his or her will, or words of like import."

"§ 19. After six months from the speaking of the testamentary words, no testimony shall be received to prove a nuncupative will, unless such words, or the substance thereof, shall have been reduced to writing within six days from the speaking of the same."

§ 20. Provides that no probate of such will shall be made till after fourteen days from the death of testator, nor until the parties interested are summoned to contest it.

§ 21. Exempts soldiers and seamen from the operation of the act.

5. *Act of 1837, Rev. Code, p. 432.* Is in substance the same, except that it does not give the power of testamentary disposition to females under 21 and over 18 years of age.

II. Capacity, and Want of it, to make a Will.

1. Disability from Coverture.

5a. *As to wills made by femmes covert, see HUSBAND AND WIFE, 161 to 164.*

5b. *Same.* A will made by a married woman is under certain circumstances good, and if duly probated, it is operative till the probate is duly set aside; it cannot be attacked collaterally by denying the executor's right to sue for and recover her property; *Herrington v. Herrington, W. 321.*

5c. *Presumption as to coverture.* The presumption in favor of the continuing relation of husband and wife, will not prevail to defeat the will of a female, who is shown to have been once married, when the will disposes of property which would have belonged to the husband if alive; and when the contestants failed in the court below to raise that objection, and to introduce any proof tending to show that the husband was living when the will was made; *Fatherree v. Lawrence, 4 G. 585.*

2 Insanity, Generally.

5d. *Presumption in favor of sanity.* On the trial of an issue *devisavit vel non*, the presumption of law is in favor of the sanity of the testator, and that the will was fairly made, and not procured by fraud; and it is the duty of the party who alleges the contrary, to prove it; *Payne v. Banks, 3 G. 292.*

5e. *Weakness of mind: Capacity to understand.* A party whose mind has been somewhat impaired by age and disease, may, nevertheless, make a will, if he were able to make a disposition of his estate with understanding and reason; *Brock v. Luckett, 4 H. 459.*

6. *The question is as to capacity at the time of execution.* The will is good if made when the testator had sufficient capacity to make it, though he may have been, both before and after that, incapable of making a will; *Ib.*

7. *Value of testimony of subscribing witnesses in favor of sanity.* It is the duty of the subscribing witnesses, to be satisfied of the sanity of testator; for the law not only requires them to attest the execution of the will, but it requires them to know whether he has capacity to make it. Hence, their testimony is entitled to greater weight than the testimony of those who had no such duty to perform, and especially of those who were not present when the will was executed. Also, great weight is to be given to the testimony of the draftsman; *Ib.*

8. *Same: Instance, where testator held sane: Paralysis: Forgetfulness: Lucid interval.* Twelve witnesses, many of whom had been acquainted with the testator from March, when he was afflicted with an attack of paralysis, up to the day previous to the execution of the will in the succeeding December, testified to his insanity, and stated the health and condition of the testator on which their belief was founded, viz.: palsy in the right side, leg and face; a fondness for relating old anecdotes and scenes; forgetfulness of recent events; miscalling the names of men and things; disconnection of ideas in conversation, and frequent transitions from one subject to another; the giving of contra-

dictory orders and shortly denying having given them; impediment in speech, and irritability in temper and incompetency to attend to business. Four of these witnesses were physicians, three of whom had attended the testator from time to time, and they expressed the opinion that the testator could not have had a lucid interval.

Five witnesses, the draftsman of the will and the subscribing witnesses to it, declared their opinion to be, that the testator was of sound and disposing mind when the will was executed; and it was proved that he had walked a mile on the morning of the execution of the will. Some of these witnesses, who had seen the testator some weeks previously, testified to an improvement in his health and mind. It was also proved that he conversed rationally and sensibly for four hours on the day of the execution of the will, without making an irrational remark; that he gave directions about his business, dictated the will, that he caused it to be read to him, and some portions of it, twice; that he conversed of early scenes, and did not miscall names, nor talk incoherently, and that he conversed intelligently and rationally about his own business, the monetary system of the country, and other subjects. He also spoke of an improvement in his health, and of its having been thought that he was insane, and he expressed gratification at seeing so many of his old friends on that occasion, and he wished them to converse with him and see if he were of sound mind, and competent to transact business. These witnesses all thought that he was entirely competent on that day, to transact any of his own business: *Held*, that he was of sound and disposing mind; *Brock v. Luckett's Executors*, 4 H. 459.

9. *Another instance: Belief in witchcraft: Eccentricity.* In this case many witnesses testified to great eccentricity on part of the testator, and to his belief in witchcraft, and gave it as their opinion that he was not competent to make a will; many others testified that he understood the value of property, and had capacity to make a will. The verdict was in favor of sanity, and this court refused to set it aside because the evidence being conflicting, the verdict would not be disturbed unless it was clearly wrong; *Kelly v. Miller*, 10 G. 17.

3. Delusions.

10. *Delusion: What is the test of insanity.* Wherever a party once conceives something extravagant to exist, which, however, has no existence but in his own heated imagination, and his conception of its existence is incapable of being permanently reasoned out of him, this is delusion, and he is insane. But however great the extravagances of an alleged lunatic, and however like to a madman he may speak or act on some or all subjects, yet in the absence of anything like delusion, as above explained, he is not insane; *Mullins v. Cottrell*, 41 M. 291.

11. *Same: In respect to what, delusions may exist.* The delusion may consist either in a wild and insane belief of the existence of

some palpable fact, manifest to the senses, not to exist, as that a particular individual is another person, or is a horse, or a wild beast, or the like; or it may consist in the belief that a state of moral facts exists, when it is clear to a sound mind that it exists only in the morbid imagination of the person believing in its existence, as the belief that a person's best friend is his deadly enemy, and is always seeking to destroy him; *Ib.*

12. *Force of the delusion: It must produce results: Emotion, &c.* From the very nature of such delusions, they must exert a controlling power over the mind and actions of the person entertaining them; and wherever the subject of them is presented to the mind of the insane person, their effect must be manifest and decided. One of these results is excitement or emotion, either of fear, anger, or some other such manifestation, as the nature of the delusion would likely produce; *Ib.*

13. *Monomania: Its effect: Eccentricity: Unnatural affections.* In cases of monomania, all the mental faculties are affected more or less; but the affection is more strikingly manifested in some than in others. If the delusion be not so great as to affect seriously the intellectual powers, or to dethrone the reason as to the particular act, in reference to which the question of sanity arises, it cannot be said to amount to insanity. The intellectual disturbance may be sometimes difficult of detection; but in every case of true insanity, it is more or less present. However perverted the affections may be, there is no insanity unless there be intellectual disturbance, or disturbed reason. Hence, no eccentricity or peculiarity of character, no degree of moral depravity, or of unnatural feeling, not amounting to destitution of reason, nor mental incompetency to do the particular act, is to be considered as insanity; *Ib.*

14. *Same: Will unnatural and unjust to child.* In determining whether a will is valid, which is unnatural and unjust to a child of testator, being the result of estrangement between them, which estrangement is alleged to be the effect of an insane hatred and aversion to the child, the offspring of a wild and totally unfounded idea, that fills the testator's mind that she has been disobedient and undutiful, it will not be sufficient to overturn the will, to show that the testator's aversion to his heir was unnatural, and without sufficient grounds therefor; but it must also be shown that the idea of disobedience, which is the foundation of the aversion, was wholly without foundation, and a mere figment of a diseased brain. For if the idea were formed on apparent cause, and upon a view on the part of the testator of the conduct of the child, which we might consider erroneous and unjust, and even cruel and unnatural, it would show an error of judgment merely, and not an absolute want of intellect on that subject; *Ib.*

15. *Same: Aversion to particular religious sect: Error in creed.* A merely erroneous religious creed, or an aversion to any parti-

cular sect, is not evidence of insanity; yet as the conversation of a man who is alleged to be insane, upon any subject tending to show the state of his mind, is competent to be given in evidence, so may his conversational developing his religious opinions; *Ib.*

16. *Onus of proof of partial insanity: Proof must be clear.* He who seeks to avoid a will on the ground of insanity or delusion must establish the incapacity of the testator by the clearest and most satisfactory proofs. And this rule is more stringent and the proof more difficult when the will is impeached on the ground of partial insanity of the testator, his general soundness of mind being conceded. The rule also increases in stringency where, in addition to the proof of general insanity, the subscribing witnesses testify to the testator's sanity and capacity to make a will at the time of its execution, and where the dispositions of the instrument are *reasonable on their face*, and the will is in the handwriting of the testator. In such a case, the proof of insanity at the time of executing the will, ought to be clear beyond all doubt, in order to affect it; *Ib.*

17. *Monomania: Unnatural affections: Case in judgment.* In this case the testator was a man above the average intellectual level—was about sixty years of age—a successful planter and merchant—but of strong passions and determined will. He was a widower and had two daughters, to whom, at one time, he seemed greatly attached, and he took considerable pains to have them educated. When they were nearly grown, he left them for a few months with a friend, whilst he was absent on a business trip. The daughters, whilst with this friend, attended night meetings at the Methodist Church, to which he had an especial antipathy—being himself rather an infidel in his religious notions. He had told his daughters before that time, that he did not wish them to attend night meetings, unless he accompanied them, or furnished them an escort. On his return home he did not break with his daughters for attending the meetings in his absence, but again told them that he did not wish them to attend again unless he accompanied them, or furnished an escort. However, in a few weeks they attended the night meetings of that church, from a neighbor's house, and accompanied by his family, on two successive nights, and also joined the church. These meetings were orderly, and attended by the most respectable people. On hearing of the last attendance, he immediately wrote a letter to his daughters, refusing them his care and protection, on account of this act of disobedience. This was twenty-three years before his death. One of the daughters lived ten or twelve years afterwards, and the other survived him. The latter married a member of the Methodist Church, to whom he was inimical; she had no children and seemed likely to have none. He gave as a reason for turning off his daughters, their disobedience as above stated, and that they had gone to his enemies for advice instead of coming to him. When he talked

about his daughters, he was generally sad, but not excited; and, upon being questioned by several of his neighbors of great intelligence about the disagreement with his children, he stated, sadly but calmly, the cause, and convinced several that he was right.

He was also shown to be a great quiz; and it was proven that he stated to several persons, that he heard in Marshall county, in this State, the cannon fired at Fort Sumpter and Pensacola, in 1861.

He made a will, giving all his property to a niece and her children; it was wholly in his handwriting, and the subscribing witnesses thought he was sane, and he gave them as a reason for disinheriting his daughter, that she was married and well provided for, and had no children, and would not likely have any, and that he did not wish his property to go to her husband's family.

The jury found against the will, but on appeal, the verdict was set aside as unwarranted by the evidence; *Ib.*

18. *Same: Conduct of the daughter after separation.* In this case, it was held that the good conduct of the daughter after the disagreement, might be given in evidence, as it was proper to be considered in determining whether there was want of reasonable ground for his ill feeling at the time the will was made; *Ib.*

19. *Same: Instructions to jury.* In this case, the following instruction was given to the jury; If the jury believe from the evidence, that the contestant had been always an obedient, dutiful and good child, but, that under the influence of an insane delusion, her father (the testator) concluded and believed that she had become disobedient and utterly unworthy of his regard, and utterly cast her off as a child, and that the paper in controversy was the direct offspring of such insane delusion, they should find against the will: *Held*, that the instruction was correct as a legal proposition; to minds versed in legal science, and acquainted with legal terms, it would be unobjectionable; but as a rule to be applied practically by a jury unskilled in the use of legal terms, it is objectionable in not explaining the legal meaning of the term "delusion," and what degree of it should appear to justify a verdict against the will; *Ib.*

20. *Same: Evidence: Opinions expressed to testator.* Where in a case of alleged insanity, the conversations of the testator are introduced as evidence of the condition of his mind, if a witness detail a part of a conversation between himself and the testator, it will be proper for the witness to state the whole, including opinions expressed by the witness to the testator, so that the answers of the testator may be understood. If any opinions thus expressed by the witness, should be incompetent, they can be excluded, or the jury directed to disregard them; *Ib.*

III. The Execution of Wills and their Form.

1. Their Form.

21. *No form required: Letters as wills.*

No particular form is required in the drawing up of a will; any paper is sufficient, if it show a testamentary intent. Hence, a letter, or letters, written wholly in the handwriting of a decedent, in which he expresses clearly an intent to make a disposition of his property after his death, are testamentary, and may be admitted to probate as the will of the writer: *Anderson v. Pryor*, 10 S. & M. 620; S. P., *Magee v. McNeil*, 41 M. 17.

22. *Same: Case in judgment.* A soldier in the Mexican war of 1846, who was killed at Buena Vista, on 22d February, 1847, wrote a letter whilst in Mexico, dated June 4th, 1846, in which he said: "If I never come back, ma promised me my property should go to Martha Yarborough;" and on 19th July, he wrote another letter in which he said: "I wish you to inform Yarborough what I told you concerning my property, ma promised me it should go as I wished, to my niece Martha;" and he also on 27th October, wrote to "Martha," as follows: "Your grand-ma promised me to let you take Nan and Jake (his slaves), in case I never get back:" *Held*, that these letters were testamentary, and constituted the writer's will; and that a letter dated 29th October, 1846, to one of his brothers, in which he requested him "to tell John" (another brother, who was in difficulties about shooting at a negro), "not to be uneasy. Every cent I have in the world is at his disposal. I tried to get a discharge, so that I might come and be with him at his trial, but could not," was not testamentary; *Id.*

23. *Letters making a disposition on condition.* A soldier in the late war between the States, wrote to his wife as follows: "In case I never get back to you, I want all I have to be yours." He did get back, sick, and soon afterwards died: *Held*, that the condition on which the letter was to take effect as a will, had not happened; and, moreover, that his declarations made before and after his coming back, that he wanted his wife to have his property, were incompetent to make it a good will; *Magee v. McNeil*, 41 M. 17.

2. Nuncupative Wills.

24. *Not favored: Must be strictly proven.* Nuncupative wills have never been regarded with favor by the courts; greater strictness of proof in several particulars, is required in order to establish them, than in cases of written wills. If the proof fail to show a strict compliance with the statute in every particular, the alleged will cannot be established. The *rogatio testium*, which is in truth the test of the *animus testandi*, must be strictly proven; *Woods v. Ridley*, 5 C. 119; S. P., *Lucas v. Goff*, 4 G. 629.

Both the testamentary capacity and the *animus testandi* must appear by the clearest and most indisputable evidence; and hence, the negative testimony of one of two persons present and having an opportunity of hearing, to the effect that he did not hear the alleged testamentary words, is sufficient to throw such doubt upon the positive affirma-

tive testimony of the other, proving the alleged nuncupation, as to render the same inadmissible to probate; *Lucas v. Goff*, *supra*.

25. *The animus testandi must be shown.* It is essential to a nuncupative will, that the words should be spoken, *animus testandi*, and that the testator should believe he was making a will; *Gibson v. Gibson*, W. 364.

26. *Same: Instance.* The alleged testator being near his death, upon the arrival of his brother M., said, "Oh, my brother, I wish I could have a few moments ease, that I could talk with you, I want you to promise to settle my business." He was then asked if it was a part or the whole of his business, and he replied, "The whole. I wish you to do the best you can for me; I wish James Morton to be made safe." M. then asked him how he was to ascertain the situation of his business, and he replied, "You must hunt it out yourself; you can ask James Morton, he knows more about it than anybody else." Soon afterwards he exclaimed, "If I had time I would make a will." He was informed that he could make a verbal will by stating his wishes to those present, and he then remarked quickly, "I wish my wife to have this place," when he was stopped by a spasm, and died soon afterwards, without saying more about his will: *Held*, that the evidence showed that he did not use any words in a testamentary sense, except the last words, making a devise to his wife; *Woods v. Ridley*, 5 C. 119.

27. *Same: Another instance showing no animus testandi.* The deceased being informed of his precarious condition, by his attending physician, was asked if he had made any disposition of his property, to which he replied, that it was too late, and that he was unable to make a written will, but that he desired E. H. to have all his property, and that he wanted some good person to take charge of her, so that she might be benefited by it, but that he was afraid it would not be done, and that his property would fall into the hands of some person who would destroy it: *Held*, that these facts did not sufficiently establish the *animus testandi*, and there was no will; *Lucas v. Goff*, 4 G. 629.

28. *The rogatio testium must be established.* A nuncupative will cannot be established without proof, in accordance with the statute, that the alleged testator called upon a person present, to take notice, that the disposition then made is his will; *Garner v. Lansford*, 12 S. & M. 558.

But it is not necessary that the witness should testify that the testator did, in *totid. m. verbis*, call on a person to bear witness, &c. It is sufficient if the testator gave a person present to understand such was his will; *Parkison v. Parkison*, 12 S. & M. 672.

29. *Same: Case in judgment: Implied rogatio testium.* Hence, if it be shown that he called upon his physician to write his will, and was informed by the latter that there was not time to do so, but there were compe-

tent witnesses present (naming them to the testator), and that he could state his wishes to them; and thereupon the decedent proceeded to state his will; and after a few minutes, being informed by his physician that his will would not probably be valid unless he mentioned all of his brothers, and he thereupon stated to the same witnesses that he gave to each of his brothers \$5.00; it was held, that the statute was complied with, and the will was valid. But if, in such case, the will be immediately written down by the witness, but not read over to testator, it will not be good as a written will; *Parkison v. Parkison*, 12 S. & M. 672.

30. *Two witnesses required to the rogatio testium.* The statute requires that the *rogatio testium* shall be proved by two witnesses; but it does not require that two witnesses shall be called on by the testator to bear witness; the calling on one is sufficient, if the calling be proved by two; *Ib.* That the *rogatio testium* should be strictly proved, see *ante*, 221.

31. *Same: Instances.* The deceased had requested one G. to write his will, stating to him its contents; G. promised to do so, and return with it by a day named. After this, deceased repeatedly declared during her illness, that she wished her property to go as she had directed G. to write the will. A short time before her death, she called a witness from the fire place to her bed side, and requested the witness to hold her head down, as she wished to talk to her; and she then said that she had requested G. to write her will, and that he had put it off, and she was afraid she would die before G. arrived with the will; and that she willed, or had willed (witness did not recollect which), a negro, Sylvia, to her daughter B., and an equal division of the rest of the property with the other children." Another witness proved she was present, and also proved the same statements as to the will; and further proved the calling of the other witness from the fire place, and the asking her to lay her head down, as she wanted to talk to her; but one of the witnesses did not prove the presence of the other witness. The nuncupative will disposed of her property, in the same way that she had directed G. to write it in the written will: *Held*, that the will was legally established. That though not expressly proven by two witnesses, that testator called on some person to take notice of her will, yet this was substantially proven by two witnesses, and that it was not necessary that the witnesses should prove the presence of each other; *Burch v. Stovall*, 5 C. 725.

32. *Necessity for two witnesses.* There must be two witnesses to a nuncupative will; *Gibson v. Gibson*, W. 364.

33. *Foreign nuncupative will.* The courts of this State will not pretend to set aside the probate of a nuncupative will made in a foreign State; yet they will, in the exercise of this power to construe the will, determine what part of the words spoken are of a testamentary character, and confine the opera-

tion of the will to such words; *Woods v. Ridley*, 5 C. 119.

34. *Revocation of improper probate of nuncupative will.* If a nuncupative will be admitted to probate without the requisite proof, the Probate Court may, at a subsequent time, upon petition of the heir, without a jury, set aside the probate; but the executor would then have a right to introduce other proof to sustain the will; *Garner v. Lansford*, 12 S. & M. 558.

35. *Proceeding to set aside probate: Parties.* A petition was filed by the heirs to set aside the probate of a nuncupative will, and for distribution. The administrator, who had been appointed before probate of the will (there being no new appointment of an administrator *c. t. a.* after probate), and who had administered the estate to final settlement, was a defendant in his character as administrator, and also personally. The court set aside the probate and decreed distribution: *Held*, that no decree for distribution could be made, because there was no administrator *c. t. a.* before the court, and that the original (and sole) administrator should not have been joined as a party in his trustee capacity; *Ib.*

3. The Signing of the Will.

36. *Guiding testator's hand by another.* Where the testator, being capable in law of making a will, has full consciousness of the act to be performed, and intending to do it, consents to have his hand guided by another in writing his signature to the will, and it is accordingly so written, it is a sufficient signing within the statute, whether his inability to write his name results from a want of education or from physical debility; such a signing is equivalent to an actual signing by the testator, or at least to a signing by such third person, by the express direction of the testator; *Watson v. Pipes*, 3 G. 451.

4. The Attestation.

37. *No particular form required.* The object of the statute in requiring a will to be attested by the subscribing witnesses, in the presence of the testator, so far as the form of attestation is concerned, is to identify the instrument as that signed and published by the testator, and to prevent fraud and imposition in establishing spurious wills, and at the same time to show the persons, by whom the facts necessary to establish the will can be proven, when the will shall be propounded for probate; and all that is necessary for this purpose is that the witnesses shall sign their names upon the paper, in presence of the testator; and hence, it is well settled that no particular form of words is necessary to constitute an attestation; *Fatherree v. Lawrence*, 4 G. 585.

38. *Same: Where the witnesses may sign.* The particular part of the will on which the attesting witnesses subscribe their names, is immaterial; it is sufficient if the attesting

witnesses sign their names upon the paper, in presence of the testator, in testimony that it was signed and published by him as his will (citing *Fatherree v. Lawrence, supra*); *Murray v. Murphy*, 10 G. 214.

39. *Same.* And if one of the subscribing witnesses to a will, being a justice of the peace, prefix to his signature a certificate of the acknowledgment of the will by the grantor, in the ordinary form of certificates of acknowledgment of deeds, &c., it will not vitiate his attestation. The certificate is superfluous and useless, and cannot have the effect to impair his signature, which was the essential act to be done; *Ib.*

40. *The attestation must be in presence of testator.* It is essential to the due attestation of a will, that the witnesses attest it in the presence of the testator; *Rucker v. Lambdin*, 12 S. & M. 230; *Watson v. Pipes*, 3 G. 451.

And the presence contemplated by the statute is not simply the bodily presence of the testator, but it is also essential that he be mentally capable of recognizing and actually conscious of the act of attestation when performed. To be corporeally present, it is not indispensable that the testator, and the witnesses should be in the same room, or in the same house, or that he actually see them attest the will; it is sufficient if the attestation be within the scope of the testator's view, and where he can see the witnesses, if he desire to do so; *Watson v. Pipes, supra*.

5. The Subscribing Witnesses.

41. *The subscribing witness: Meaning of "credible witness."* The words "credible witness," in the statute of wills, means competent witness, and the witness must be competent at the time of attestation; *Rucker v. Lambdin*, 12 S. & M. 230.

42. *Executor: Good witness.* An executor is not, by reason of his being entitled to commissions, interested in establishing the will so as to prevent his being a competent witness; he has no interest in the commissions at the time of attestation, since he is entitled to none, except he administer, and then, only as compensation for services actually rendered; *Ib.*

43. *Legatee as a subscribing witness: Statute on this subject.* Under the statute (H. U. 651), which provides that if any person shall be a subscribing witness to a will, in which a devise or bequest is made to him, and the will cannot be otherwise proven, such a devise or bequest shall be void, and such witness shall be compelled to give testimony on the residue of the will; a direct legatee or devisee under the will is competent to give evidence in behalf of the will, but he shall lose his legacy.

The statute, however, only avoids a bequest made to the witness personally, and not one made to his wife; and hence, if the legacy be to the wife, which under our statute enures to her sole and separate use, the husband will be an incompetent attesting witness, as he cannot testify for his wife; *Ib.*

44. *Interested witness may testify in sup-*

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port of a will. Under the Revised Code of 1857, a legatee in the will, though not competent to prove its execution as a subscribing witness, except upon a forfeiture of his legacy, is, nevertheless, competent to testify to the testator's sanity, on the trial of an issue *devisavit vel non*; *Kelly v. Miller*, 10 G. 17.

45. *Will of realty and personalty, insufficiently attested as to the former.* A will purporting on its face to dispose of both real and personal estate, but not attested so as to pass the former, is not, for that reason, incomplete and inoperative as to the entire estate; *Chapman v. Brown*, 7 H. 636; *Fatherree v. Lawrence*, 4 G. 585. In such a case it is a question of fact, whether the testator intended that the testament should operate as to personalty, unless it could have effect as to realty, and if it appeared by the testimony of a subscribing witness, that the testator published the instrument as a complete testament, the presumption will be that he was ignorant of the law requiring three witnesses to wills of realty, and the testament, though insufficient to pass realty, will be valid as to the personalty; *Fatherree v. Lawrence*, 4 G. 585.

And the probate of such a will, though no words be used in the order restricting its effect, will simply extend to it, as a will of personalty; *Murray v. Murphy*, 10 G. 214.

6. The Publication of the Will.

46. *Formal: Unnecessary.* The formal publication of his will, by a testator, is unnecessary; a will may be good, if in all other respects regular, without any words of the testator declaratory of the nature of the instrument, or any formal recognition of, or allusion to it; *Watson v. Pipes*, 3 G. 451.

IV. Revocation and Republication of Wills.

1. By Cancellation and Obliteration.

47. *Is an equivocal act.* An act of cancellation or obliteration is equivocal in itself, and not conclusive, but only *prima facie* evidence of an intention to revoke; and where such an act is associated with another, upon which it is dependent, and which fails of effect, the *prima facie* presumption of an intent to revoke is rebutted, and the obliteration or cancellation will not have that effect; but it is otherwise of a will duly executed, containing an express clause of revocation, but which fails to take effect as to a disposition of the estate therein attempted to be made; *Hairston v. Hairston*, 1 G. 276.

48. *Amount of alteration, &c., necessary.* An alteration or erasure, however small, made with intent to revoke, is a good revocation. In this case, the testator made a will in 1831, and afterwards expressed an intention to make a new will, and he applied to B. to write "a new will," presenting at the same time the will of 1831, in which were alterations and erasures, which he pointed out, and objected to other provisions in it. He stated to B. that he had done away with that

will, and that the interlineations and alterations were made by his directions; and B. having made a memorandum of the additional alterations desired, received the will, interlined and erased as above described, as a guide to be used in drafting another. During his last illness he expressed a wish that if B. should not write a new will, that a will he had made in 1829 should go into effect: *Held*, that the will of 1831 was revoked, and that the will of 1829 was not revived; *Bohanon v. Walcott*, 1 H. 336.

3. By Deed.

49. *Rule on this subject.* A deed executed by a testator after the publication of his will, is not a revocation of the will, unless the whole estate devised be conveyed in the deed. If the deed conveys a part of the property devised, it will operate as a revocation *pro tanto*, and to the extent of the inconsistency between them; *Wells v. Wells*, 6 G. 638.

3. By Subsequent Will or Codicil.

50. *Effectual as a revocation, though it fail as a devise.* The doctrine of dependent relative revocations, in which the act of cancellation, obliteration, &c., being done with reference to what is intended to be an effectual disposition of the estate, will be a revocation or not, as the relative act is efficacious or not, has no application to a case in which the intent to revoke is contained in a will or writing duly executed. Hence, if a will containing a clause of revocation be wholly inoperative as to the disposition of the estate therein attempted to be made, because the devisee is incapable of taking, yet it will be good as a revocation of a former will; *Hairston v. Hairston*, 1 G. 276.

And this principle was applied where the second will had been lost, and no satisfactory proof of its contents could be made, except as to the revoking clause, the court holding that the failure of the lost will to take effect as a devise from inability to prove its contents, would not prevent its revoking clause from taking effect; *Vining v. Hall*, 40 M. 83.

51. *Same: Mistake of law in this respect.* A misapprehension on the part of the testator as to the legal capacity of a devisee to take, is a mistake of law and not of fact, and will not affect a clause of revocation contained in the will; *Ib.*

52. *Revocation by codicil.* A codicil duly and legally executed, which makes a disposition of the testator's property inconsistent with the disposition made in the will, is to the extent of such inconsistency, a revocation of the will without an express clause to that effect, and it will so operate, although the disposition attempted to be made by the codicil be void for illegality. Thus, when a testator by his will gave his slaves absolutely to his widow, but by a codicil thereto gave them to her "if she should marry and have issue, otherwise that they should be set free," the codicil, though void as to the attempted emancipation, revokes the bequest of them made in the will, and the widow can only

claim such interest in the slaves as is vested in her by the terms of the codicil; *Read v. Manning*, 1 G. 308.

53. *Revocation of will of realty by another will.* Where a will is only attested by two witnesses, a revoking clause therein will not revoke a former will, except so far as such former will relates to personalty—a will of realty under the statute (Rev. Code of 1857, p. 432, arts. 34, 35), being incapable of revocation by another will, except the last, will be executed, so as to pass realty; *Vining v. Hall*, 40 M. 83.

4. Revocation by Implication.

53a. *Rule on this subject.* A will is revoked by implication where, after its execution, there occurs a material change in the testator's circumstances, imposing such new obligations and duties, as to raise an inference that the testator would not adhere to a will made previous to their existence, and would consider it a moral duty to revoke it, such as a subsequent marriage, and birth of a child, &c. But this rule does not apply where there has been a mere change in the testator's feelings, as if before death he became reconciled to a child which he disinherited by his will; *Jones v. Mosley*, 40 M. 261.

See HUSBAND AND WIFE, 162.

5. Republication.

54. *Republication of revoked will.* Where a will is revoked, it has neither a potential nor actual existence, and it requires for its revivor some express and direct act of the testator equivalent to adopting it as his present will, and as a new testamentary act, and the expression of a wish that, in case a new proposed will should not be executed, that a former revoked will should take effect, is not sufficient to revive it. See *ante*, 48, for the instance. *Bohanon v. Walcott*, 1 H. 336.

54a. *Republication of will revoked by marriage.* See HUSBAND AND WIFE, 161.

V. Construction of Wills.

1. General Rules for Construction.

55. *Intent, if legal, carried out: Words taken in ordinary acceptation.* The great rule for the interpretation of a will is, that the intention of the testator must be ascertained from the language employed, and must be carried into effect if not inconsistent with the rules of law, and the words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected from the will. Where there is no ambiguity in the words, there is no room for construction; *Vannerson v. Culbertson*, 10 S. & M. 150. See *post*, 60. The words are to be construed in their plain and natural sense, unless a different intention be manifested by the context; *Tucker v. Stiles*, 10 G. 196. See *post*, 61.

56. *The words.* It is always safest, in the interpretation of wills, to adhere to the words of the instrument, without considering either

the circumstances arising *aliunde*, or calculations that may be made as to the amount of property, or the consequences which may flow from any particular construction; *Curry v. Murphy*, 6 G. 473. See *post*, 62. Yet a literal construction is not to be indulged in, which would defeat an intention appearing from the whole will; but we must consider all its parts, and the circumstances under which it was made as shown on its face, and thereby ascertain the intention of the testator; *Houghton v. Brandon*, 4 M. 729. See *post*, 62.

57. *The intention is the main object.* In the construction of wills, the main object is to ascertain the intention of the testator; the intention is to be gathered from the whole will, and, if legal, is to be carried out, notwithstanding it may violate technical rules which relate to the construction of words rather than the nature of the estate; *Sorsby v. Vance*, 7 G. 564.

58. *Construed so as to make all parts harmonize.* In the construction of a will, every part and provision must be made, if possible, to harmonize, and be consistent with the other parts; a construction will not, therefore, be put upon a clause of doubtful import, which would make it irreconcilably inconsistent with another plain and clear provision of the will; *Dean v. Nunnally*, 7 G. 358.

59. *Technical rules, and adjudged cases, as aids.* Technical rules of law, and the authority of adjudged cases, are not to be disregarded in the construction of wills; yet the true interpretation of a will is so dependent upon the language and circumstances of each particular instrument, that adjudged cases are of less authority, and are more hazardous in their application to the construction of wills, than in any other branch of the law; *Sorsby v. Vance*, 7 G. 564. Adjudicated cases can give but little aid in the exposition of a will, unless the words in the adjudicated case relied on, and the words in the will under consideration, be the same precisely, and are used in the same connection; *Vannerson v. Culbertson*, 10 S. & M. 150.

60. *Application of the rule stated in ante, 55.* The will provided as follows: "I devise and bequeath to my wife, M., for her life, to her exclusive use during the term of her natural life, in lieu of dower and her distributive share in and to my real and personal estate, the mansion house occupied by us as a residence, and the tract of land on which it stands, and all outbuildings and improvements, together with all the family plate, and all other personalty in and about said dwelling and farm; and that upon my wife's death her land and mansion house shall go to my son, Thomas, and his heirs." Held, that the widow only took a life estate in the slaves and personalty, as well as in the land; and that it was no argument against this construction, that there was a bequest over of the personalty; *Vannerson v. Culbertson*, 10 S. & M. 150.

61. *Same: Another application of the rules, as to words in 55, ante.* The testator gave a slave to H. until her death, and "then

to M. and E., the infant daughters of H., or if either M. or E. should then be dead, then to the living one, and if both M. and E. be then dead, then the slave shall descend to the surviving children of H. (the first taker), equally." M. and E. both died before their mother, H., each leaving issue: Held, that the surviving children of H. were entitled to the slave on her death, to the exclusion of the issue of M. and E.; *Tucker v. Stites*, 10 G. 196.

62. *Application of rule, as to words as stated in ante, 56.* The testator, before his death, had made an invalid sale of land, and held the note of the purchaser for the balance of the purchase money then unpaid; the executor offered to execute a deed, if the purchaser would pay the note, which the latter refused. The executor then brought suit for and recovered the land, and held it as a part of the residuum, and the purchaser recovered back the purchase money which he had paid. By the first clause of the will, all the notes and choses in action belonging to the testator, and remaining after the payment of his debts, were bequeathed to the widow; and by the 14th clause, the residuum was given to other parties: Held, that the residuary legatees were entitled to the proceeds of the sale of the land, and that the widow was not entitled to re-imbursement out of said proceeds, for the note of the purchaser held by testator at his death, and which had been lost to the widow, by reason of the purchaser refusing to carry out the invalid sale; *Currie v. Murphy*, 6 G. 473.

63. *Another application of the rule stated in ante, 56.* The testator was worth \$250,000, and he left a widow and eight children, and his estate was somewhat encumbered with debt; he had a mansion house in a city, in which he resided in considerable style, dispensing a liberal hospitality. By his will he provided for an equal distribution of his estate among his widow and children, and gave to his widow in addition, as her own property, his carriage and horses, five domestic servants, and \$300 in money, which was to make her equal to the advancements which he had made to his children; and he provided that these should go to her immediately, and that she should occupy the mansion and furniture during widowhood. He directed that his estate might be equally divided at once; each child and the widow assuming a *pro rata* share of the debts; or that it might be kept together until the debts were paid, at which time the division was required to take place. He also directed that his "widow should have ample support out of his estate until such time as may be required to enable her to have control of her own property." Held, that the time for which she was entitled to this support was up to the general distribution of the estate, and did not expire when she got the five slaves, specifically bequeathed to her as her own property. That it was manifest these slaves were intended as domestics, and not as a means of making a support, and that a contrary construction would leave his widow

without adequate support till the general distribution, which was contrary to his clear intention: *Held*, further, that the "ample support" meant a sufficiency to enable the widow to live in the style he had been accustomed to live in, and that \$2,000 per annum, out of the estate, was a reasonable allowance for her: *Held*, also that the widow's consent, given with that of all the other parties, that the property should be sold on a long credit for distribution, did not waive her right to the support, but that she was entitled to it till collections were made and a distribution consummated; *Haughton v. Brundon*, 40 M. 729.

64. *Application of rule as stated in ante*, 57. The testator, by the first item of his will, gave to his wife and executrix, his plantation and "all his slaves after the payment of the legacies bequeathed." By item 2. he directed "that his plantation should be kept up, and the slaves and stock kept together on the same, and that the proceeds should be appropriated to the support of his family and the education of his children." By item 3, he bequeathed to each of his three children ten slaves, of average quality, with the whole lot to be delivered "as they respectively arrive at age, or marry;" and further, "that each one of his children, as they respectively arrive at age, or marry, receive one-fourth part of the residue of his estate that may have been on hand at the time the eldest arrived at age, and not heretofore disposed of by special legacies and a small legacy hereinafter mentioned; all the rest and residue he gives to his wife." After the testator's death several crops were raised, by which the value of the estate was increased, and then his eldest daughter arrived at full age: *Held*, that she was entitled, in addition to the ten slaves, to one-fourth part of the residue of the estate (slaves and special legacies excepted), as it existed on the day she arrived at full age, and was, consequently, entitled to distribution in the profits, or increased value accruing after testator's death; *Sorsby v. Vance*, 7 G. 564.

65. *Application of rule stated in ante*, 58. The testator declared it to be his desire that his widow should have his entire estate, "to have, and to hold, and to sell any part thereof, she might think best for her interest, and the interest of her children, during her natural life or widowhood;" that his entire estate should be kept together during the life or widowhood of his widow; and if she should survive until his two youngest children should marry or attain the age of majority, that she should give them such property as in her judgment should seem best, and that these two children should be educated out of his estate; and upon the death of his widow, he directed a division of his property among his children; and finally he directed that D. & N. "should take his entire business in hand and act as executors of his will:" *Held*, 1st. That the widow took a legal freehold in the property during her life or widowhood. And, 2d. That his executors were not entitled to retain possession of and manage the estate after

the payment of his debts and the lapse of twelve months from the date of their qualification; *Dean v. Nunnally*, 7 G. 358.

2. Some Miscellaneous Instances of Construction.

66. *Same: One clause limiting interest given in another.* By the fourth clause of the will, it was provided that six slaves should be given to Sarah Truly, and it then proceeded, "I wish the property I give to Sarah Truly to be given and secured to herself and her bodily heirs. Should she marry, and at her death, should she have no issue, it is to go to her brother and sisters." By the sixth clause it was provided that "the balance of my property be divided between Sarah Truly and Martha Truly:" *Held*, that the general words of the fourth clause limiting the estate given to Sarah, were broad enough to cover the devise in the sixth clause, and that Sarah Truly took the residuum under the sixth clause, subject to the limitations mentioned in the fourth: *Rucker v. Lambdin*, 12 S. & M. 230.

So, if in one part of a will, an absolute estate be given, and in another there are words which clearly show that the testator intended only to give a qualified estate, then only the latter estate will pass by the will. *Lucas v. Lockhart*; 10 S. & M. 466.

67. *Construction in disparagement of children: Inconsistency in will.* In this case, the will devised a part of the testator's land to his widow for life, and a part of his slaves to her in fee, and the remainder of lands and slaves was devised to his children. In the construction of this will, a controversy arose as to whether a clause limiting the devise to the children and to the survivors in case any of them should die without issue, applied to the land alone, or to the whole of the property devised to them, and it was held to apply to the land only, upon the grounds that the words of limitation did not clearly embrace slaves, and that to apply them to the children would make the will inconsistent, and give the children a less estate than was given to the wife, and that such a provision was in disparagement of the children, and ought not to be inferred from doubtful words, and that the clause of limitation was in immediate connection with the land, and might be properly referred to it alone; *Funchess v. Seibe*, 4 C. 634.

68. *Construction as to children's shares where widow renounces.* M., by his will, gave to his widow \$20,000, and the remainder of his estate to his then only child, A.; after the birth of his child, L., he directed, by a codicil to his will, that she should have one-fourth of the net profits of his estate, until she should arrive at sixteen years of age, and after that time, should share equally with A. The widow renounced the will, and claimed her statutory portion, being one-third of the estate: *Held*, that the youngest child, L., was entitled, whilst under sixteen years of age, to one fourth of the net profits of the whole estate, inclusive of the widow's portion, or to three-eighths of the remainder,

after the widow's portion had been deducted; *Johnson v. Miller*, 4 G. 553.

68a. *Bequest to wife construed only a dower interest: Instance.* A will contained the following clause: "Also, I give and bequeath to my wife, N., all my real estate, with furniture, plantation, tools, and the balance of my negroes that are not bequeathed to my children, including stock of all description, and a wagon and three men, and that I have left to my wife, N., all to work as follows: for the use of the plantation, * * * and that my son, J., be educated and raised out of the proceeds of the plantation, at the discretion of my executors, and that when my son J. becomes of age, my wife, N., shall receive her dower, and that she remain on the plantation during her life, and at her death, the plantation to be equally divided among my children: *Held*, that the interest conveyed to the wife, in the land, was only her dower, with a right to remain on the plantation during life, and that no life estate in it was devised to her; *Cooper v. Benson*, 6 C. 766.

69. *Meaning of "estate" and of "property"* The word "estate" used in a will, means both real and personal property, unless the context show the contrary; *Andrews v. Brumfield*, 3 G. 107. The term "property," also embraces both real and personal estate, and under it, when used in a residuary clause, realty, not attempted otherwise to be disposed will pass; *Morris v. Henderson*, 8 G. 492.

69a. *Meaning of "heirs."* The word "heirs," when used in a will, is to be construed in its ordinary sense, and a devise to the testator's heirs, will embrace every person coming within the legal meaning of that word; *Love v. Buchanan*, 40 M. 758.

3. Extrinsic Evidence to Interpret Wills.

70. *Rule on this subject.* When the will is explicit, either the one way or the other, there is no room for the admission of extrinsic evidence; *Gilliam v. Chancellor*, 43 M. 437.

71. *Same: Extrinsic evidence as to situation of testator, etc.* On questions of interpretation, it is always competent to prove by parol, the situation of the testator, the condition, character, etc., of his property, so that the court as nearly as may be, may realize the surroundings of the testator, his relations to the subject with which he is dealing, and thereby be better qualified to reach his meaning and purposes, through the language employed in the will to express them; *Ib.*

72. *Parol evidence to explain words of the will.* Parol evidence is not admissible to supply, contradict, enlarge, or vary the words of a will, nor to explain the intention of the testator, except in two cases: 1. Where there is a latent ambiguity. 2. To rebut a resulting trust; *Love v. Buchanan*, 40 M. 758; *Magee v. McNeil*, 41 M. 17; *Gilliam v. Brown*, 43 M. 641. See LEGACIES, 28, 29.

4. Foreign Will, Conflict of Laws, Lex Domicilii.

See CONFLICT OF LAWS, 21 to 28. *Post*, 97, *et seq.*

73. *Construed according to lex domicilii.* A will is to be construed according to the law of testator's domicile; *Newell v. Newell*, 9 S. & M. 56. It is to be construed according to the law of the domicile as to all property there situated at the time of his death; *Sale v. Saunders*, 2 C. 24.

74. *Construction as to realty.* So much of a will as makes any disposition of realty situated in a jurisdiction foreign to the testator's domicile, is to be governed by the *lex rei sitæ*. Hence if, by the law of the domicile, a will is inoperative as to after acquired lands, this incapacity will not extend to a devise of such land situated in a State where that rule does not exist; but if good by the *lex rei sitæ*, the devise will be carried into effect. For the reason why, by the common law, such devise was not good, was not on account of a want of intention of the testator to make it, but from an incapacity to make it, and it is therefore no objection to the will having that operation, if so intended, as to land situated in a place, by the law of which, no such restriction is placed on the capacity of the testator; *Doe v. Wynne*, 1 C. 251.

But whilst this is so, yet the nature, meaning and interpretation of a foreign will of immovables, will be determined by the *lex domicilii*, and not by the *lex rei sitæ*; *Crusoe v. Butler*, 7 G. 150.

See CONFLICT OF LAWS, 25, 26.

5. Charging Estate or Legacy with Debts, &c.

75. *Charge construed to be on life estate and remainder.* A testator devised his estate to his wife for life, remainder over, and directed his executrix (who was his wife) to pay his just debts, as soon as possible, "out of such funds as my (his) executrix may be able to appropriate for that purpose." *Held*, that the debts were not a charge on the life estate alone, but on the whole estate, and the tenant for life and remainderman should each contribute according to the value of his respective interest; *Peck v. Glass*, 6 H. 195.

76. *Charge of general legacy on specified legacy by condition subsequent.* Testator devised slaves to B., on condition that a certain sum of money should be paid annually to the children designated in the will, and a certain other sum should be paid them on their attaining majority, and B. accepted the devise: *Held*, that his estate was, on condition subsequent, with which, if he failed to comply, the estate would be forfeited and vest in the children: and that the legacy to the children was a charge and lien on the slaves devised to B.; *Beck v. Montgomery*, 7 H. 39.

77. *Right of general legatee to security.* But in such a case the general legatees are not entitled to have security for the ultimate payment of the legacy; *Ib.*

78. *Charge on foreign property.* A legacy given by a will in a sister State, and charged

on property situated there, cannot be collected out of property situated here, unless it be shown that the fund in the other State is insufficient; *Montgomery v. Millikin*, 5 S. & M. 151.

VI. Legacies.

See LEGACIES.

VII. Equitable Conversion.

80. *What is: Case in judgment.* The testator left his whole estate, real and personal, subject to sale at the discretion of his executor; whether this was an equitable conversion of the realty into personality; *Quære?* *Hart v. Dunbar*, 4 S. & M. 273.

Where a testator directs all his land to be sold out and out, and converted into money, this is an equitable conversion of the land into money; and this is the true rule, even when a part of the proceeds of the sale of the land is directed to be applied to an illegal purpose; it being clear from the will, that the testator directed all the land to be sold, and not so much only as is necessary to carry out the illegal purpose, and he having also made such provision in the will, that the surplus created by the illegal part of the bequest, failing, would otherwise be validly disposed of; *Mahomer v. Hooe*, 9 S. & M. 247.

VIII. Illegal and Void Bequests and Devises and Trusts.

See LEGACIES, 18, 19, 20.

1. Illegal Trusts, who Takes.

81. *The heir takes.* If the trust created by a will be declared ineffectual as against public policy, and the will show the intention that the devisee shall be a trustee only, without any beneficial interest in the bequest, the trust in the property will revert to the heir and not to the trustee. Thus a bequest of slaves to persons who are strangers to and have no claim upon the bounty of the testator, "in trust for the Colonization Society," conveys no beneficial interest in the slaves to the trustees, and the trust being void, the slaves go to the heir; *Lusk v. Lewis*, 3 G. 297.

82. *Same: Another rule.* The general rule is, that a bequest upon a void condition vests the estate in the legatee discharged of the condition; *Weathersby v. Weathersby*, 13 S. & M. 685; *Cheairs v. Smith*, 8 G. 646. But it is otherwise, where the legatee is a mere trustee to carry out the void condition, and it does not appear that it was intended that he should have any beneficial interest in the legacy; in that case, a trust in the legacy results to the heir; *Cheairs v. Smith*, 8 G. 646; *Lusk v. Lewis*, *supra*.

2. How far the Nullity of the Bequest Extends.

83. *Same.* The invalidity of any particular trust, limitation or interest created by a will, will not destroy trusts and limitations which are otherwise valid, unless the latter are so connected with the former, that it is

impossible to sustain the one without giving effect to the other; *King v. Talbert*, 7 G. 367.

84. *Same: Illustration.* Thus, where a testator, by a will insufficiently attested to pass realty, directed his executors to sell his farm and buy a new one, and to keep his property together and plant with it, the latter direction will be good, notwithstanding the invalidity of the will as to the sale of the land, for the executors may buy another farm on which to plant without the sale of the one owned by testator; *Id.*

85. *Valid bequest dependent on void bequest.* A bequest valid in itself will be ineffectual if made to depend on an illegal bequest; *Lusk v. Lewis*, 6 G. 401. And so a pecuniary legacy directed to be paid after the payment of another legacy which is illegal, is also void; *Lusk v. Lewis*, 3 G. 297. But the bequest, though connected with, yet if not dependent on, an illegal bequest, will be good; *Lewis v. Lusk*, 6 G. 401. A will is void only to the extent of its illegality; *Cheairs v. Smith*, 8 G. 646.

86. *Same: Law of Louisiana.* It is the law of Louisiana to give effect to the intention of the testator whenever it can be gathered from the will, and if he make a bequest prohibited by law, in this, that it exceeds the amount the law allows him to give to the legatee, the bequest will not be void entirely, but only as to that portion which exceeds the disposable amount. Thus, where a testator, having children by a former wife, gives to his widow more than one-fifth part of the usufruct of his estate (which he is prohibited from doing), the court will convert the bequest into an equivalent to the one-fifth part of the usufruct, and give that to the widow; *Montgomery v. Millikin*, 5 S. & M. 151.

3. Devises in Restraint of Marriage.

87. *A devise during widowhood.* A devise by a testator to his wife, "to be held by her so long as she continued his widow, and upon her marriage" the property to go to other devisees named, is good; and her estate terminates with her second marriage. It is not a devise in restraint of marriage nor in *terrorem*. The limitation over, relieves it from the last objection; *Pringle v. Dunkley*, 14 S. & M. 16; *Dilliard v. Cunoway*, 3 G. 230.

IX. Whether an Instrument is a Deed or a Will.

88. *Distinction between will and deed.* In determining whether an instrument be a deed or a will, the main question is, did the maker intend to convey any estate or interest whatever, to vest before his death and upon the execution of the instrument? Or, on the other hand, did he intend that all the interest and estate should take effect *only* after his death? If the former, it is a deed; if the latter, a will; and it is immaterial whether he calls it a will or deed, the instrument will have operation according to its legal effect; *Wall v. Wall*, 1 G. 91 (citing *Harrington v. Harrington*, 2 H. 701).

If it be in form a deed, yet is to have no operation until after the maker's death, it will be a will; *Sarter v. Sarter*, 10 G. 760; *S. P., Harrington v. Harrington, supra*.

89. *Same: Examples of deeds.* A voluntary instrument, purporting on its face to be a deed, by which land and slaves are conveyed, by terms in the present tense, but reserving a power of revocation to the maker, to be exercised in a certain specified mode at any time during his life, and also declaring that it shall not take effect as to a delivery of the property until after the maker's death, vests in the donees an estate *in presenti*, to be enjoyed *in futuro*, and is therefore a deed and not a will; *Wall v. Wall*, 1 G. 91.

And so an instrument which, in consideration of love and affection and of past services rendered, and of future support for life, to be given by the beneficiary to the maker, stipulates that the latter will stand seized of the real and personal property therein mentioned, for his own use during his life, and no longer, and that then a trustee shall convey to the use of the beneficiary, vests in him an interest *in presenti*, to be enjoyed *in futuro* after the death of the maker, and is a deed, not a will (citing *Wall v. Wall, supra*); *Exum v. Canty*, 5 G. 533.

An irrevocable deed, by which personalty is conveyed to a trustee for the use of the grantee during life, and after his death to others, is a deed, and not a will; *Cameron v. Cameron*, 10 S. & M. 394.

90. *Same: Example of a will.* An instrument which was in form a deed, contained the clause: "For the love and affection which I have for my wife, Harriet N. Sarter, I give unto her all my property, real and personal, during her widowhood; and if she marries, it is all to go back to my niece, Sally." There was nothing else in the instrument which showed unequivocally whether the maker intended it to take effect before or after his death: *Held*, that it was doubtful, from the expression, "I give, * * * during widowhood," whether the maker intended to give an interest *in presenti*, or only after his death; but that upon the consideration that he gave all his estate, it was highly improbable that he intended the gift to take effect before his death, and it was, therefore, held to be a will; *Sartor v. Sartor*, 10 G. 760.

91. *Same: Another example of a will.* An instrument in form of a deed, for the consideration of love and affection to the grantees, gave and granted to them certain slaves, and, also, to one of them, "all the land I now possess, or may possess at the time of my decease, together with all the household goods and chattels in my dwelling house. The above named property at my decease, and not before, an inventory signed with my own hand, and bearing even date, to have and to hold the aforesaid property, unto the above named 'grantees,' for their proper use, absolutely, without any manner of condition:" *Held*, to

be a will; *Harrington v. Harrington*, 2 H. 701.

92. *If intended as a deed, though inoperative as such, it is no will.* The following instrument was propounded for probate as a will:

"I, H., in view of the strong probabilities of my early death, and a desire to secure my friends in their just rights, do hereby convey all my estates, both real and personal, to L. and E., in fee simple, to be held by them until my debts, on which they are sureties, are satisfied. I also request L. to take charge of T.'s and give him as good an education as the country affords. Witness my hand and seal," &c. It was signed by the maker, but not sealed, and it was witnessed by four witnesses who proved its execution. The sureties, L. and E., resisted its probate, claiming that it was a deed.

It was proved by one of the subscribing witnesses, that H., on the date of the instrument, and during his last illness, requested all persons to withdraw from the room, and then asked witness to prepare a paper for him, and send for a justice of the peace, and for H.'s sister, and also for the grantee, L. Witness drew up the paper according to his directions. Whilst witness was reading it over to H., the persons subscribing as witnesses came into the room, and H. signed the paper, and requested them to subscribe as witnesses, which they did, in his presence, and in the presence of each other. The justice did not come; and when the subscribing witnesses came in the room, H. said something about fearing that the justice would not come till he was not in a condition to execute it, and that he wished those gentlemen to sign as witnesses, and that it would all be fixed up when the justice came. It was also proven that the instrument lay on H.'s bed, after its execution, and was handed by one of the witnesses to C., the overseer of H.'s and that two nights afterwards H. asked C. where it was, and said, "hold on to it, and keep it; that L. and E. were his friends, and they would do to tie to, and that the instrument would protect them." The instrument was admitted to probate, and L. and E. appealed.

Per Curiam. "The question is whether the instrument admitted to probate, was designed by the deceased to operate as a will or a deed. We are of opinion that it was intended to operate as a deed, and whether it can so operate or not, it cannot be regarded as a will, for the reason that it was not designed as such. Decree reversed." *Edwards v. Smith*, 6 G. 197.

92a. *Parol evidence.* Where it is doubtful on the face of the instrument whether it be a deed or will, parol evidence to show the facts attending its execution, and the declarations of the testator at the time of making it, are admissible; *Herring'on v. Bradford*, W. 520.

X. Trusts created by Precatory Words.

92b. *Rule on this subject.* Where property

is given absolutely to another person, and the same person is, by the giver, who has power to command, recommended, entreated, or wished to dispose of that property in favor of another, the recommendation, entreaty or wish, shall be held a trust. first, if the words are so used, that upon the whole, they ought to be construed as imperative; second, if the subject (*i. e.*, the interest or property given) of the recommendations, &c., be certain; and thirdly, if the objects or persons intended to be benefited by the recommendations be also certain; *Lucas v. Lockhart*, 10 S. & M. 466; S. P., *Wade v. Am. Col. Society*, 7 S. & M. 663.

93. *Same: Case in judgment.* By the first clause of the will, the testator gave his "whole estate, both real and personal, to his wife, during her widowhood." By the 4th clause, he provided, that, "during my wife's widowhood, she is to have the entire use, profits, and control of my estate, and to her discretion do I intrust the maintenance and education of my children during that time;" and this clause also provided for the maintenance and education of the children "out of the profits of the estate, in case of the death or marriage of the widow:" *Held*, that the 4th clause created a trust for the children, and the property was not liable for the widow's debts; *Ib.*

XI. Powers.

94. See POWERS.

XII. Conditional Will.

95. *Whether conditional depends on terms of will.* Whether a will be conditional or not, depends on its terms. The declarations of the testator are inadmissible to explain or contradict it in this respect. Hence, where a soldier wrote to his wife, "In case I never get back to you, I want all I have to be yours," and he did get back sick, but soon afterwards died, it was held, that his declarations, made both before and after the date of the letter, to the effect that he wished his wife to have all he had, were inadmissible to explain whether the will was a conditional one or not. Such a will is conditional, and on the testator's return, it became of no effect; *Magee v. McNeil*, 41 M. 17.

96. *Whether a will is conditional is a question of law.* The construction and effect of a will or other writing, are questions of law for the court, and are not to be left as matters of fact to the jury. And in case of a will which is alleged to be conditional, the jury in bringing an issue *devisavit vel non*, are to determine whether it was duly executed, and whether the condition on which it was to take effect has happened; but the court is to determine whether on its face it be conditional, or not. And on the trial of such issue, the condition of the mind of the testator after its execution, is immaterial; *Ib.*

XIII. Foreign Will.

97. *As to probate of foreign will.* See

CONFLICT OF LAWS, 21 *et seq* See also, *post*, 112, 136, and *ante*, 73, *et seq*.

98. *Proof of foreign probate.* A certified transcript of the Court of Ordinary, in the State of Georgia, in which is embraced a copy of a will and the affidavit of the subscribing witnesses proving its execution, made in open court (before the ordinary, who is both judge and clerk), and also a statement that the will was recorded, and copies of receipts of legacies given to the executor named in the will, for legacies therein bequeathed to them, which receipts were also recorded in said court, contains sufficient, though informal evidence of the probate of the will; *Jordan v. Thomas*, 2 G. 557. See *post*, 111, and EVIDENCE, 108, *et seq*.

99. *Copies of foreign wills as evidence.* A copy of a will made and probated in a sister State, and authenticated according to the act of Congress in relation to the authentication of judgments, records, &c., of the different States, is admissible in evidence in the courts of this State in a suit to recover personalty bequeathed in it, without a previous probate here. The statute (H. & H. 338, § 13) allowing such copies to be probated here, when there are estates here devised in them, and providing that the validity of such will shall be subject to contest as if made and probated here, was not designed to introduce a new rule of evidence on the subject; and if it were so designed, it could have no effect against the provisions of the act of Congress (it does not appear from the report of the case, whether the property sued for was in this State or not at the death of the testator, or whether it had been removed here afterwards); *Melvin v. Lyons*, 10 S. & M. 78.

100. *As to mode of authentication.* See EVIDENCE, 109b, 110, 111, 112.

101. *Copy must be authenticated &c.* A copy of a will made and probated in a sister State, is not admissible in evidence here, to establish title to personalty, unless it be authenticated according to the act of Congress, or be probated in this State; *Ratcliff v. Ratcliff*, 12 S. & M. 134.

102. *Probate of foreign will as a cloud on title.* It is no objection to the probate here of a foreign will, devising or attempting to devise land situated here, that the testator had no title to the land, and that such a probate would cast a cloud on the owner's title. The making of a will confers only such title as the testator has, and does not enlarge his estate; and hence, if he had no title, its probate can cast no cloud on the title of the owner; *Watson v. Buller*, 4 C. 178.

102a. *Domestic will made in a foreign State.* A will of personalty must be made according to the law of the testator's domicile, and if invalid by that law, is invalid everywhere; and this rule is the same, though the testator be absent from home, and make a will in a foreign State, and dies there. And such will must be probated here originally; its probate in the State where he died is void; *Strudivant v. Neill*, 5 C. 157. See *post*, 115, *et seq*. PROBATE OF WILLS.

XIV. Probate of Wills.

1. Probate in Common Form.

103. *Its effect.* The probate of a will in common form, is a mere incipient step necessary to its execution, and is not binding on the heirs or distributees, who may have it reopened, and the question of its validity tried; *Cowdens v. Dobyns*, 5 S. & M. 82; *Hamberlin v. Terry*, 7 H. 143; *Garner v. Lansford*, 12 S. & M. 558. It is not conclusive even, that the paper probated is to have effect as a will; *Wall v. Wall*, 1 G. 91.

103a. *Its effect as to whether probated as a will of realty or not.* When a will attested and proved by the requisite number of witnesses for a will of personality, but not by the number required for a devise of realty, is admitted to probate in common form generally, the probate will simply extend to it, as a will of personality; *Murray v. Murphy*, 10 G. 214.

104. *Its effect to protect executor when it is afterwards set aside.* The decree of the Probate Court admitting a will to probate in common form is not like an ordinary judgment or decree which protects those acting under it, until it is regularly set aside, but it is an incipient step in the execution of the will, and confers on the executor, acting in good faith, the power to proceed with its execution, until he has notice of its invalidity. The pendency of an issue *devisavit vel non*, is notice to the executor, and till it is done he has no power, except at his own risk, to pay legacies, or otherwise dispose of the assets in pursuance of the will, and contrary to the law for the administration of estates. He may, however, proceed to collect debts, and pay claims against the estate, and do all other acts beneficial to those interested; *Kelly v. Davis*, 8 G. 76.

105. *The decree not final.* A decree of the Probate Court, probating a will in common form, is not a final decree, therefore, not subject to be reviewed, or reversed by bill of review; *Murray v. Murphy*, 10 G. 214.

105a. *Objections made to probate of will in common form.* Where no objections are made in the Probate Court to the probate of a will, when it is propounded, the court may then take probate of it, but if objections be then regularly made, the court must dispose of them before proceeding to take probate of the will; *Jones v. Mosley*, 40 M. 261.

2. How Proven for Probate.

106. *All the witnesses must be produced.* A will devising both real and personal estate was attested by three witnesses, but admitted to probate on the testimony of one alone, the others being alive, and within the jurisdiction of the court. A petition was filed to set it aside for insufficiency of probate, which was dismissed in the court below. The court say, "we are inclined to hold that no will can be proved unless all the subscribing witnesses alive and within the control of the process of the court, are produced to testify. In

Chase v. Lincoln, 3 Mass., it is said the Legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names; an idiot might do this. These witnesses are placed around the testator to ascertain and judge of his capacity, and the heir has a right to insist that the testimony of all three of the witnesses be given to the jury. In *Sears v. Dillingham*, 12 Mass. 358, it was contended that no will can be proven unless all the witnesses are produced to testify. The court said, "this, as a general rule, is undoubtedly settled, both here and in England." The decree was reversed; *Evans v. Evans*, 10 S. & M. 402. (This, however, it will be noted, was said in reference to a proceeding by the heir to contest the will.)

107. *Same.* Wills of personality, though attested by more than one witness, may be probated on the testimony of one alone; *Kirk's Case*, 13 S. & M. 406.

108. *Will of realty must be proven by three witnesses.* A devisee under a will, attested by three witnesses, but only proven by one, filed his bill in chancery to recover land from parties who had purchased under sales made by the administrator. The defendant demurred: *Held*, that the demurrer was properly sustained. "The will under which the complainant set up claim was proven only by one witness. As an incipient probate, one witness might have been sufficient, but in any controversy respecting the title to the land it must be shown that the will was established by the competent number of witnesses;" *Reagland v. Green*, 14 S. & M. 494.

109. *Same: When one witness will do.* Where it appears from the face of the will that there are three subscribing witnesses, it may be proven by one, so as to pass realty, if the witness examined prove that it was duly attested by the others. And if the record of the probate state that it was duly proven by one of them and admitted to probate, and it does not affirmatively appear that that witness proved only attestation by himself, and execution in his presence, it will be presumed that he testified to every fact necessary to due execution; *Crusoe v. Butler*, 7 G. 150.

3. What is a Probate and the Evidence of it.

110. *Probate must be done by the judge.* The probate of a will is a judicial power, confided by our laws to the probate judge, and, unless shown to have been exercised by him, no testamentary paper can have the effect of a will; *Fotheroe v. Lawrence*, 1 G. 416.

110a. *Probate in vacation.* The probate of a will by the probate judge in vacation is void, but if all parties acquiesce in it for seven years, and the estate be administered on such probate, they will be estopped from denying its validity. The validity of the will cannot be contested after five years, and by analogy to this its probate ought not to be contested after that time. Hence, where a widow, after the lapse of that time, and having received the provision made for her in the will, sought to impeach the validity of the probate, and

renounce the provision in her favor. it was held that she was estopped; *Saunders v. Saunders*. 14 S. & M. 81.

111. *Form of proof of probate.* No particular form of exercising the judicial function in the probate of a will is prescribed by law, it is sufficient if it clearly appear that the judicial act was done by the judge, and this may be shown by the minutes of the court reciting the probate, or by an entry made on some part of the will, showing that it was duly proved before and approved by the court, or ordered to be recorded as the will of the testator; or it may be shown by proof that letters testamentary were granted on it. The record of it after proof of its execution before the clerk, is not a probate, and the lapse of twenty years after such record, without the property bequeathed having passed in possession under it, and without any other act being done recognizing either directly or by legal intendment, its validity, will not authorize the presumption that it was duly probated; *Ib.*

See *ante*, 98.

4. The Necessity of Probate.

112. *Invalid till probate.* Before a will can be admitted in evidence in support of title to property, therein bequeathed or devised, it must appear to have been duly probated. A record of the will, on due proof of its execution, will not do; *Fotheroe v. Lawrence*, *supra*.

And it is no evidence in support of title to property, till probated in the jurisdiction in which the property was situated at the testator's death; *Wells v. Wells*. 6 G. 638.

But if it dispose of the testator's property, as in case of intestacy, its probate is unnecessary, for the devisees and legatees may recover on their title as heirs and distributees; *Campbell v. Webster*, 2 G. 345.

112a. *What executor may do before probate.* By the common law of England, "the probate of a will is merely operative as the authenticated evidence, and not at all as the foundation of the executor's title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death, and the probate, when produced, relates back to that time." This rule, though probably inapplicable, under our laws, to a disposition of property which is strictly assets made by the executor before probate, does apply to a sale of realty, made by the executor, under a special power conferred by the will and not appertaining to the office and duties of an executor, in the ordinary administration of the estate; and hence, where an executor, in execution of a power conferred by a foreign will, which was duly probated where it was made, sold and conveyed lands situated here, before its probate in this State, it was held that a valid title passed to the grantee, which would be protected upon the subsequent probate and record of the will in this State; *Crusoe v. Butler*, 7 G. 150.

See HUSBAND AND WIFE, 164.

5. Probate and Proof of Ancient Will.

113. *Same: Case in judgment.* An instrument purporting on its face to be the last will and testament of E. L., and bearing date 7th September, 1833, was propounded for probate in 1856. It was signed by the testator by his mark, and under the word "Test" were subscribed the names of two witnesses. In December, 1833, and after E. L.'s death, it was filed for probate in the proper court, and one of the subscribing witnesses then made an affidavit before the clerk, setting forth facts sufficient to probate the will, except that he did not state that the will was attested in the presence of the testatrix. No order or decree was made in relation to the probate of the will, nor the estate of E. L., but the will was recorded in the proper book. In 1856, one of the legatees propounded the will for probate, taking it from the files of the Probate Court, where it had remained from the time of filing, in 1833, and produced one of the subscribing witnesses, who proved the handwriting of the other, and that he was dead. He also proved that he wrote the will, and that the name of the testator and his own name were in his handwriting. The witness had no independent recollection of the execution of the will, and the circumstances attendant thereon; nor did he then recollect whether, at the date of the will, he knew what formalities were required for the valid execution of a will, and thought it possible that he might have attested an instrument not legally executed; but he was satisfied from an inspection of the instrument of the truth of the above facts, and was also satisfied that he would not have subscribed the testatrix's name, nor his own, unless he had been requested to do so by her. He also proved that the will was intended to be executed in good faith, and that it was generally understood amongst the relatives of E. L. that she had made a will. The property disposed of by the will had never been held in subordination to the will, but had been held adversely by the distributees of E. L.: *Held*, that under these circumstances, the will having on its face all the formalities required by the statute to appear there, it might properly be presumed that the other incidental requisites were also complied with, and that the will was sufficiently established; *Fatheroe v. Lawrence*, 4 G. 585.

114. *Same: Statute of limitations.* There is no limitation as to the period in which a will may be probated, and hence, a long continued possession of the estate, adverse to the will, is no presumption against its validity, unless it be shown that the devisee propounding the will for probate was under no disability, and that there was no impediment to the ascertaining of his rights, and that his acquiescence was tantamount to a disclaimer under the will, with a full knowledge of its legal character; *Ib.*

6. In what Jurisdiction Will must be Probated.

115. *Must be established in domicile of testator.* A will must be probated and estab-

lished according to the law of the testator's domicile, and in the courts of his domicile; and this is so though the testator make his will and die outside of his domicile; *Sturdivant v. Neill*, 5 C. 157; *Morris v. Morris*, 1b. 847; *Bailey v. Osborne*, 4 G. 128.

But the courts of any State not being the testator's domicile, in which the testator left property, may, in the first instance, probate the will; *Still v. Corporation of Woodville*, 9 G. 646;

And such probate, in a foreign jurisdiction, in which the testator was not domiciled, but had property, will be recognized as valid by the courts of the domicile, as to the property situated in the State where probate was made, if such property should afterwards be brought within the domicile, for each State has the power to regulate for itself the disposition of property within its limits, as it sees proper, and such disposition, if valid there, will be recognized as valid everywhere; *Wells v. Wells*, 6 G. 638.

116. *Court of domicile has jurisdiction though no property of testator there.* The general rule is, that the capacity of a testator to make a will, and the rules regulating the disposition of personal property by testament, depend on the law of the domicile. Hence, where the testator has by law a general power of disposition by will, it is immaterial whether there be property in the domicile which will be affected by the will or not, so far as the jurisdiction to probate the will is concerned.

And the rule is the same where the testator has no such general power of disposition, but being a married woman, makes a will disposing of real and personal property in virtue of a power to do so reserved in a marriage settlement.

When, therefore, a married woman having power to make a will as to real and personal estate situate in Arkansas, is domiciled here, and makes a will in pursuance of such power, the will should be probated here, though there is no property here on which it could take effect. And the order of probate should be general, since its legal effect can be determined afterwards; *Cameron v. Watson*, 40 M. 191.

7. Miscellaneous as to Probate of Wills.

117. *Probate must be general, leaving construction open.* If a will be alleged to have illegal devises in it, still, if it be properly executed, it will be admitted to probate, and the order of probate will be general, extending to the whole will. The court cannot restrict the probate to such parts as it may deem of legal validity. The validity of the devises may be contested afterwards; *Lusk v. Lewis*, 3 G. 297. And the rule is the same where the will of a married woman, made under a power conferred by a settlement, is propounded for probate. The order for probate will be general, and the question as to what property is validly devised by it will be afterwards determined upon proper proceedings for that purpose; *Cameron v. Watson*, 40 M.

191. And the rule is the same upon the trial of an issue *devisavit vel non*; *Lusk v. Lewis*. *Cameron v. Watson*, *supra*.

118. *Revocation of probate without notice.* The revocation of the probate of a will by the Probate Court, without notice to any of the legatees, and without any issue being submitted to the jury, is invalid, and distribution made after such revocation, as in cases of intestacy, is no bar to the claim of a legatee for his legacy; *Quinn v. Moss*, 12 S. & M. 365.

XV. Establishing Wills Lost or Destroyed.

119. *Contents must be clearly proven.* Where the contents of a will which has been improperly destroyed, are satisfactorily proven, they will be established as the will of the testator; but the policy of the law requires such contents to be established by the clearest, and most conclusive, and satisfactory proof; *Vining v. Hall*, 40 M. 83.

120. *Proof of part of contents.* Whether, if a part of the contents be clearly proven they can be established, or whether it is essential that the whole contents be established; *Quære?* But if there be no satisfactory proof of the contents so far as establish any part of the will, except a clause revoking all other wills, that clause will be established, and will have the effect to revoke former wills. The failure of the will from want of proof of its contents, or from any other matter *dehors* the will does not prevent the revoking clause from taking effect; *Ib*.

121. *Proof of contents: Case in judgment.* In 1813, A. died, having made a will, by which she bequeathed certain slaves to her children, specifying which slaves each child was to have, but providing that there should be a valuation of the slaves, and the shares of the legatees should be made equal by money, and providing also for a limitation over to her sons in case her daughter (one of the legatees) died without issue.

The daughter died in 1838, without issue, but made a will giving her slaves to her nephew, a son of one of the brothers, and the property was delivered to him.

The other sons of A. sued for the recovery of the slaves, under the provision in the will of A., limiting them to her sons on the death of the daughter without issue. The defendant denied the right of A. to make a will of the slaves, and set up a will made by A.'s husband, by which he bequeathed all his slaves to A. and her children equally, to be divided on the youngest child arriving at 13 years of age. The defendant proved by his father (one of the sons of A.), about the year 1840, that the witness' father (A.'s husband) died in 1789, having made a will which was duly probated, and afterwards destroyed by fire, the whole of the records having also been destroyed, that the said husband of A. was the owner of all the slaves, and his will was exactly like A.'s, except as to the limitations over, and except as to specifying the slaves each legatee was to have; and

that by common consent of the legatees—being children of A., and of A.'s husband—A. was allowed to retain possession of the slaves, and that the will of A. was carried into effect, he being executor: *Held*, that the witness being only 16 or 17 years old at the death of his father (A.'s husband), his deposition taken after the lapse of half a century, from that time, was insufficient to establish the will of his father; *Newell v. Newell*, 9 S. & M. 56.

XVI. Contestation of Wills and of their Probate.

See PROBATE COURT, 121, *et seq*

1. How Wills are to be Contested.

122. *When by petition alone.* A petition seeking to annul an instrument which has been probated as a will, and to set aside the probate thereof, on the ground that it appears on its face to be a deed, and not a will, raises purely a legal question, to be determined by the court; and it ought not, therefore, to ask for an issue *devisavit vel non*, to be submitted to a jury; *Sartor v. Sartor*, 10 G 760; *Wall v. Wall*, 1 G. 91. And so if a nuncupative will be admitted to probate on insufficient proof; *Garner v. Lansford*, 12 S. & M. 558. But in *Cowden v. Dobyns* 5 S. & M. 82, a petition was filed, attacking the probate of a will on the ground that it appeared on its face not to be a will, and an issue *devisavit vel non* was prayed for, and the court held this a proper remedy.

123. *When issue devisavit vel non necessary.* When a will has been admitted to probate in common form as a will of realty, and it appears from the records, that it was attested and proved by three witnesses,—the proper mode in which to contest it as a will of realty, is to petition for an issue *devisavit vel non*; *Murray v. Murphy*, 10 G. 214. Generally in all cases where the competency of the testator, or the due execution of the will, according to the forms of law, is involved, an issue *devisavit vel non* is the proper remedy, and these are the only questions triable under that issue; *Cameron v. Watson*, 40 M. 191; *Lusk v. Lewis*, 3 G. 297.

2. Issue Devisavit vel non, the Framing of it, Trial, &c.

124. *How framed: Duty of the court in this respect.* A petition was filed in the Probate Court for an issue *devisavit vel non*, to be sent to the Circuit Court, to try the question of the validity of a will, the petition alleging that the testator was incompetent to make a will, and that the will was obtained by fraud. A decree was made "that an issue *devisavit vel non* be made up and sent to the Circuit Court, at the next May term thereof, 1852, and that the cause be continued." At the next term of the Probate Court, the petition was dismissed on the ground, that the petitioner had declined to tender an issue as required by the former order of the court: *Held*, that this order was erroneous; that if the issue was not already sufficiently made

up on the petition and answer, and by the first order of the court, it was the duty of the court to make up the issue upon the facts presented in the petition; *Kell v. Rogers*, 6 C. 83.

125. *Issue based on the petition.* The issue in relation to the validity of the will certified to the Circuit Court to be tried by a jury, should be based on the allegations in the pleadings, and no issue should be so made up and certified, unless the fact therein submitted for trial be alleged in the petition asking for the issue; *Hairston v. Hairston*, 1 G. 276.

126. *The issue should be special.* An issue *devisavit vel non* should be framed so as to try the truth of the facts stated in the petition as the grounds of avoiding the will. A general issue, "whether the writing produced be the will of the testator or not," is unnecessary, if not improper; *Payne v. Banks*, 3 G. 292.

Yet if such general issue be made up, the question of fraud in procuring the will may be appropriately tried under it; *Hairston v. Hairston*, 1 G. 276.

127. *As to what is triable in an issue devisavit vel non.* see *ante*, 96, 117, 123.

128. *Verdict.* A verdict that "R. H. was of sound and disposing mind at the time of making his will, and that the same was executed and attested according to law," is substantially responsive to the following issues submitted to the jury:

1. "Whether R. H. was of sound and disposing mind at the time of the execution of the will." 2. "Whether the writing purporting to be the last will and testament of said R. H., be his last will and testament or not."

129. *Effect of a judgment sustaining the will.* Where the validity of a will has been contested according to law, and sustained, the decree is conclusive against all parties interested, infants as well as adults, and whether they were parties to the proceeding or not; *Scott v. Calvit*, 3 H. 148.

130. *Effect of judgment annulling it.* A judgment on a verdict rendered against the validity of a will, annuls it *ab initio*, although the judgment recite that the will is "annulled from that day hence;" *Kelly v. Davis*, 8 G. 76.

131. *Parties.* If the Probate Court, at the instance of the legatees, refuse to allow them to be made parties with the executor to an issue *devisavit vel non*, the contestant cannot complain; the error, if any, not being to his prejudice; *Graves v. Edwards*, 3 G. 305.

132. *Probate in common form no evidence on the trial.* The record of the probate of the will, in common form, being *ex parte*, and made without notice to the heirs, is not admissible in evidence, on the part of the executor, on the trial of an issue *devisavit vel non*; *Edwards v. Gauding*, 9 G. 118.

133. *Costs.* The costs of an unsuccessful attack on a will cannot be taxed against the estate; *Piper v. Heatherington*, 3 G. 306.

134. *As to effect of pendency of the issue*

devisavit vel non on the powers of the executor, see ante, 104.

135. *As to the powers and duties of an executor in reference to an issue devisavit vel non.* see EXECUTOR AND ADMINISTRATOR, 217, 218, 219.

136. *Contesting foreign will.* The Probate Court has jurisdiction to admit to probate and record an authenticated copy of a will, made and probated in another State, where the testator was domiciled; and its judgment allowing the probate of such will cannot be attacked collaterally, but only in a direct proceeding for that purpose; *Crusoe v. Butler*, 7 G. 150.

XVII. Miscellaneous.

137. *Devising after acquired land.* By statute (H. C. 649, Rev. Code of 1857, p. 432), it is competent to make a will devising land acquired after the making of the will, just as at common law, after acquired personalty could be bequeathed. A will of realty here, just like a will of personalty, is ambulatory till the testator's death, and if general words be used in it, disposing of testator's whole property, all that he has at the time of his death—but realty and personalty—will pass; *Doe v. Wynne*, 1 C. 251.

138. *Same: Case in judgment.* A testator after directing the payment of his debts, bequeathed to his wife, "all the balance of his property both real and personal, to hold to her exclusive benefit:" *Held*, that this was a manifestation of an intention of the testator, to give his wife all the estate he had at the time of his death; *Ib.* See *post*, 74.

139. *Devise of interest under a will when testator is alive.* A devisee in a will, who dies before the testator, has no power by his will, to dispose of the devise to him in the first will—though the first testator afterwards die, without changing the devise to him. In such a case, if the devisee be a child of the first testator, the legacy or devise is not lapsed, but under our statute, it would go to the children of the deceased devisee, in the same manner as if the devisee had survived the testator, and died unmarried and intestate; and hence, his widow has no interest in it; *Pate v. Pate*, 40 M. 750.

140. *Taking under and against a will: Lapsed legacy, &c.* And, in such a case, if the deceased devisee by his will, devise property which he then owned, to his widow and children, and also attempt to give his widow and children an interest in the devise to him, contained in his father's will, the widow cannot get compensation out of the property which the devisee really owned, and had a right to dispose of, for her loss in the devise contained in the father's will, but she must take alone her share in the property which her husband owned, and the children will, under the statute, take the whole devise in the will of the grandfather; *Ib.*

141. *As to wills by wards in favor of guardians,* see GUARDIAN AND WARD, 32, *et seq.*

142. *Sale of land devised to be divided.* The testator by his will devised all his estate to his widow and children in equal shares, and directed that his slaves and other property should be kept together on his farm, under the control of his widow; and that distribution of the personalty should be made to each of his children as they should respectively arrive at full age or marry; and then when his youngest child should arrive at full age, or marry, his real estate should be then divided, but reserving the right to any one of the legatees to have the land sold for a division. The executors nominated in the will renounced, and letters of administration were granted on the estate to the widow and her second husband, who settled up the estate and closed the administration. Afterwards, on petition of one of the devisees, a division was made of the realty under an order of the Probate Court and the guardian of one of the minors procured an order, to sell, and did sell the share of his ward: *Held*, that the provision in the will restricting the division of the realty till the youngest child became of age, or married, was material, and vested a valuable right in the minor distributees, and could not, therefore, be disregarded by the Probate Court, and that the sale made by the guardian of his ward's interest was void; *Shipp v. Wheelless*, 4 G. 646.

143. *Contract to make a will.* A party who receives a deed conveying to him property absolutely, may in consideration thereof, bind himself by parol to dispose of the property by will, to a designated beneficiary, and if he execute the will in pursuance of the contract, it will be irrevocable; and if he fail to execute it, it will be a fraudulent violation of his contract, against which equity will give relief to the beneficiary; *Anding v. Davis*, 9 G. 574.

144. *Wills by ward in favor of guardian.* See GUARDIAN AND WARD, 33, *et seq.*

Writ.

1. *Defect in waived by plea.* A defect in the writ cannot be taken advantage of after plea to the writs; *Stevens v. Richer*, 1 H. 522.

2. *Plea in abatement: Oyer.* By statute, certain defects in the writ may be taken advantage of by plea in abatement; on such a plea oyer is not necessary. A variance between the writ and declaration may be taken advantage of by demurrer as well as by plea in abatement; *Gilleland v. Wilkins*, 1 H. 574.

4. *Endorsement on the writ.* The endorsement of notice of the cause of action required by the statute (Poindexter's Code, 107), to be made on the writ by the clerk or plaintiff's attorney, is mere notice, and if it set out more than the statute requires, the excess is surplusage; and if erroneous in the excess, it is immaterial. Hence, an error in the notice as to the place at which the note sued on was made payable, is immaterial; *Walker v. Tunstall*, 3 H. 259.

5. *Same.* Larger damages than those stated in the endorsement may be recovered if they do not exceed the amount claimed in the declaration; *Lynch v. Com'r of Sinking Fund*, 4 H. 377.

6. *Writ a part of the record.* The writ under the practice in this State, is a part of the record, and a variance between it and the declaration as to the amount of damages claimed, may be taken advantage of by plea in abatement; *Walker v. Walker*, 6 H. 500; and being part of the record, over is unnecessary to take advantage by plea in abatement, of a variance between it and the declaration (citing *Officers of Court v. Fisk*, 7 H. 403; *Kibble v. Butler*, 14 S. & M. 207); *Pierce v. Lacey*, 1 C. 193.

7. *Variance: Instance.* If the writ describe the plaintiffs as partners, and the declaration do not, the variance will be fatal on plea in abatement; *Id.*

Writ of Error.

See APPEAL.

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I. When it Lies, and what Examinable under it.

1. Only lies from Final Judgment or Decree.

1. *Same.* A writ of error lies only from a final order or decree, except in cases specially authorized by statute; *Bank of Lexington v. Taylor*, 2 S. & M. 27; *Hickingbottom v. Shell*, 3 id. 588; *Terry v. Robins*, 5 id. 291; *Stebbins v. Niles*, 13 id. 307; *Pickle v. Holland*, 2 C. 566; *Dilworth v. Fooshee*, 5 G. 288.

2. *Same: Instances from Circuit Court.* Hence, a writ of error will not lie, when exceptions are taken to a judgment granting a new trial, until after a new trial has been had, and a final judgment rendered; *Bank of Lexington v. Taylor*, 2 S. & M. 27; *Terry v. Robins*, 5 id. 291.

3. *Same: Instances from Chancery Court.* It does not lie from an interlocutory order overruling a demurrer to a bill; *Hickingbottom v. Shell*, 3 S. & M. 588. Nor from any interlocutory order in chancery; the remedy in such cases is by appeal; *Stebbins v. Niles*, 13 S. & M. 307; *Pickle v. Holland*, 2 C. 566.

4. *Same: Instance from Probate Court.* It will not lie from an interlocutory order in the Probate Court, overruling defendant's demurrer to a petition for distribution; *Dilworth v. Fooshee*, 5 G. 288.

2. Does not Lie from Judgment on Voluntary Nonsuit.

5. *Same.* A writ of error does not lie from a judgment on a voluntary nonsuit, to examine the ruling of the court, which caused such nonsuit to be taken; *Ewing v. Glidwell*, 3 H. 332; *Thornton v. Demoss*, 5 S. & M. 609; *Copeland v. Mears*, 2 id. 519; *Greenlee v. McCoy*, 1 G. 588.

3. After Forthcoming Bond.

6. *Same.* A writ of error is not allowable to reverse the original judgment, after forthcoming bond has been given and forfeited; *Stamps v. Newton*, 3 H. 34. But it is allowable after the giving of the bond and before forfeiture; *Davis v. Jordon*, 5 H. 295.

7. *Same: Where one defendant did not join in the bond.* There were three defendants in the original judgment, and a forthcoming bond was given and forfeited by two alone, and a writ of error was afterwards sued out in the name of all three: *Held*, that the writ would be dismissed as to the two who had given the bond; and as to the other, he was discharged from the judgment; *Sanders v. McDowell*, 4 H. 9.

8. *Same: Where judgment is against makers and endorsers.* The statute (H. & H. p. 541. § 50), provides that no writ of error shall be granted in a case where a forthcoming bond has been given and forfeited. Ordinarily, where the judgment is joint against several defendants, if one has given a forthcoming bond and it is forfeited, the writ would be barred as to the others (for the giving and forfeiture of the bond, is a discharge of the judgment); but the statute requiring makers and endorsers to be sued in the same action, provides, that new trials may be granted as to part of the defendants, and refused as to the others. This rule allows the High Court, on a writ of error by all, to affirm as to part and to reverse as to part, and as to such cases, is a change of the rule, which requires reversal as to all the defendants, if the judgment be erroneous as to one: Hence, if under such a judgment an execution be issued against the maker alone, and he give a forthcoming bond, which is forfeited, it is no bar to a writ of error by the endorser; *Dorsey v. Merritt*, 6 H. 390.

9. *Same: Will lie to judgment on motion to quash the bond.* A writ of error will, nevertheless, lie to a judgment on a motion to quash a forthcoming bond, that being a distinct and independent judgment from the original; *Bank of United States v. Patton*, 5 H. 200; *Puckett v. Graves*, 6 S. & M. 384.

4. Where the Judgment is Void.

10. *Same: Case in judgment.* A judgment rendered by the Circuit Court on a verdict found on an issue sent to it by the Probate Court, for trial by jury, is an utter nullity; the sole duty of the Circuit Court being to try the issue and certify the finding to the Probate Court; and if the Circuit Court entered judgment, it being without jurisdiction and void, a writ of error will not lie

to reverse it; *Wallace v. Wingate*, 6 S. & M. 151. And when an attachment for rent not due has been issued and levied, and tenant, under the statute, had released the levy, by giving security for the rent, and on the note so given an action was brought, to which the defendant pleaded payment, and then, on his motion, the court quashed the attachment without any trial on the issue made by the pleading: it was held that no writ of error would lie from that judgment, as the attachment had performed its office, and was no part of that proceeding on the note for rent, and its quashal was no bar to a trial on that issue; *Carr v. Coopwood*, 2 C. 256.

5. From Judgment on Habeas Corpus.

11. *Writ of error: The remedy.* No appeal lies from the judgment of a circuit judge, in vacation, rendered on a *habeas corpus* for the recovery of slaves; the remedy is by writ of error; *Steele v. Shirley*, 9 S. & M. 382; *Steele v. Shirley*, 13 id. 196; *Covington v. Arlington*, 3 G. 144; the writ was allowed in this case without objection; *Hardy v. Smith*, 3 S. & M. 316; and in *Nations v. Alvis*, 3 S. & M. 338, where the judgment on the *habeas corpus* was rendered in term time. And so, the writ is allowed, as a right, to reverse the judgment of a court or judge, refusing bail in a criminal case; *Moore's Case* 7 G. 137.

6. Miscellaneous.

12. *Allowable generally from the Circuit Court.* Under the general provisions of the statute, writs of error are allowable to revise the final judgment of the Circuit Court in all civil cases, unless there be an express prohibition in a particular case; and hence, a writ of error will lie from a judgment of the Circuit Court, confounding, or setting aside, the verdict of a jury of inquest, summoned to assess the damages accruing to the owner of land from the location of a railroad thereon, if there be no express prohibition of it in the statute authorizing the assessment; *N. O. J. & G. N. R. R. Co. v. Hemphill*, 6 G. 17.

13. *For correction of errors in final process.* A writ of error will not lie to correct irregularities of a clerk in issuing process after final judgment. If the judgment of the court award final process, the regularity of that order will be examined on writ of error; *Hicks v. Murphy*, W. 66.

14. *No writ from Special Court to try unlawful detainer.* A writ of error will not lie from the High Court to the Special Court, composed of justices of the peace, to try writs of unlawful detainer, or forcible entry, the remedy is by appeal to the Circuit Court; *Robertson v. Williams*, 6 H. 579.

15. *From the Criminal Court of Adams county.* No writ of error lies to reverse the judgments of the Criminal Court of Adams county; *Holmes' Case*, W. 415.

16. *What examinable on the writ.* Notwithstanding the general rule, that a writ of error does not bring up for examination any-

thing which transpired after final judgment (see HIGH COURT, 16), yet, if a final decree on *pro confesso* be set aside, and the answer of defendant be allowed to be filed, and afterward, on rehearing the order annulling the final decree be itself set aside, and the answer taken from the file, and the original decree reinstated, a writ of error sued out from the original final decree, will bring under review all the above subsequent proceedings; *McGowan v. James*, 12 S. & M. 445.

17. *As to what is examinable on writ of error to a decree on a bill of review*, see HIGH COURT, 19.

II. Issuance and teste, Petition for, and Citation.

18. *That it is issued by circuit clerk, and tested in the name of the chief justice*, see HIGH COURT, 15.

19. *Issued according to law in force at its date.* A writ of error is good if issued in accordance with the law in force at its date. An act was passed 22d February, 1840, changing the terms of the High Court from December to July, which act went into operation on 22d April, 1840. Writs of error sued out between the date of its passage and the date of its operation, should be according to the old law, and if plaintiff in error after 22d April, 1840, sue out an *alias* citation returnable to July term, it will be good, though the writ of error issued before that date was returnable in December; *Wells v. Woodley*, 5 H. 484.

20. *By what clerks the writ issued.* Writs of error may be issued by the clerks of the Circuit and Chancery Courts, or by the clerk of the High Court. When issued by the former, they act as clerks of the High Court; *Natchez Ins. Co. v. Stanton*, 4 H. 7.

21. *The petition.* If there be no petition for a writ of error in the record, it will be presumed that the clerk of the court below did his duty, and issued the writ only on petition; *Tombigbee R. R. Co. v. Bell*, 4 S. & M. 685.

22. *Citation: Description of the judgment.* If the citation on a writ of error be directed to the defendant in error, or his attorney of record, by name, and describe the judgment sought to be revised, as against the plaintiff in error, by name, without stating in whose favor it is, this will be sufficiently certain to notify the defendant in error that the judgment sought to be revised, is in his favor; *Demoss v. Camp*, 5 H. 516.

23. *On whom citation served.* A citation may be served on the defendant in error, or on his attorney of record; *Wilcox v. Mitchell*, 4 S. & M. 744.

III. In whose Favor and against whom the Writ is Allowable.

24. *Any person interested entitled, though no party.* Any person whose interests are affected by a judgment may sue out a writ of

error to it. A deputy sheriff, who is no party to the motion, may sue out a writ of error from the judgment of the Circuit Court, rendered on a motion made by the defendant in execution, to set aside a sheriff's sale, at which the deputy was a purchaser; *Flournoy v. Smith*, 3 H. 62.

24. *Same: Another instance.* A judgment was rendered against three; one gave a forthcoming bond, which was forfeited. On motion, the bond was quashed, and the judgment of *quashal* was reversed by writ of error by the two defendants in the original judgment, who did not join in the bond. The point was made, and elaborately argued, that they had no such interest in the order quashing the bond as would authorize them to present a writ of error to revise it; but it does not appear that there was any motion to quash the writ, nor any plea attacking it. The court say nothing about this point, but reverse the judgment; *Shields v. Graves*, 6 H. 262.

25. *Record must show interest.* The plaintiff in error must be shown by the record to have an interest in the suit. If he have no interest he cannot be prejudiced by the judgment; *Dougherty v. Compton*, 3 S. & M. 100.

26. *Where the interest has ceased.* Where the judgment is for real property, and there has been an accord and satisfaction between the parties, by which the title of plaintiff in error has ceased, then, perhaps, he has no such interest as will enable him to maintain a writ of error; *Gordon v. Gibbs*, 3 S. & M. 473. See *post*, 34.

27. *Assignee of judgment not entitled to.* A writ of error or appeal must be prosecuted in the name of the parties, to the record; an appeal or writ of error prosecuted in the name of an assignee of a judgment, from an order of the court quashing the execution, will be bad, and will be dismissed; *Beazley v. Prentiss*, 13 S. & M. 97.

28. *Right of administrator de bonis non.* An administrator *de bonis non*, is, by our statutes, in full privity with the administrator in chief, and may prosecute or defend a writ of error to revise a judgment against, or in favor of his predecessor, without revivor; *Mayer v. McLure*, 7 G. 389.

29. *Writ lies against administrator.* Where the plaintiff in the court below dies after judgment, a writ of error will lie against his administrator, without revivor; *N. O. J. & G. N. R. R. Co. v. Rollins*, 7 G. 384.

And in such cases, where the writ is sued out against the administrator, a *scire facias ad audiendum errores*, may issue from the High Court, to notify him of the pendency of the writ; *Mayer v. McLure*, 7 G. 389.

30. *Surety on forthcoming bond.* Where a forthcoming bond has been given and forfeited, and quashed, and a writ of error is presented to revise the judgment of the court, entering satisfaction of the original judgment, it will not be error to include in the writ as defendants, the sureties on the forthcoming bond; *Tombigbee R. R. Co. v. Bell*, 4 S. & M. 685.

IV. The Parties to the Writ, Summons and Severance.

31. See HIGH COURT, 23, 23a. APPEAL, 22, 27.

V. Writ of Error after Dismissal of Appeal, or Prior Writ.

32. See HIGH COURT, 24.

VI. Bars to the Writ.

33. *Release of errors.* A release of errors is a bar to a writ of error to that judgment, and may be so pleaded. The release of errors is binding, if made on a valuable consideration; and forbearance to execute the judgment, for a definite and fixed period, is a valuable consideration for the release of errors; *Barnes v. Moody*, 5 H. 636.

The release must be pleaded; it cannot be set up by motion to dismiss; *Vick v. Maulding*, 1 H. 217; *Produt v. McCobb*, 2 C. 169.

34. *Accord and satisfaction no bar.* Accord and satisfaction of the judgment below, is not good plea in bar of a writ of error to revise that judgment; for notwithstanding satisfaction and payment of a judgment, the defendant is entitled to have it reversed if erroneous. The rule is probably different, where the judgment is for realty (see *ante*, 26); *Gordon v. Gibbs*, 3 M. 473.

35. *Judgment appearing satisfied of record.* It is no objection to a writ of error to revise a judgment ordering entry of satisfaction of another judgment, that the last judgment appears satisfied of record, since that is the very point the writ is brought to contest; *Tombigbee R. R. Co. v. Bell*, 4 S. & M. 685.

36. *Statute of limitations.* See LIMITATION OF ACTIONS, 84.

37. *Statute must be pleaded in High Court.* On the trial of a motion to quash an execution because it had been issued in violation of a *supersedeas*, the writ of error, bond and *supersedeas* were produced, but no writ of error, and the time in which the writ could issue had elapsed; *Helt*, that the bond and *supersedeas* could not on that showing be considered as void, as the writ of error may have been pending in the High Court, and if it had never been issued the statute of limitations could not be pleaded to it in the court below, and the proper mode of getting rid of the *supersedeas* was to move in the High Court to dismiss the writ of error; or if it had been issued, to plead the statute of limitations there (citing *Craig v. Butler*, 5 C. 628); *Treadwell v. Herndon*, 41 M. 38.

38. *As to confession of judgment as a bar*, see HIGH COURT, 6.

VII. The Writ of Error Bond.

See HIGH COURT, 20, *et seq.* APPEAL, 3, 6.

39. *The condition of the bond.* The writ of error bond must have a condition to perform the sentence or decree which the High Court may render in the case, or the cause

will be dismissed. The condition of the bond in this case was: "That if said R. shall prosecute to effect his said writ of error, or failing therein, shall pay and satisfy the judgment of said court, together with all damages, interests and costs, as the High Court of Errors and Appeals shall award in the premises, then the above obligation is void," &c.: *Held good*; *Rogers v. Galloway*, 3 H. 58; *sed vide* next section, as to defect in bond.

40. *Bond not necessary: Effect of defective bond.* The giving of a bond is not necessary to the suing out of a writ of error; it is necessary to make the writ operate as a *supersedeas*, and if the bond is defective, the writ of error will be good, though the *supersedeas* will be discharged; *Wills v. Woodley*, 5 H. 484; *S. P. Baskins v. May*, 9 S. & M. 373. The writ of error may issue without a bond; *Tombigbee R. R. Co. v. Bell*, 4 S. & M. 685; *Stephens v. Hood*, 9 S. & M. 75. But the rule is different in appeals. See *APPEAL*, 2 to 6.

41. *Same: Defective bond: Time to perfect.* The statute requires two sureties to a writ of error bond; if only one surety be on the bond, the *supersedeas* is illegal, and time will not be given to perfect the bond; but the *supersedeas* will be at once discharged; *Baskin v. May*, 9 S. & M. 373.

42. *Original bond may be filed in High Court: Evidence of its approval.* If the original writ of error bond be sent up with the transcript to the High Court, it will be sufficient, and filing it among the papers by the clerk is sufficient evidence of his approval of it; *Wells v. Woodley*, 5 H. 484.

See *SUPERSEDEAS*.

VIII. Miscellaneous.

43. *No writ: Effect of: Alias.* Where no writ of error has ever issued, the cause will be dismissed from the docket; if it has been lost, a new one will be granted; *Stephens v. Hood*, 9 S. & M. 75.

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44. *Failure to serve citation no cause for dismissing the writ.* Where the plaintiff in error, on the day he sued out the writ of error, sent citations to the sheriff of the proper county to be served on defendants in error, the failure of the sheriff to execute the citations is not a fault of the plaintiff in error, and is not cause for a dismissal of the writ; *Wilcox v. Mitchell*, 4 S. & M. 744.

45. *Writ of error allowable before the term expires.* A writ of error may be prosecuted from a final judgment or decree immediately after its rendition, and before the end of the term at which it is rendered; *Byrn v. Jeffries*, 9 G. 533.

46. *As to effect of reversing on writ of error a judgment quashing an attachment, on the liability of grantee, see GARNISHMENT, 35.*

Writ of Error Coram Nobis.

1. *The writ to a judgment on forthcoming bond.* Whether a writ of error *coram nobis* will lie to a judgment on a forthcoming bond; *Quere?* The court intimate it will not; *Fellows v. Griffin*, 9 S. & M. 362.

2. *From what court issued.* A writ of error *coram nobis* must be issued in the same court in which the judgment sought to be corrected by it was rendered. Hence, the Circuit Court to which a cause is remanded by the High Court, cannot entertain the writ to correct an error of fact in the judgment of the High Court, affirming the judgment of the Circuit Court. The writ should issue from the High Court; *Land v. Williams*, 12 S. & M. 362.

3. *The writ allowable by our law.* Although no reference is made in the Rev. Code to a writ of error *coram nobis*, it is nevertheless a common law remedy, and may be adopted in a proper case. The same object may, however, be effected by motion, which is the usual remedy in the High Court; *James v. Williams*, 44 M. 47.

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I. Abatement.

See sub-division grand jury, 230, 228, 229, 236.

1. *Incompetency of grand jury.* The incompetency of the grand jury who found it, may be shown by a plea in abatement to an indictment; *McQuillan's Case*, 8 S. & M. 587; S. P., *Rawl's Case*, 8 S. & M. 599.

2. *Must be pleaded in gradation.* Pleas in abatement in criminal as well as in civil cases, must be pleaded at the proper time; by denying the charge, the criminal waives matter in abatement: *Ib.*

3. *Judgment on.* When the prisoner pleads in abatement to an indictment, and the plea is demurred to, and the demurrer overruled, the judgment should be that the prosecution abate; *Rawl's Case*, 8 S. & M. 599.

4. *Swearing grand jury.* It cannot be pleaded in abatement, that the grand jury were not sworn according to law. Such a plea is a nullity—that question can only be determined by an inspection of the record; *Smith's Case*, 6 C. 728.

5. *Judgment: Misdemeanor: Felony.* In a misdemeanor, where the issue on a plea in abatement is decided against the prisoner, the judgment is final; but if the plea itself be a nullity, and the issue submitted immaterial, the defendant is entitled to plead, as if these void proceedings had not taken place; *Ib.* See also, *Miazza's Case*, 7 G. 613. But it is otherwise in case of felony in *favorem vitæ*, and also on an issue of law; *Sumrall's Case*, 7 C. 202; *McGuire's Case*, 6 G. 366.

6. *Burden of proof in.* In an issue joined by the State on the defendant's plea in abatement, setting up the incompetency of one of the grand jurors who found the bill, the burden of proof is on the State; *Beason's Case*, 5 G. 602.

6a. *Grand jury: Board of supervisors.* A plea in abatement to an indictment for murder, alleging that the grand jury who found it, was an illegal body, because they were selected by an illegal board of supervisors, is bad; the acts of a board who are only *de facto*, being as valid as to third persons, as those of a board *de jure*; *Durrah's Case*, 44 M. 789.

II. Accessory.

See *post*, 181, 326, 362.

7. *Weight and value of testimony.* When on the trial of an accessory to murder, the principal, after his conviction and sentence, was examined as a witness for the prosecution, and the jury found the accessory guilty, and it appeared on the trial, that the principal had made contradictory statements, and the circuit judge refused a new trial; it was held by the High Court, that while the evidence of an accomplice was to be weighed by the jury with great jealousy and distrust, yet his credibility belonged exclusively to them, and it would be a delicate point for a court to touch it, and it would be impossible, as a question of law, to say that he should not be believed; the jury are to determine that from his manner, consistency and other attending circumstances; they are to judge how far his testimony has been corroborated, or they may believe him without corroboration; *Keithler's Case*, 10 S. & M. 192.

8. *None in misdemeanors.* There are no accessories in misdemeanors, but all who aid and incite in the commission of the crime, are principals; *William's Case*, 12 S. & M. 58; S. P., *Hogsett's Case*, 40 M. 522.

9. *Accessory after the fact.* If a party be present at the commission of a felony with the intention to give the felon assistance, if necessary, he is guilty as a principal in the second degree, though his services were not called into requisition. Presence and intention to aid is participation; *McCarthy's Case*, 4 C. 299; S. P., *Hogsett's Case*, 40 M. 522. See sub-division Larceny, 409a.

10. *Before the fact who is.* An accessory before the fact, is one who is not present at the time of the commission of the offence, but counsels, procures and commands the commission of the crime; *Unger's Case*, 42 M. 642.

11. *How indicted.* It is well settled at common law, that a party indicted as principal in a felony, cannot be convicted on proof that he was merely accessory before the fact to the commission of the offence; *Josephine's Case*, 10 G. 613; *Changed Code*, of 1857, p. 572, art. 2.

12. *Witness competency as.* An accomplice is a competent witness against his associate; *Keithler's Case*, 10 S. & M. 192; *George's Case*, 10 G. 570.

13. *Weight and value of testimony.* The testimony of a party jointly indicted in a capital felony, should be received and considered with caution; and in weighing it, the jury have a right to, and should take into consideration the situation of the witness,

and the temptation he may have to swear falsely, and give it such consideration as they may deem proper. They have the right to disregard such testimony entirely, if they deem it unworthy of credit, or to take such parts as may be consistent with the other testimony in the cause, or they may act upon the whole of it if they deem it worthy of credit; *George's Case*, 10 G. 570.

14. *Admissions of principal: How far competent.* On trial of accessory, the admissions of the principal are good only to establish his own guilt, and not otherwise; *Lyne's Case*, 7 G. 617. And so the record of conviction of principal, is evidence to prove his conviction, and all its legal consequences, but no evidence of guilt of accessory; *Keithler's Case*, 10 S. & M. 192.

15. *Mode of charging material.* The right to be informed by the indictment as to the degree of guilt charged in it, whether as principal or accessory, existed by the law of this State when Rev. Code '57 went into effect. This right is substantial and material to the defendant, and hence is not taken away as to offences committed prior to its passage by art. 2, p. 572, of Rev. Code of 1857; *Ib.*

16. *After the fact, what makes.* To constitute an accessory after the fact, the aid and assistance must be given after the felony is fully completed; and hence, a party rendering assistance to another after the mortal blow has been stricken, and before death has taken place, cannot be convicted as an accessory after the fact to the crime of murder. His offence is that of an accessory after the fact to the crime of an assault and battery with intent to kill; *Harrell's Case*, 10 G. 702.

16a. *Indictment: Principal and accessory jointly.* See *George's Case*, 10 G. 570, for a precedent of indictment, decided by High Court to be good for an indictment for murder by poisoning against two, in which by the first count both were charged as principals, and in second, one was charged as principal, and the other as accessory before the fact.

III. Accomplice.

16f. (See sub-division Accessory.) See *post*, 181.

IV. Adultery.

17. *When indictable at common law.* Adultery and fornication at common law were indictable only when committed openly and publicly; *Carotti's Case*, 42 Miss. 334.

18. *Statutory offence: What constitutes.* In order to constitute the offence denounced by art. 8, p. 573, Rev. Code 1857, it must be shown that the parties dwell together openly and notoriously, as if the conjugal relation existed between them. The language of the act is this: "If any man and woman shall live together in unlawful cohabitation, whether the same be in adultery or fornication, they shall be punished," &c.; *Ib.*

19. *Criminal intercourse: Continuance presumed.* Criminal intercourse once shown is presumed to continue, if the parties are still

living under the same roof, although those who dwell with them are not prepared to depose to the fact. The principle is especially applicable to a civil proceeding for a divorce; *Ib.*

20. *Same: Case in judgment.* C. & W. were indicted for unlawful cohabitation. The testimony showed that W., as a servant-woman, was in the employ of C., as keeper of a hotel and railroad eating house, and that C. had been caught on several occasions, in the act of sexual intercourse with W., and several times in bed with her. *Held.* that under the statute the testimony was not sufficient to warrant a conviction; *Ib.*

V. Agency.

21. *None in crime.* No one can excuse himself from the operation of a penal statute by showing that he acted as agent for another; *Kilfield's Case*, 4 H. 304.

22. *Proprietor of drug store: Liability for acts of clerk.* The principal, or proprietor of a drug store, is liable for the acts of his agents and clerks, in the unlawful sale of vinous and spirituous liquors, even though such sale be without his knowledge and against his express orders; *Riley's Case*, 43 M. 397.

VI. Amendment.

23. *Not applicable to criminal cases.* The law of amendment does not apply to criminal cases, and an indictment, defective for want of a prosecutor being marked on it, cannot be amended after it comes from the grand jury; *Moore's Case*, 13 S. & M. 259; *S. P.*, *McGuire's Case*, 6 G. 366. See *post*, 322, 323.

VII. Appeal.

See sub-division, Writ of Error. *Post*, 594, 594a. 595.

24. *When none.* Under County Court Act of 1863, no appeal lies to either Circuit Court or High Court in a criminal case, where the defendant was convicted by the verdict of a jury; *Dawkin's Case*, 42 M. 631.

VIII. Arraignment.

See *post*, 462.

25. *Defendant cannot waive.* Under an indictment for a felony, the accused cannot waive his arraignment, nor can he plead by attorney; *Wilson's Case*, 42 M. 639.

IX. Arrest of Judgment.

26. *What it reaches.* A motion in arrest of judgment, can reach such defects only as are apparent upon the face of the record itself, and which make the proceedings erroneous; and hence, no defect of evidence, or improper conduct on the trial, can be urged in support of it; *Corey's Case*, 8 S. & M. 573; *S. P.*, *Frank's Case*, 10 G. 705.

27. *Misconduct of jury: No ground for.* It is ground for a new trial, but not for arresting the judgment, that the jury were ex-

posed to improper influences; *McCann's Case*, 9 S. & M. 465.

28. *For defective indictment: Substantial, not formal.* Where the indictment is essentially defective, after verdict, the judgment will be arrested; *Jones' Case*, 11 S. & M. 315. The judgment will not be arrested because the indictment is inartificially drawn, if it be substantially correct; *Morgan's Case*, 13 S. & M. 242.

30. *What it reaches: Limitation of prosecution.* Where an indictment for murder, charges the time of the commission of the offence to be within one year from its finding, and the prisoner is convicted of manslaughter, and the proof shows that the offence was committed more than a year before the indictment was found, the judgment cannot be arrested. Judgment can only be arrested for a defect appearing on the face of the record; *Heward's Case*, 13 S. & M. 261. See *ante*, 26.

31. *No ground for.* It is no ground for an arrest of the judgment, that several defendants jointly indicted and tried for murder, were convicted of different degrees of homicide; *Mask's Case*, G. 406.

32. *Pendency of other indictments no ground for.* A motion in arrest should not be sustained, because other indictments of like import, and for similar offences, are pending against the defendant. The remedy against two prosecutions for the same offence, is by plea of *autre fois acquit, or convict*; *Miazza's Case*, 7 G. 613.

X. Arson.

See sub-division Indictment, *post*, 310.

33. *Malice in: "Maliciously."* Malice is a necessary ingredient in the crime of arson at common law, and of house burning under the statute, and the indictment must charge that it was done maliciously; *Jesse's Case*, 6 C. 100.

34. *Corpus delicti in.* In arson, the *corpus delicti* is the burning of the house, and if this be established by other evidence, the defendant's confessions are competent to show that it was malicious and that he was the agent; *Sam's Case*, 4 G. 347. This seems shaken by *Pitt's Case*, 43 M. 472.

XI. Assault and Battery, and Assault.

35. *Husband and wife.* As to right of the husband to chastise his wife, see *HUSBAND AND WIFE*, 187. *Bradley's Case*, W. 156.

36. *Assault defined.* An assault is an attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness; *Smith's Case*, 10 G. 521.

37. *Intention to do injury essential.* Threatening words, and violent and menacing gestures, if unaccompanied by a present intention to do a corporal injury, do not amount to an assault; *Ib.* (Handy, J., dissented.)

XII. Assault and Battery with intent to Kill.

See sub-division Attempts, post, 51.

38. *Indictment must allege with deadly weapon.* Under the statute of this State, the indictment must state and assault an battery, and that it was done with a deadly weapon. The charge that the defendant cut and stabbed the prosecutor with a drawn knife, with intent to kill, &c., will not do; *Ainsworth's Case*, 5 H. 242; S. P., *William's Case*, 42 M. 328.

39. *Same: Proof.* Under an indictment charging an assault with intent to kill by shooting, it must be shown that the gun discharged was so loaded as to be capable of killing at the distance from which it was fired at the prosecutor; *Vaughan's Case*, 3 S. & M. 553; S. P., *William's Case*, 42 M. 328.

40. *Same: Illustrated: Case in judgment.* The defendant fired a gun at some boys, sixty yards distant, who were travelling a road through his premises, about the right to travel which there was a dispute between him and his neighbor; no one was injured, and no traces of shot were discovered in the immediate vicinity of where the boys were; but traces of shot were discovered in a somewhat different direction from where the boys stood, and were discovered to be made by small bird shot, and there was testimony which tended to show that these traces were produced by shot fired by defendant; there was also evidence of experiments made by the same gun used by defendant, which showed that thus loaded, it was incapable of killing at that distance: *Held*, that as a man's intentions are inferred from the means which he uses, and the acts which he does, that it appeared that no serious damage was intended by the prisoner, and that his object was rather to alarm than to injure; *Ib*.

41. *With intent to commit manslaughter.* An indictment which charges the defendant with an assault and battery with a deadly weapon, "with intent to commit manslaughter," is an indictment only for an aggravated assault and battery. It is not good as an indictment for an assault with intent to kill, which means an intent to murder; *Bradley's Case*, 10 S. & M. 618.

42. *Proof insufficient to sustain verdict.* Proof that the defendant, indicted for an assault and battery, was seen with a knife in his hands, in pursuit of the slave (who was the party assaulted), but not near enough to strike him when he was stopped by the witness, and that he then made threats against the slave's life, is insufficient to sustain a verdict of conviction; *Ib*.

43. *Particular person, object of felonious assault.* An indictment for an assault with intent to kill, must charge the assault with intent to kill some particular person; *Jones' Case*, 11 S. & M. 315.

44. *Same: Case in judgment.* The indictment charged that the accused, with a certain gun, then and there loaded, &c., which he (the accused), then and there had and

held, at, and against one M., then and there feloniously, &c., to kill and murder, &c.: *Held*, it was insufficient in not charging the name of any person whom it was accused's intent to kill; *Ib*.

45. *Specific intent necessary, and must be proved as laid.* In the statutory crime of assault, or assault and battery, with intent to kill and murder, the specific intent to kill is an essential ingredient and must be proved as laid; and notwithstanding a person is presumed to intend the natural consequences of his own deliberate act, yet, if a party shooting a human being, be shown by the proof to have intended to shoot another person, and not the prosecutor, an indictment charging him with shooting the prosecutor, with intent to kill, will not be sustained; and the general rule, that when a party intending to commit one felony commits another, is guilty, does not apply in such a case; proof of a general felonious intent will not do, the specific intent must be proved as charged; *Morgan's Case*, 13 S. & M. 242; citing *Jones' Case*, 11 ib. 317; S. P., *Morman's Case*, 2 C. 54.

46. *Crimes of different degrees: Counts joined.* Under the statute, H. C. 983, § 22, which provides that upon an indictment for an offence consisting of different degrees, the jury may acquit of the offence charged, and find the defendant guilty of an inferior degree of such offence, a count for an assault and battery may be joined with a count for an assault with intent to kill and murder; *Brantley's Case*, 13 S. & M. 468.

47. *Different offences, not different degrees: Same offence.* But he cannot be convicted of an assault with intent to commit manslaughter, that being a separate and distinct offence from, and not an inferior degree of, the offence of an assault and battery, with intent to kill and murder; *Morman's Case*, 2 C. 54.

48. *Slave: Master: Specific intent.* Under the Rev. Code, 1857, p. 248, art. 59, which provides for the punishment of a slave who shall commit an assault and battery upon his master or employer with intent to kill, the specific intent to kill is the gist of the offence, and unless it be shown, the jury must acquit; *Jeff's Case*, 8 G. 321; S. P., S. C., 10 G. 593.

49. *Intent presumed from use of deadly weapon.* The unlawful use of a deadly weapon is not of itself the same thing as, nor conclusive evidence of, the intent to kill, but it is *prima facie* evidence of it, which will prevail, unless rebutted by the other proof in the case; *Ib*.

50. *Same.* It is a probable consequence of the use of a deadly weapon in an assault and battery committed by one person on another, that the death of the assaulted party may ensue, and hence proof of such use is *prima facie* evidence of an intent to kill which must prevail unless overcome by other proof in the case; *Jeff's Case*, 10 G. 593.

XIII. Assault in the attempt to commit Manslaughter.

50a. See sub-division Assault and Battery

with Intent to Kill, *ante*, 47, and *Gibson's Case*, 9 G. 295. Rev. Code, 1857, 575, sec. 8, art. 18.

XIV. Attempts.

51. *Specific intent inferred from use of deadly weapon, &c.* The law presumes that a party intends to do not only what he does actually accomplish, but also the natural and probable consequences of his own acts when deliberately done; and hence, in considering technical attempts, the jury may take into consideration the nature of the act done, and the attendant circumstances, as matter of evidence to determine the particular intent with which it was performed; they may infer the specific intent to do a particular thing which is the necessary, natural, or even probable, consequences of the act proved to have been done; *Jiff's Case*, 10 G. 593. (See sub-division Assault and Battery, 49, 50.)

XV. Autrefois Acquit and Convict.

See sub-division Twice in Jeopardy. See sub-division Arrest of Judgment, *ante*, 32; *Miazza's Case*, 7 G. 613.

52. *Evidence on plea of.* The evidence under a plea of *autrefois acquit* or *convict*, is not exclusively record, but may be by parol to the extent required to identify the offences; and where the rule requiring of fences to be identified in the indictment is relaxed, the rule requiring record evidence is also proportionately relaxed; *Noonan's Case*, 1 S. & M. 562.

53. *Murder: Manslaughter: Guilty of manslaughter: Acquittal of murder.* Where, under an indictment for murder, the jury found a verdict of manslaughter, this is in legal effect a rendition of a verdict of acquittal of murder, and in practice, the verdict and judgment ought so to be recorded; *Hurt's Case*, 3 C. 378.

54. *Same: Effect of verdict set aside.* The verdict and judgment of acquittal of murder in such case are not embraced in a writ of error sued out by the prisoner; and hence, if on such writ the verdict of guilty of manslaughter be set aside, this does not vitiate in the least the verdict of acquittal, which still remains, and is a full bar to any further prosecution for murder; *Ib.* See *post*, 555.

55. *Same.* And this is so, though the verdict for manslaughter be set aside and the indictment quashed for a defect in the organization of the grand jury; for the statute (H. & H. 690, § 5, *Ib.* 725, § 20) expressly provides that a trial and verdict on the merits shall be a legal acquittal, notwithstanding any defect in form or substance in the indictment; *Ib.* See *post*, 60.

56. *Same.* But the rule is different where the party is convicted and the judgment is arrested; then he may be tried again; *Ib.*

57. *What necessary to make out plea.* To make out this defence, the prisoner must show not only the record of his former conviction or acquittal, but he must show by ev-

idence *aliunde* the identity of the offence of which he was formerly convicted or acquitted, with the offence charged in the present indictment; *Rocco's Case*, 8 G. 357.

58. *Rule in cases capable of repetition.* In the prosecution of offences which, from their nature, are capable of repetition, each separate act being a distinct offence, as gaming, retailing, &c., no presumption of the identity of the offence charged in the indictment will arise from the similarity of the language used in the two indictments, or from the fact that the evidence sufficient to convict under one, is also admissible under the other; *Ib.*

59. *Rule of identity from evidence.* The rule recognized in the books, that if it appear on the trial of a plea of *autrefois convict* or *acquitt*, that the evidence necessary to support that indictment might have been introduced on the trial of the first indictment, this plea is supported, only applies where it is shown that the transaction which was the subject matter of the first indictment, is the same as the one on which the last indictment is predicated; but when this identity is shown the prisoner must be acquitted, whether the evidence were introduced under the first indictment or not; *Ib.*

60. *Indictment must be sufficient for court to pronounce judgment on.* The rule of the common law, incorporated into the State constitution, which declares that, "No person shall, for the same offence, be twice put in jeopardy of life or limb," is applicable only to cases where there has been an acquittal or conviction under an indictment which is sufficient in law to authorize the court to pronounce judgment; *Kohlheimer's Case*, 10 G. 548. See *ante*, 55.

61. *Same: Void: Voidable.* Where the indictment under which a party has been tried and convicted or acquitted, is void on the face of the record, because of the illegal organization of the grand jury, who found and returned it, such acquittal or conviction is not, either by the common law or the statute of this State, a bar to a subsequent prosecution for the same offence; it is otherwise where the indictment is merely voidable for matter *dehors* the record; *Ib.*

62. *Punishment protects, though under void indictment.* It seems that a party who has been convicted and suffered the punishment prescribed by law, under a void indictment, cannot be prosecuted again for the same offence; *Ib.*

63. *Power of court to discharge jury without consent of prisoner.* The Circuit Court has no power to discharge a jury in a capital case, without the consent of the accused, after the evidence is closed, and the cause submitted to them, on the ground merely that the jury say, "they are unable to agree on a verdict;" and if it do so under such circumstances, the prisoner, having by that trial been once put in jeopardy of his life, will be entitled to his acquittal. But the court has the power to discharge a jury and order a mistrial to be entered, without their having agreed on a verdict, in case of a legal neces-

sity for so doing; and the fact that the jury report to the court in five minutes of the expiration of its term, as prescribed by law, that they are unable to agree, is such a legal necessity as authorizes the court to discharge them without the consent of the accused; *Josephine's Case*, 10 G. 613. See post. 556.

64. *Rule where one offence is included in another.* An acquittal on an indictment for a greater offence, is a bar to a subsequent indictment for a less offence included in the greater, only where, under the indictment for the greater, the prisoner could be legally convicted of the less; *Munford's Case*, 10 G. 558. See ante, 53, 54.

65. *Same: Case in judgment.* A slave was indicted for the murder of V. A., and was convicted of manslaughter. The judgment was arrested, because the indictment did not show whether the deceased was a white man or a negro. The prisoner was afterwards indicted for the manslaughter of V. A., a white man: *Held*, that the former trial and judgment were no bar to the second prosecution, as the first indictment, for murder, was legally insufficient to support a conviction for manslaughter; *Ib.*

XVI. Bail.

66. *Power of Circuit Court to bail after conviction.* The Circuit Court, in which a prisoner has been convicted in a case not capital, may, after verdict, take a recognizance for the prisoner to appear, and receive the proper judgment, but this is a matter of discretion with the court, which should be exercised with the greatest caution, and bail granted only in cases of minor importance. The courts had this power at common law, and the constitutional provision securing bail in all cases not capital, before conviction, was intended to secure the right to bail before conviction, and not to deny it afterwards; *Davis' Case*, 6 H. 399.

67. *Same: Constitution: Common law.* The right of the prisoner to bail after conviction, is not regulated by the constitution, nor is there a statute in this State, on this subject. The court being governed by a sound judicial discretion on the subject, the rule and practice at common law obtain; *Ex parte Dyson*, 3 C. 356.

68. *Same: Rule governing discretion.* In the exercise of this discretion, the court will grant bail after conviction, in misdemeanors, where the party has applied for and obtained a writ of error; and it may grant bail in felony cases not capital, but this will be done with great caution, and only where the peculiar circumstances of the case render it proper; *Ib.*

69. *Same: Case in judgment.* In this case, the prisoner had been convicted of manslaughter, had sued out a writ of error, and his case had been argued in the High Court, and had been affirmed by two judges, one dissenting, and a reargument had been granted, and the judgment of affirmance had been set aside, and proof was made of the

prisoner's ill health, but this did not amount to a belief that his imprisonment would endanger his life; the court refused to grant bail, saying that the record does not contain any peculiar facts which would authorize the granting of bail; *Ib.*

70. *Master and slave: Emancipation of slave by State: Discharging master.* Where a master entered into a recognizance for the appearance of his slave to answer a criminal charge, and before the trial or forfeiture, the slave was emancipated by the State; it was held that this destroyed the power of the master to control the slave, and compel his attendance, and he was released; *Lewis' Case*, 41 M. 686.

71. *Same: Surrender to sheriff.* Where the bail surrendered the prisoner to the sheriff of the proper county, and he was lodged in a secure jail, from which he was released by irresistible force, it was held he was no longer bound for the prisoner's appearance to answer; *Ib.*

72. *Constitutional rule.* A prisoner has a right to bail in a capital case, where proof is not evident, or presumption great, and the court has the power to bail, even if proof be evident or presumption great; *Ex parte Wray*, 1 G. 673.

73. *Discretion of court in.* Bail may be granted by the High Court, in a case where the jury would, and perhaps ought to convict of murder, on the same evidence; *Moore's Case*, 7 G. 137; *S. P., Beall's Case*, 10 G. 715.

74. *Power of surety over prisoner, and right of sheriff to readmit to bail.* A defendant being at large on bail may at any time be surrendered by his bail, to the sheriff of the county in which the indictment is pending, and the sheriff may again admit him to bail or recognizance, with new sureties; *Kellogg's Case*, 43 M. 57.

75. *Power and practice in regard to bail.* At common law, the Court of King's Bench and its judges had the power to bail in all felonies, before or after conviction, without regard to the nature of the crime or punishment; but the practice was not to bail where the facts made it highly probable that the accused had committed a felony. The discretionary power to bail, at common law, was rarely exercised after indictment for a felony, except in special circumstances, arising generally after indictment; *Street's Case*, 43 M. 1.

76. *Effect of indictment on questions of bail.* The bill of rights makes bail, before conviction, a matter of right for all crimes, except capital felonies, where the proof is evident or the presumption great. The original of this provision is a clause in the ordinance of 1787, for the government of the territory north and south of the river Ohio. From the original it has been copied into most of the State constitutions and statutes. The courts of many of the States hold indictments, for murder, as furnishing the "presumption great," and refuse to hear testimony to reduce the grade of the crime from murder to manslaughter; *Ib.*

77. *Same: Practice in this State.* In this State, for many years the practice varied. But since the decision in *Wray's Case*, 1 G. 673, the practice has been to receive testimony *aliunde* the indictment; *Ib.*

78. *Power of Supreme Court on writ of error in habeas corpus.* On writ of error in habeas corpus proceedings, the Supreme Court exercises purely a revisionary and correctionary jurisdiction. The judgment reviewed is presumptively correct, and error must be shown. The Supreme Court has no larger discretionary power to bail than courts of original jurisdiction; *Ib.*

79. *Same: Practice where testimony is conflicting: Indictment, prima facie lawful authority for custody.* If the testimony be conflicting, or the credibility of witnesses involved, the Appellate Court would regard the circuit judge who heard it orally, as in a more favorable situation for forming a right judgment than itself, having the testimony in a rigid bill of exceptions, and would not disturb the decision. If the impression made by the evidence on the mind of the Appellate Court was, that it would sustain a verdict of a jury of guilty of murder, then such appellate court ought to affirm the decision of the court below refusing bail and remanding prisoner. If the return to the writ is, that the relator is in custody to answer an indictment for murder, lawful authority for the detention is shown; and if the prisoner offers no testimony to show a less grade of felonious homicide, or that he ought not to be convicted of any offence, it would be the duty of the judge to refuse bail and remand; *Ib.*

XVII. Bill of Exceptions.

See BILL OF EXCEPTIONS. *Post*, 400, 401.

80. *Material fact not appearing in, will reverse.* When the bill of exceptions certifies that it contains the whole evidence, it will be so considered by the court; and if there be no proof in it of a material fact, as of venue, the verdict will be set aside, though no exceptions were taken on that point in the court below; *Vaughan's Case*, 3 S. & M. 553.

81. *How certified.* A bill of exceptions which states that the judge who presided at the trial, refused to sign it, and the two persons who did sign it, are practising attorneys of the court, and were present at the trial, is in accordance with the statute, and valid; *Rawl's Case*, 8 S. & M. 599.

XVIII. Bigamy.

82. *Presumption of death in.* The law presumes in favor of the validity of a marriage contracted by a person, where a husband or wife by a former marriage has been absent, and not heard from, and not known by such party to be living for five years preceding such second marriage, that the absentee is dead; *Gibson's Case*, 9 G. 313.

83. *Same: Acted on in prosecution for.* And this legal presumption, arising in such a case, will be acted on in a prosecution for

bigamy against one of the parties to such second marriage, who subsequently and during the lifetime of the other party to such second marriage, has contracted another marriage; *Ib.*

XIX. Burglary.

See *post*, 168.

84. *Night time.* Burglary must be committed in the night time; but whether it is light enough at the time to see a man's face, is not the criterion of whether it is night; *Thomas' Case*, 5 H. 20; changed by statute. Burglary, whether day or night; Rev. Code, 1857, p. 580. § 16, art. 44.

85. *What is a breaking.* The raising of a window-sash which was down, and which was the only obstacle to ingress through the window, and the entry of the accused through the same, is a sufficient breaking in law to constitute burglary; *Frank's Case*, 10 G. 705.

85a. *Burglary: Presumption in case of fraud: Possession of goods stolen.* Though the finding of stolen goods in the possession of the accused, or their discovery at a place where they have been hid, in consequence of information derived from him, is generally presumptive evidence of larceny only by the accused; yet, if a burglary be proved to have been committed, and the accused makes a circumstantial confession of his entry of the house and taking of the goods, and then discloses the place of their concealment, in accordance with which they are found, such disclosure and finding are presumptive evidence that the accused committed the burglary; *Ib.*

XX. Certiorari.

86. *Power to grant in criminal cases.* The power to grant writs of certiorari has always been conceded to courts in criminal cases as well as in civil; *Loper's Case*, 3 H. 429.

87. *After verdict, court may award in change of venue case, to make perfect record.* And after verdict, on a motion for a new trial, the court may award a certiorari to the clerk of the court from which the venue was changed, and if on the return thereof, the record is made perfect and legal, it will do, though it was defective when trial was had; *Ib.*

XXI. Committing Court.

87a. See sub-division Judge, and *Doty's Case*, W. 230.

XXII. Confessions.

1. Admissibility of.

See sub-division Arson, *ante*, 34. Sub-division Evidence, *post*, 148, 165, 167.

88. *Same.* Where confessions and gestures, tending to establish guilt, were made under the influence of personal violence, and through fear, they are inadmissible; *Serpentine's Case*, 1 H. 256; and so, even if made before a magistrate; *Ib.*

89. *Same: Preliminary examination of: Circumstances of making.* Testimony is admissible to show under what circumstances confessions were made; *Ib.*

90. *Same: To be admissible, must be understood by narrator.* When the accused spoke a foreign language in making confessions, and the interpreter testified, that from his imperfect knowledge of the language, he may not have understood the prisoner's meaning, it seems the confessions are inadmissible; *Ib.*

91. *Same: Made when in custody.* The confessions of a prisoner, though made when he is in custody, are admissible against him, if otherwise unobjectionable; *Peter's Case*, 3 H. 433.

92. *Same: If reduced to writing by justice of the peace, writing must be produced, or accounted for.* When the confessions of a prisoner, made to a justice of the peace, were reduced to writing, it will be error to permit the justice of the peace to testify from his recollections as to the confessions; the non-production of the writing not being accounted for; *Peter's Case*, 4 S. & M. 31.

93. *Must be voluntary.* Confessions are inadmissible when made under the influence of a sufficient threat, or a sufficient promise; *Ib.*; *S. P., Sam's Case*, 4 G. 347; *Simon's Case*, 7 G. 636; *Cady's Case*, 44 M. 333. Slight expressions calculated to engender hope of benefit, or fear of injury, will vitiate; *Simon's Case*, 8 G. 288. After a slave's arrest, and whilst he was chained and alone with his master, he was asked by the master "Why he had burned his gin house." In response, the slave confessed the burning; *Held*, the confession was voluntary; *Sam's Case*, 4 G. 347.

93a. *Same: Case in judgment.* The prisoner, a slave, was pursued with dogs as a runaway, and after his capture was bitten by the dogs, and stricken a severe blow by one of his pursuers; he was not then suspected of the murder, and was asked by a white person present why he ran away? He failed to answer, and was stricken by the interrogator, and warned if he did not talk he would be knocked down. He was then asked by the same person "What he knew about Hiram (another slave), killing deceased?" and was told, "that it would be better for you to tell the whole truth about the matter." The prisoner then said, that "Hiram did not kill the deceased, but I did it;" *Held*, the confession was not voluntary, and was inadmissible; *Simon's Case*, 7 G. 636.

94. *Improper influence once shown is presumed to continue.* Where it has been shown that a confession was induced by a threat or promise, any subsequent confession made will be rejected, unless it be clearly shown the last confession was made under such circumstances as to be voluntary. This may be shown by the length of time between the first and second confession, proper warning given to the accused of his rights, and of the nature and consequences of the confession, or by other circumstances which

would reasonably be considered as sufficient to dispel the first improper influence of hope or fear; *Ib.*; *S. P., Van Buren's Case*, 2 C. 512; *Simon's Case*, 8 G. 288; *Simon's Case*, 7 G. 636; *Cady's Case*, 44 M. 333.

94a. *Instance of improper influence not moving confession.* The prisoners were in custody, and as witnesses before a jury of inquest over the body of deceased, and were told by several of the jury that their testimony was contradictory, and told if they were guilty of the homicide, they had better confess. On the next day, they confessed the killing to a person not in authority, and not present when the above statement was made to them by the jury: *Held*, that the confession was admissible; *Lyne's Case*, 7 G. 617.

95. *Same: Case in judgment.* The prisoner, a slave, was arrested and charged with murder, by a party armed with guns, who threatened him if he did not confess, that they would hang him, and actually made preparations in his presence to do so; he then confessed his guilt, and shortly afterwards he was taken before a justice of the peace (some of the party who arrested and threatened him being present), who gave him no warning, further than to explain to him that he had a right to ask the witnesses questions, and he then repeated his confession: *Held*, the confessions were not voluntary, and were inadmissible; *Peter's Case*, 4 S. & M. 31; *S. C.*, 3 H. 433; 6 H. 326.

96. *Same: Case in judgment.* The prisoner, who was a slave, was suspected of larceny, and being charged with it, he denied his guilt; he was then whipped by his employer for his suspected guilt, and again denied it. On the next day he was again taken up and threatened, and he then confessed, and stated what articles he had taken, and where they could be found, and accompanied a witness to the place and showed the articles; he then stated where he got them, confessing that he had stolen them. The next day, the employer sent for the prisoner's master, and when he arrived in the presence of the prisoner, the employer said to prisoner, "Here is your master, who has come for the things you took;" and thereupon the prisoner, without any threat made, or any promise of reward offered, voluntarily confirmed his previous confession; the last confession was admitted in evidence: *Held*, that it was improper, and that according to the principles settled in *Peter's Case*, 4 S. & M. 31, an explicit warning should have been given of the consequences of the confession, after a previous confession had been extorted by fear; *Van Buren's Case*, 2 C. 512. But the conduct and actions of the prisoner in showing the articles, were properly admitted; *Ib.*; *Belote's Case*, 7 G. 96.

97. *Confessions must all go to jury together: Jury to determine true from false.* The prisoner's confessions must all go to the jury just as he made them; but they may disbelieve one portion, and credit another; *Coon's Case*, 13 S. & M. 246; and the jury are the judges of what part is true and

what false, and they are not bound by law to receive as true those parts favorable to the prisoner, though they be not impossible in their nature, or inconsistent with the other evidence in the case; *Ib.*

98. *Not every inducement or appeal vitiates confession made from it.* A confession obtained under the influence of a statement to the prisoner, "that it would be better for the guilty to confess that the innocent might not be punished," is admissible; *Dick's Case*, 1 G. 593. So of appeals to character and circumstances of the party accused, his family connection and situation in life, the claims of justice, and rights and safety of others that may be involved, demanding the truth to be told, and his responsibility to God; *Frank's Case*, 10 G. 705.

99. *Confession: Evidence of by State at one time, does not authorize evidence of at another, by prisoner.* A slave confessed to a stranger that he killed the deceased; in two or three minutes thereafter his master arrived, and he confessed the killing to him, and at the same time stated his reasons for doing the act: *Held*, that the introduction in evidence by the State of the first confession, did not authorize the prisoner to introduce the second; *Alfred's Case*, 8 G. 296.

100. *Confession: Right of prisoner to cross-examine on.* If a witness for the State depose to a confession in detail, and then state in general terms that he soon afterwards heard the prisoner make other confessions, the prisoner has the right to cross-examine as to the nature of such confessions; *Dick's Case*, 1 G. 593.

101. *Master: Confessions of slaves to.* The confessions of a slave to his master are not privileged, and are admissible against him if voluntary; *Sam's Case*, 4 G. 347.

102. *Discoveries to which confessions of prisoners lead: Common law rule of admissibility.* By the common law, the fact that the instrument, or fruits, or any associated circumstances of the crime were discovered in consequence of the confession of the accused, is admissible against him, though the confession was obtained by the influence of hope or fear exerted upon him; but it is essential to such admission, that the instrument or other material facts should correspond with the description given by the prisoner; *Jordan's Case*, 3 G. 382; S. P., *Belote's Case*, 7 G. 96.

103. *Same: Rule under our constitution.* But this rule does not apply under our constitution to confessions obtained by violence, they being inadmissible for any purpose, and under all circumstances; *Jordan's Case*, *supra*.

104. *Confessions, extra judicial, admissible without warning.* Extra judicial confessions are competent, if voluntary; though the party was not warned, he was not bound to criminate himself; *Dick's Case*, 1 G. 593. Rule in *Peter's Case*, 4 S. & M. 31, and *Van Buren's Case*, 2 C., approved.

2. Sufficiency of.

105. *Confessions: Charge on weight and value of, erroneous.* It will be error to charge the jury "that confessions made voluntarily and not obtained by force, fraud, or threats, are regarded by the law as the highest and most satisfactory proof;" *Brown's Case*, 3 G. 423.

106. *Confessions: Corpus delicti.* The confessions of the prisoner alone will not, in a capital case, warrant a conviction without independent proof of the *corpus delicti*; *Stringfellow's Case*, 4 C. 157; S. P., *Sam's Case*, 4 G. 347; *Pitt's Case*, 43 M. 472.

107. *Relation of prisoner to party to whom confession is made.* If a confession be made by the accused to one in official authority, in response to an inducement offered, especially if the official personage be in a position likely to enable him to render his inducement effectual, it should be promptly rejected; *Cady's Case*, 44 M. 382.

108. *Confession must be voluntary: Case in judgment.* About 8 o'clock on the night of the homicide, accused was at the house of deceased. They were heard quarrelling mutually, but did not seem so angry as to excite apprehension of witness. On the next morning at 8 or 9 o'clock, deceased was found dead, about one hundred yards from her house, her skull being fractured, a good-sized stick lying near the body. M. arrested the accused next morning; rode up to him in a field about a mile from place of homicide, and told him some one had shot the deceased. He responded, she was not shot, but knocked on the head. At the time eight or ten freedmen came up from different directions, and tied accused and took him to where the body of the deceased was, and where one hundred or one hundred and fifty freedmen had collected, and were much excited, and insisted that accused should be hung. No threats or promises were made to induce confession. Accused's hands were tied, and a large crowd had gathered around him. Accused said he and deceased had a quarrel about some clothes, and deceased struck him, and he struck her one blow, not intending to kill her: *Held*, the confession was properly admitted to jury; *Ib.*

XXIII. Conspiracy.

109. *Conspiracy to commit crime complete offence: Not merged.* A conspiracy to commit a crime is a complete offence in itself and not an attempt to commit one; and hence, is not merged where the offence is actually committed; *Laura's Case*, 4 C. 174.

110. *Parties jointly indicted: When declarations of one good against another.* That parties are jointly indicted does not make the acts and declarations of one evidence against the other; a conspiracy must be first established by evidence extrinsic, such acts and declarations; *Browning's Case*, 1 G. 656; S. P., *Lyne's Case*, 7 G. 617; S. P., *Street's Case*, 43 M. 1. But it is well settled, that the conspiracy may be proved, like other controverted facts, by the acts of the parties, or by

circumstances, and that the positive agreement on a common purpose or design need not be proved by a witness or witnesses; *Street's Case*, 43 M. 1.

111. *Same: Whether acts of one can be admitted against the other upon prosecutor's undertaking to prove conspiracy afterwards: Quere?* Whether, before conspiracy is established, the acts of one can be admitted against the other, upon the prosecutor's undertaking to prove conspiracy afterwards: *Quere?* It seems they would not; *Browning's Case*, 1 G. 656.

112. *Acts and declarations of co-conspirators part of res gestæ.* Acts and declarations of one conspirator are admissible against another as part of the *res gestæ*; and hence, must have been done and made pending the criminal enterprise; *Browning's Case*, *supra*. If made after its completion, or abandonment, they are inadmissible against another; *Lynne's Case*, 7 G. 617.

XXIV. Continuance.

See CONTINUANCE.

113. *Granting or refusing when ground of error.* The granting and refusing of a continuance, is within the discretion of the court, and cannot be assigned as error. Appellate tribunals interfere with the exercise of this discretion with extreme reluctance and caution, and only when a palpable error has been committed, without the correction of which, manifest injustice would be wrought; *Noe's Case*, 4 H. 330; *McDaniel's Case*, 8 S. & M. 401; *Lundy's Case*, 44 M. 669 (citing *Ogle's Case*, 4 G. 383).

114. *Affidavit for.* An affidavit for a continuance, on the ground of absence of witnesses, should show diligence in procuring their attendance, and an expectation that their attendance will be procured at the next term; *Noe's Case*, 4 H. 330.

115. *Facts expected to be proved by absent witnesses must be set out.* In this State, by statute (H. & H. 610, § 37), upon every application for a continuance, the applicant must state in his affidavit, the facts which he expects to prove by his absent witnesses, in order that the court may judge of the materiality of the facts to the issue in the cause; and the statute applies alike to criminal and civil cases; *McDaniel's Case*, 8 S. & M. 401. Code of 1857, p. 503, art. 151; Code of 1871, § 633.

116. *Error of court below in refusing, should be sought to be corrected first, by motion for new trial.* When an application for a continuance is made, the judge is supposed to know nothing of the testimony which will be adduced; he can, therefore, only determine the materiality of the facts stated in the affidavit, by the consideration of what might be urged in the defence, if they should be established. His means of judging are less satisfactory at that stage, than at the close of the trial. When, in the opinion of counsel, a continuance has been improperly refused, a new trial should be moved for at

the conclusion of the trial, the judge can then see more clearly the bearing of the testimony sought to be introduced. If a new trial be refused, the bill of exceptions should embody the whole evidence, so that the Appellate Court shall have the means of forming a correct conclusion; *Ib.*

117. *Discretion exercised refusing continuance held proper: Case in judgment.* The prisoner was indicted 12th September, 1870, was arraigned and pleaded not guilty, same day. On 23d same month, he moved court for a continuance, upon affidavit of absence of C. who was not regularly served with subpoena to that term; that witness was within the jurisdiction of the court; that a subpoena was regularly sued out; affiant does not know cause of witness' absence, which is not by his procurement or consent. Witness is very material, and by him prisoner expects to prove that H., the principal and most important witness subpoenaed for the State, had said that if he could not convict prisoner by telling the truth, he would do it otherwise. Affiant set forth further, the absence of a brother of prisoner, for whom no subpoena had been issued, but whose presence was relied upon from a letter received: *Held*, a continuance was properly refused; *Lundy's Case*, 44 M. 669.

XXV. Corpus Delicti.

See *ante*, 34, 106.

118. *Proof of, independent of confession, essential to convict in capital case.* There must be proof of the *corpus delicti* in a capital felony, independent of the confession of the prisoner, or he cannot be convicted; *Stringfellow's Case*, 4 C. 157; *S. P., Sam's Case*, 4 G. 347; *Pitt's Case*, 43 M. 472.

119. *Same: In larceny.* Nor are confessions alone, in case of larceny, sufficient to prove the *corpus delicti* (citing *Stringfellow's Case*, 4 C. 157; *Brown's Case*, 3 G. 433; *Sam's Case*, 4 G. 347); *Jenkin's Case*, 41 M. 582.

120. *Corpus delicti: What is.* In arson it is the burning of the house, and, if this be established by other evidence, the defendant's confessions are competent to show that it was malicious, and that he was the agent; *Sam's Case*, 4 G. 347. In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts; first, the death, and second, that it was caused by criminal agency; *Pitt's Case*, 43 M. 472.

XXVI. Costs.

121. *Costs: Fees of clerks in State cases.* The clerks of the Circuit Courts are not entitled to tax the State with their costs in criminal cases, where the defendants are acquitted, or, being convicted, are unable to pay the costs; for their services in such cases, they are entitled to receive a sum not exceeding fifty dollars *per annum*, payable out of the county treasury; *Burt v. Harwood*, 10 G. 756.

122. *Construction of art. 60, sec. 19, ch. 64, Rev. Code 1857. Art. 60, sec. 19, ch. 64, p. 583, Rev. Code, 1857, code 71, § 2888, which makes it the duty of civil officers to inform against and prosecute all violations of the penal laws of the State, and provides that all necessary costs and expenses incurred therein shall be paid, on due proof thereof, out of the State treasury, provides only for the payment of costs and expenses attending the discharge of the duties of civil officers in prosecuting offenders elsewhere than in the Circuit Court; Ib.*

XXVII. Court.

123. *Court: Time and place of holding. If the time and place of holding the court appear in any part of the record, it is sufficient; Loper's Case, 3 H. 429.*

XXVIII. Criminal Court.

124. *Inferior court. The Criminal Court, organized by the Act of 1836, is an inferior court, in the sense of the constitution, and authorized by that instrument; Thomas' Case, 5 H. 20.*

XXIX. District Attorney.

See post. 329.

125. *When other counsel may officiate in his place. When all the preliminaries to a trial in a State prosecution, have been duly performed by the district attorney, he may withdraw from the case, and other counsel may appear in his stead; Byrd's Case, 1 H. 247.*

126. *Law to appoint pro tem. by Circuit Court, constitutional. The law authorizing the Circuit Court to appoint a district attorney pro tem., in the absence of the regularly elected officer, is constitutional; Keithler's Case, 10 S. & M. 192.*

127. *Non-essentiality of signature of district attorney to indictment. The signature of a district attorney to an indictment is not necessary to its validity. Such signing is not required by common law or statute. The signature of the foreman of the grand jury to the endorsement on it, "A true bill," is that which gives it validity. Yet it is the practice for the district attorney to sign the indictments, and it should be observed; Ib.*

127a. *District attorney: His tax-fee. The district attorney is entitled to a tax-fee of \$10 only in convictions for gaming, after Rev. Code of 1857 went into operation, reducing the fee from \$50 to \$10, even though the indictment was found and returned before that time; Charter's Case, 7 G. 75.*

128. *Power to quash indictment on his own motion. The district attorney may, at any time before the defendant is arraigned and put on his trial on an indictment, quash it. It is a matter entirely in his discretion, and the prosecutor cannot complain of his action, as the quashal is not a matter to his prejudice; Clark's Case, 1 C. 261. See post, 329.*

XXX. Dying Declarations.

129. *Dying declarations: Admission of: Constitutional provision that accused shall be confronted by witnesses against him. The admission of dying declarations, according to the rules of the common law, is not a violation of that clause of the constitution which declares that the accused shall be confronted with the witnesses against him; Woodside's Case, 2 H. 656; S. P., McDaniel's Case, 8 S. & M. 401. But the witness who proves the declaration, must be produced; Lambeth's Case, 1 C. 322. They are admitted only in cases of homicide; McDaniel's Case, 8 S. & M. 401.*

130. *Same: Must be made under consciousness of impending death. It is essential to the admissibility of dying declarations, that they were made under a sense of impending death. And this must be satisfactorily established to the judge before they can be admitted. But it is not necessary that the declarant should state they were so made at the time. It is sufficient if it be satisfactorily shown in any mode, that they were made under that expectation, whether it be proven directly by the language of the deceased, or be inferred from his evident danger, or the opinions of medical or other attendants, stated to him, or from his conduct or other circumstances of the case; McDaniel's Case, 8 S. & M. 401; S. P., Brown's Case, 3 G. 433. This has reference to declarant's consciousness that he is on the verge of dissolution. Proof that that was his actual condition, without proof that he was sensible of it, will not do; Lewis' Case, 9 S. & M. 115.*

If the declarations were made before all hope of recovery had ceased, but afterwards were written down and read over to deceased, and adopted by him under a sense of impending death, they are admissible. But if such written statement be partial and incomplete, and were prepared upon consultation between the parties drawing them up, who designedly omitted material statements of the deceased, they will be rejected; Brown's Case, 3 G. 433.

130a. *Same: Illustrated: Declarant's consciousness of impending death not sufficiently apparent: Case in judgment. The declarant was mortally wounded, in such a way that death must necessarily follow in a few hours. When wounded, he exclaimed, "O, my people," but made no other remark indicating a sense of impending dissolution. It was held that the proof was insufficient to admit his declarations; Lewis' Case, 9 S. & M. 115.*

131. *Same: Illustrated: Case in judgment. In this case dying declarations were received in evidence under the following circumstances: On the night of the day on which the mortal stroke had been given, a witness told the deceased that he thought his deposition ought to be taken, as, in his opinion, he must inevitably die before the next morning. The deceased replied that he thought so too. Afterwards the deceased said: "O, Lord, I*

shall die soon." His declarations were then reduced to writing, read over to him twice, and signed and sworn to by him. The attending physician, on the evening previous, had held out to the deceased some hope of recovery, but had told him his chance was bad. The deceased lived some ten days after the declarations; *McDaniel's Case*, 8 S. & M. 401.

132. *Same: Admissibility of for court: Error to leave to jury to fix weight.* The court must decide, after a preliminary examination into the circumstances under which they were made, as to the admissibility of dying declarations. When admitted, the jury is to judge of the weight to attach to them, as they do to all other testimony. But it will be illegal for the court to submit to them, by its charges, the questions of fact on which their admissibility depends, and to charge them that if they have not been legally proven to be dying declarations, they must disregard them; *Ib.*; S. P., *Nelms's Case*, 13 S. & M. 500.

133. *Same: Slaves presumed to have religious sense.* Slaves are presumed to have a sense of religious accountability, and hence their dying declarations are admissible, as in other cases, without any affirmative proof showing that the declarant had the proper religious instruction as to the nature of an oath; *Lewis's Case*, 9 S. & M. 115.

134. *Same: Impression made on mind of witness not inquirable into where precise words of declarant are given.* The dying declarations of the deceased were offered in evidence, and the witness proving them repeated the precise words used by the deceased, as follows: To the question by witness, "who shot him?" deceased replied "Nelms." "Was it S. H. Nelms?" he answered, "Yes." The counsel for the prisoner then asked witness "whether deceased did not so express himself as to convey the idea that what he said was a mere opinion, and not a thing within the actual knowledge of the deceased." *Held* that as the witness gave the precise words of deceased, the question was incompetent, and that it would probably be otherwise if the witness only gave the substance of what deceased said, as the substance of what is said is and can be nothing more than the impressions produced on the mind of the witness, translated into his own language. And the peculiarity of this kind of evidence, and the absolute necessity of confining it within proper limits, if the declarations be equivocal or ambiguous, the impression made on the mind of the witness might be inquired into; *Nelms's Case*, 13 S. & M. 500.

135. *Same: To be considered, scrutinized and weighed by jury with great caution.* Great caution is called for in the application of this kind of evidence. To this end, all of the attending circumstances should be well weighed by the jury; the degree of self-possession, of observation and recollection of the deceased should be ascertained. The state of mind arising from his critical condition, added to his suffering, may produce indistinctness of memory. Sometimes the declaration

is a matter of judgment, of inference and conclusion, which may be fatally erroneous. It may often happen that the deceased, without being perfectly certain, would ascribe the act to some suspicious person, when, if the grounds of the suspicion were known, it would be unsatisfactory. Hence, the circumstances of suspense and confusion connected with the declarant, are to be considered with the most minute and scrupulous attention, and the accordance and consistency of the facts stated, with the other facts established in evidence, is to be examined with peculiar circumspection; *Ib.*

136. *Same: Mode of impairing credibility of.* It is competent where dying declarations are admitted, to show, by way of impairing their credibility, what the declarant said on the same subject at other times; *Ib.*

137. *Same: In what cases only admissible.* Dying declarations are admissible only on a trial for homicide, where the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the declaration; *Lambeth's Case*, 1 C. 322.

138. *Same: Belief of impending death: Solemn religious sense presumed from.* Before dying declarations are admissible, it must be shown to the court that they were made under a belief of immediate and impending dissolution; when this is established to the satisfaction of the judge, the presumption is that they were made under a "solemn religious sense" of approaching dissolution, unless the contrary is shown, just as a witness, sworn, is presumed to believe in the existence of God, and of future accountability. And when the judge has decided on the admissibility of the evidence, it is not for the jury to determine any question concerning that; but they are to judge of its credibility. Hence, it is improper that the jury should be charged, that unless the declarations were made under a solemn religious sense of impending dissolution, they are entitled to but little weight; *Ib.*

139. *Same: Hearsay intrinsically weaker than if cross-examination was had.* The court instructed the jury that the dying declarations of the deceased, as written out and offered in evidence, "were entitled to the same credit and force before the jury as if the statement had been regularly sworn to before the jury;" *Held*, to be erroneous; that it is hearsay evidence, and intrinsically weaker than if the declarant had been present and subject to cross-examination, and the jury alone were the judges of its weight and force; *Ib.* (The value of dying declarations forcibly commented on in this case.)

XXXI. Doubts.

See post, 353a.

140. *Doubts reasonable: Need not be strong and clear.* The court instructed the jury that a reasonable doubt is not a vague conjecture, or mere hypothesis, but a sentiment clear and strong, arising in the mind of an enlightened and conscientious jury,

which upon a full survey of the facts, forbids its going forward to a conviction: *Held*, erroneous;—that the language was too strong, that the doubt need not be clear and strong, but only "reasonable;" that is just, rational, conformable and agreeable to that faculty of the mind, by which it distinguishes between truth and falsehood, good and evil, and which enables the possessor to deduce inference from facts or propositions. It implies a want of fulness and completeness of proof, which would enable the mind satisfactorily to draw the conclusion of guilt from the facts in evidence; *Bowler's Case*, 41 M. 570.

141. *Doubt reasonable, explained.* The prisoner being tried for murder, asked this charge: "If the jury, after weighing the evidence, have a reasonable doubt that the prisoner is guilty, they are bound by law to find a verdict of not guilty," which was given by the judge, with this addition: "To warrant the jury in finding the prisoner guilty, there should be evidence before them sufficient to satisfy their minds of his guilt, beyond a reasonable doubt; that which amounts to mere possibility, or conjecture, or supposition, is not what is meant by a reasonable doubt. The doubt which should properly influence a jury to withhold a verdict of guilty, should be such a doubt as would reasonably arise from the evidence before them; and if such a reasonable doubt should arise from the evidence, the prisoner should have the benefit of the doubt:" *Held*, that this explanation was correct, and did not vary the rule laid down in the instructions as first presented; *Cicely's Case*, 13 S. & M. 202.

141a. *Doubts reasonable.* There is a reasonable doubt of guilt, where there is a probability of innocence; *Browning's Case*, 1 G. 656.

141b. *Doubt reasonable: Where case will not be reversed for want of instruction on.* If the court refuse to give a proper instruction on the subject of a reasonable doubt, the verdict will not be set aside, if the evidence of guilt be so conclusive, that there is no room for doubt; *McGuire's Case*, 8 G. 369 (see *post*, 353a).

XXXII. Evidence.

See EVIDENCE. See sub-division Witness. See *post*, 456, 527, 237, 266, 266a, 273, 274, 275, 442.

See *ante*, 93.

1. Hearsay, *Res gestæ*, Confession.

142. *Hearsay.* Hearsay is not admissible to prove fornication; *Overstreet's Case*, 3 H. 328.

143. *Admission.* On the trial of a prisoner for selling liquor to a slave, the statement of a bystander, made immediately after the sale, "that the prisoner did let the negro have whiskey," is not admissible, though made in the presence of the prisoner. The bystander should himself be introduced; *Noonan's Case*, 1 S. & M. 562.

144. *Admissions: Quasi.* Statements made

by another, in presence of the accused, in relation to the accused's connection with the alleged offence, if not denied by the accused, he having opportunity to do so, are admissible in evidence against him; *Hoggsett's Case*, 40 M. 522.

145. *Res gestæ: Habit of punishing slave: Trial for murder of slave.* Where a party is indicted for the murder of a slave, it will not be competent, in order to show the means by which death was produced, to prove the general habit of the accused in punishing slaves in a particular manner, such evidence is not responsive to any charge in the indictment, and calculated to prejudice the jury against the prisoner; *Dowling's Case*, 5 S. & M. 664.

146. *Res gestæ: Admissions and confessions.* A witness who had pursued the prisoner soon after the killing, was asked by the district attorney the question, "When you had overtaken the prisoner, or while pursuing him, what did you say to him?" he replied, without objection, "That he asked the prisoner why he did so;" and he then proceeded to state, in opposition to the remonstrance of the district attorney, "That the prisoner replied he would not allow any man to follow him around town." And the court decided that this response of the prisoner should not go to the jury: *Held*, that the exclusion of it was right, as it was no part of the *res gestæ*, and no effort had been made by the State to prove admissions or confessions by the prisoner; *Bole's Case*, 2 C. 445.

147. *Res gestæ: Declarations.* The declarations of the accused charged with murder, made just before the killing, and whilst the deceased was absent, and when the accused did not suspect that a conflict was impending, are not admissible in his favor as part of the *res gestæ*; *Newcomb's Case*, 8 G. 383.

148. *Res gestæ confessions.* On a trial for murder, a witness for the State testified that, on the day on which the killing took place, and about one-half mile from the place where it was perpetrated, he met the accused, and he had blood on his hands; and then, on cross-examination, he stated that the accused was coming from his own house at the time, and that he discovered the blood on his hands in consequence of the accused pointing it out to him. He was then asked by the prisoner what "he, the prisoner, then said, when he showed the blood on his hands:" *Held*, that the refusal of the court, below, to permit the question to be answered, was right, as the accused's statement then made was neither a part of a confession which had been drawn out by the State, nor part of the *res gestæ*; *Scragg's Case*, 8 S. & M. 722.

148a. *Same: Declarations: When.* The declarations of the accused, made at the time of his shooting, as to the effect of his shot, are not "confessions" in the technical sense, but connect themselves with the act, and form part of the *res gestæ* and are clearly admissible in evidence; *Head's Case*, 44 M. 731.

2. Circumstantial Evidence.

149. *Circumstantial evidence: Sufficiency:*

Test. Circumstantial evidence has been received in every age of the common law, and it may rise so high in the scale of belief as to generate full conviction. When, after due caution, this result is reached, the law authorizes its ministers to act on it; *McCann's Case*, 13 S. & M. 471.

150. *Same.* What circumstances will amount to proof can never be matter of general definition. Absolute metaphysical and demonstrative certainty is not essential; the legal test is, its sufficiency to satisfy the understanding and conscience of the jury, and produce moral certainty to the exclusion of every reasonable doubt; *Ib.* (citing *Cicely's Case*, 13 S. & M. 202); S. P., *Browning's Case*, 4 G. 48.

151. *Same: Range of admissibility of.* In cases depending on circumstantial evidence, every circumstance which may tend to elucidate the transaction, should be admitted. Hence, it was held on a trial for murder, where circumstance, had been shown connecting a son of the deceased with the murderer as his abettor, not to be error to allow proof of an interview between the son and the prisoner, about ten days before the killing, in which the former seemed to be giving the latter some powder and shot; the murder having been committed with a gun or pistol; *Ib.*

152. *Same: Illustrated: Case in judgment.* On the trial of a slave for murder, by mixing poison in the food which she prepared for her master and family, it is competent, where the evidence is entirely circumstantial, for the purpose of showing the state of feeling of the prisoner, and her motive to commit the crime charged, for the prosecution to prove her conduct and disposition towards her owner, his wife and family, and what she may have said, expressing content or discontent towards them, and her acts of kindness or unkindness, obedience or disobedience. And it will be competent for her to show, in reference to the question of motive, that her owner was in the habit of sexual intercourse with her; *Josephine's Case*, 10 G. 613.

153. *Same.* In the trial of a capital case, where the evidence is entirely circumstantial, the defendant cannot introduce evidence to show that another party had a motive to commit the crime, if the evidence in the case conclusively show that such party had no opportunity of committing it; *Ib.*

154. *Circumstances: Union: Combination.* The mere union of a number of independent circumstances, each of which is inconclusive in its nature and tendency, affords a just ground of conviction, if the combination be conclusive; *McCann's Case*, 13 S. & M. 471.

155. *Same: Illustrated: Case in judgment.* In this case, the prisoner was convicted on circumstantial evidence, the court reviewed the evidence, and reached the conclusion that guilt was established, and among the circumstances relied on as showing his guilt, were: 1st. His flight on the day after the murder, and while the jury were holding the inquest,

and before any person was suspected or accused, and on his apprehension, giving as a reason therefor, that he fled, because he was accused, and that he was the last person seen with the accused at a point and time designated, which was very near the scene and time of the murder. 2d. A stranger approached him in a village, on his flight, 100 miles from the scene of the murder, and he took him for an officer, and showed great apprehension of arrest. 3d. When arrested, denying his name, and defending himself against the charge, by saying that deceased's children had furnished him arms and money to leave; one of these children being indicted as an accessory before the fact. 4th. His having left the town where he and deceased both were on the day of the killing, an hour prior to the deceased, and afterwards being behind the deceased, and overtaking and passing him on the road which led to their homes; and when near the scene of the murder, his departing from the road, saying he was going to a certain house for his supper, and after this, being again behind the deceased after dark, very near the scene of the murder, and his total failure to make any proof showing where he was during these two absences; *Ib.*

156. *Same: Alibi.* All experience shows that but little reliance can be placed upon the recollections of a witness as to the exact minute of any occurrence, and hence, proof of an *alibi* which shows that the prisoner arrived at a certain place fifteen or twenty minutes after the crime was committed, and the distance between the two places could be travelled over in about that time, is entitled to but little weight, owing to the different estimates about time, which the witnesses proving the hour of the crime and the other proving the hour of prisoner's arrival might naturally make; *Ib.*

157. *Same: Caution in its application.* Whilst circumstantial evidence is, in its nature, capable of producing the highest degree of moral certainty, yet experience and authority both admonish that in its application the utmost caution and vigilance should be shown; *Algheri's Case*, 3 C. 584; S. P., *Caleb's Case*, 10 G. 721; *Pitt's Case*, 43 M. 472.

158. *Same: When insufficient.* Circumstantial evidence is always insufficient, when assuming all to be proved which the evidence tends to prove some other hypothesis may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of truth. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely raises a finite probability in favor of one hypothesis over another, such evidence cannot amount to proof however great the probability may be. In this case, the evidence (being entirely circumstantial), was declared insufficient to support a verdict of conviction; *Algheri's Case, supra.*

158a. *Circumstances: Union: Combination.* Where no one circumstance distinctly proved, is sufficient to raise more than a

slight presumption of guilt, then all united are, upon well recognized principles, insufficient to create such a presumption of guilt, as to warrant a conviction; *John's (a slave) Case*, 2 C. 569. This was a case of circumstantial evidence in which the evidence was declared insufficient to convict. See *ante*, 154.

158b. *Same: Presumption and inference: One cannot be based on another in admitting testimony.* On a trial for murder, there being no direct proof either of the *corpus delicti* or of the venue of the murder (Issaquena county), to establish the latter fact, a witness was asked these questions: "Did you ever receive a letter from Decatur Whitley, the deceased, and if so, at what place was it written and post marked, and when did you receive it?" The witness answered, "that he had received a letter purporting to be written by Whitley. It was post marked at Ashton, and was dated on the inside from the island of Bunch's Bend cut-off (the scene of the alleged murder)," and he then answered about the date.

2. "Did you ever carry property from Bunch's Bend island cut-off, in Issaquena county, as the property of Decatur Whitley, deceased?" *Held*, as to the first question and answer, that conceding that the witness had answered that the letter was in the handwriting of Decatur Whitley, it was illegal; that in that event it might raise the presumption that Whitley was at Bunch's Bend island cut-off at the date of the letter, but it would not warrant the presumption that he was there at the date of the killing. That if it had been proved by direct evidence that he was on the island within some short time before the alleged homicide, a feeble presumption might have been indulged that he remained there until the occurrence; but it was extending the doctrine of presumption too far to presume from the fact of the letter being dated at the island, that he was there when it was written, and on that presumption to base the further presumption that he was there when the homicide took place; and that the second question was illegal for the same reason; that the carrying of the property of D. W. from the island, might possibly raise the presumption that it was D. W.'s, but on that presumption could not be based the other presumption, that D. W. was ever on the island himself; *Stringfellow's Case*, 4 C. 157.

158c. *Case in judgment.* See *Browning's Case* for a case of circumstantial evidence, in which the evidence is reviewed by the court, and a majority reach the conclusion that it is sufficient to justify the verdict of conviction; 4 G. 48.

158d. *Same.* A case of circumstantial evidence (where the defendant was charged with putting obstructions on the railroad track), considered, and the evidence declared sufficient to warrant a conviction; *McCarty's Case*, 8 G. 411.

158e. *Same.* A case of circumstantial evidence, charge murder, in which the High Court reviewed the evidence, and reached

the conclusion that it was impossible to ascertain from the evidence, with any reasonable certainty, how deceased came to his death, or who was the guilty agent, and reversed the case; *Caleb's Case*, 10 G. 721.

3. Miscellaneous.

159. *Depositions: Criminal trial.* In no state of circumstances under our constitution can a deposition of a witness be used against the accused in a criminal prosecution, and a similar rule is to be held as to witnesses in his favor, unless by his consent; *Domingue's Case*, 7 S. & M. 475.

160. *Same: Practice of admitting what absent witness will prove: Effect and extent of it.* The practice in criminal cases of proposing to admit what was expected to be proved by absent witnesses, is not calculated to advance the ends of justice, and should not be allowed or encouraged, except in extreme cases. But when such admission has been once made, it amounts to an absolute admission of the truth of the facts expected to be proved by the absent witness; *Ib.* Changed by art. 302, p. 622, Code, 1857, and § 2806, Code, 1871.

161. *Indictment: Averments in: Necessity of proving.* It is not necessary that all the averments in an indictment should be proved as laid; it is sufficient that so much of the charge be proved as constitutes an offence punishable in law; *Swinney's Case*, 8 S. & M. 576.

162. *Same: Non-essential averments: When must be proved.* Averments in an indictment not necessary to be made, must, when made, be proved whenever they are descriptive of the identity of that which is essential; *John's Case*, 2 C. 569; S. P., *Dick's Case*, 1 G. 631.

163. *Same: Time as laid in.* The charge must be proved as laid in the indictment; but the time laid in the indictment need not be proved as laid, unless it be an ingredient of the offence or descriptive of it; *Strauchern's Case*, 8 G. 422; *Miller's Case*, 4 G. 356; S. P., *McCarty's Case*, 8 G. 411.

164. *Evidence illegal must be objected to when offered.* Incompetent evidence must be objected to when offered; if admitted without objection it will not be error for the court not to exclude it, and the jury are authorized to give weight to it in making up their verdict; *Coon's Case*, 13 S. & M. 246; *Dick's Case*, 1 G. 593.

165. *Evidence: Admission: Confession.* A statement made by the prisoner as a witness on the trial of another party, charged with the same offence, for which he is indicted, is not admissible in evidence against him; *Josephine's Case*, 10 G. 613.

166. *Same: Recitals in record, whether conclusive or prima facie.* Whether the record in a capital case which recites such facts as constitute in law a necessity for discharging the jury, and entering a mistrial, is conclusive, or only presumptive evidence of the existence of such necessity *Quære*. But if it were conceded to be presumptive only, the charge of the court to the jury that it is

conclusive, will be no ground for setting aside the verdict, if there be no evidence in the case which tends to rebut the presumption of its correctness; *Ib.*

167. *Same: Confession: Free and voluntary: Illustrated: Case in judgment.* The fact that another slave was whipped in the hearing of the accused, "in relation to matters connected with the offence with which the accused is charged," does not make a confession soon afterwards made by the accused, otherwise than free and voluntary; for it not appearing that the whipping of the slave was done for the purpose of coercing confession or discovery from him, in relation to the crime charged against the accused, it is not shown that the whipping could have had any influence over the accused to cause him to make a confession; *Frank's Case*, 10 G. 705.

168. *Evidence: Presumption from confession of housebreaking and finding goods abstracted, in possession of accused.* Though the finding of stolen goods in possession of the accused, or their discovery at a place where they had been hid, in consequence of information derived from him, is generally presumptive evidence of larceny, only by the accused, yet, if a burglary be proven to have been committed, and the accused makes a circumstantial confession of his entry of the house and taking of the goods, and then discloses the place of their concealment, in accordance with which they are found, such disclosures and finding are presumptive evidence that the accused committed the burglary; *Frank's Case*, 10 G. 705. See *ante*, 85a.

169. *Same: Declarations of a messenger: When competent.* The declarations of a messenger sent by the prisoner, made with reference to the object upon which he was sent, and if shown to be made by authority of the prisoner, are admissible against him; *Browning's Case*, 4 G. 48.

169a. *Evidence: Good character of accused: Admissibility and weight of.* The good character of the accused, if established, ought always to be submitted to the consideration of the jury. No definite rule exists as to the weight that evidence of good character is entitled to in cases where the guilt of the accused is otherwise clear; but it would be giving such evidence too much weight to instruct the jury that it is sufficient to raise a reasonable doubt of guilt, where, excluding that evidence, the crime is established to their satisfaction; *Wesley's Case*, 8 G. 327.

169b. *Evidence: Threats.* Threats made by the deceased, and not communicated to the accused before the conflict, are not admissible in his favor; *Newcomb's Case*, 8 G. 381.

169c. *Evidence: Corpus delicti: Confession.* Facts ascertained by reason of a confession, may be considered in establishing the *corpus delicti*; but a confession not made in open court, or before the examining magistrate, but to an individual, uncorroborated by circumstances, and without proof *aliunde*

that a crime has been committed, will not justify a conviction. But the *corpus delicti* must be proved independently of extra-judicial confessions, and beyond reasonable doubt; and without such proof of the *corpus delicti*, evidence of the confession is inadmissible at the trial; *Pitt's Case*, 43 M. 472.

169d. *Same: Illustrated Case in judgment.* Where a person of generally good health dies suddenly, and the symptoms and appearances indicate narcotic poison of Jamestown weed or stramonium, but are also similar to disease of the heart, or congestion of the brain or stomach, and the testimony and opinions of several physicians who have examined the stomach and contents, without any analysis, is conflicting, and leaves it in doubt, with the probabilities equally balanced, whether the deceased died of poison or of disease, these facts, though accompanied by a confession of the accused, that he had administered Jamestown weed, are not sufficient to warrant conviction; *Ib.*

169e. *Evidence: Retailing: Agreement to sell: Cash: Credit.* On the trial of an indictment for retailing, proof of an agreement to sell, is not sufficient, but there must be proof of an actual delivery of the liquor. There need not be proof of payment, because a sale on credit is as much a violation of law as a sale for cash; *Riley's Case*, 43 M. 397.

169f. *Evidence: Competent respected: When Supreme Court will not reverse for.* If excluded testimony, had it remained for the consideration of the jury, would have no influence on the verdict, the Supreme Court will not reverse a case on account of its exclusion; *Evan's Case*, 44 M. 762.

4. Witnesses.

170. *Evidence: Witness: Mode of discrediting.* To discredit a witness, it is not necessary to bring witnesses to swear that they would not believe him on oath. The manner of a witness in testifying, his situation and motives to commit perjury, proof of his having made statements which he denies under oath, may all be taken into consideration as affecting his credit, and the jury upon consideration of all the circumstances, may act upon or disregard the testimony of such witness in whole or in part, as they deem it worthy or unworthy of belief; *George's Case*, 10 G. 570.

171. *Same: Illustrated: Case in judgment.* See *Ned & Taylor's Case*, 4 G. 364, for a case in which the court notice the circumstances which tend to discredit and to corroborate the principal witness for the prosecution, and reach the conclusion that a conviction on his testimony was proper.

172. *Witnesses: State may examine, though names not on bill of indictment.* The State may examine witnesses whose names are not marked on the bill of indictment, and who were not summoned in the case; *Ned & Taylor's Case*, 4 G. 365.

173. *Witnesses: Hearsay declarations: Post litem motam.* The rule which excludes hearsay declarations made *post litem motam*,

extends only to declarations in relation to the principal matter in issue and in controversy; and hence, in a trial for murder, a witness to impeach another is competent, though the former never heard the veracity of the latter questioned until after the killing; *Mask's Case*, 7 G. 77.

174. *Witnesses: Bias: Prejudice.* Anything tending to show that a witness is under bias or feeling for or against a party to the issue, may be shown to the jury, to enable them properly to weigh his testimony; and hence, on a trial for murder, a witness for the defendant may be examined as to whether she had made a statement to the effect "that if the accused did not kill deceased, she would not own him for a son," and if she deny making the statement, another witness may be called to disprove her answer; *Newcomb's Case*, 8 G. 383.

175. *Witness: Right to object to question.* The witness may object to answering a question which may criminate him, but the party calling the witness cannot, if it be otherwise competent. It is the privilege of the witness to decline to answer, and the duty of the court to advise witness of such privilege; *Ib.*; *S. P., Head's Case*, 44 M. 731.

176. *Same.* And where a witness refuses to answer on that ground, no inference prejudicial to his credit can be drawn from his refusal; and the courts are careful to so instruct the jury; *Ib.*

177. *Witness: Grand juror: Competency of.* Under art. 252, p. 614, of the Rev. Code of 1857, a grand juror may be examined in court in relation to the action and proceedings of the grand jury, and the testimony of witnesses before them; *Rocco's Case*, 8 G. 357. See Code of 1871, § 2846.

178. *Witnesses: Co-defendants: Competency for each other.* A defendant, after conviction (if not rendered infamous thereby), is a competent witness for his co-defendant; and if the punishment is a fine, it is not necessary that he should have paid it; *Strawhern's Case*, 8 G. 422.

179. *Same: Where charged with separate offences.* And if the indictment charge several defendants with the commission of separate and distinct offences, and not with the joint commission of the same offence, it seems they are competent witnesses for each other before acquittal or conviction; *Ib.*

180. *Same: Competency against each other.* Parties jointly indicted for the same felony, are competent witnesses against each other when tried separately; *George's Case*, 10 G. 570.

181. *Testimony of accomplice in capital case: Rule.* The testimony of a party jointly indicted for a capital felony, should be received and considered with caution; and in weighing it, the jury have a right to, and should take into consideration, the situation of the witness, and the temptation he may have to swear falsely, and give it such consideration as they may deem proper. They have the right to disregard such testimony entirely, if they deem it unworthy of credit,

or to take such parts as may be consistent with the other testimony in the cause, or they may act upon the whole of it, if they deem it worthy of credit; *Ib.*

182. *Witnesses: Experts: Designation of.* On questions of science, skill, and trade, or others of like character, persons of skill, called sometimes experts, may not only testify as to the facts, but may give their opinion in evidence; but this rule does not permit a person who has never studied or practised the science of medicine or surgery, but who has seen six or eight gunshot wounds, and as many made by a sharp instrument on human bodies, to give his opinion as to whether a wound was made by a gunshot or sharp instrument; *Caleb's Case*, 10 G. 721.

183. *Same: Where received.* Where the dead body or remains have been discovered and identified, and the immediate cause of death remains unknown, the sworn observations and opinions of physicians, surgeons, chemists, and other scientific persons, who have examined the body or remains, are often of the greatest value as testimony explaining the means of death; *Pitt's Case*, 43 M. 472.

183a. *Evidence: Impeachment of witnesses: Mode of: Not competent to bolster by showing accordant statements to third persons.* To discredit a witness it is competent to prove that he had made discordant statements at other times and places; but to re-establish his credibility, or support what he has sworn to on the trial, it is not admissible to prove that he has made the same statements to third persons; *Head's Case*, 44 M. 731.

XXXIII. False Pretence.

190. *Obtaining money under: Code of 1857, Act, 1865.* Obtaining money or goods to any amount by false pretences, under R.v. Code of 1857, is a felony, and under the Act of 24th November, 1865, p. 68, if the amount obtained is less than \$100, it is a misdemeanor; if \$100 or over, felony; *Bowler's Case*, 41 M. 570.

191. *Indictment for felony in. must charge it done "feloniously."* An indictment for obtaining over \$100 by false pretences, under Act of 1865, should charge that it was done feloniously; nor will such indictment omitting the word "feloniously," be good as an indictment for a cheat at common law, where the value of the money or property exceeds \$100, for that by our statute is a felony, in which the misdemeanor is merged; *Ib.*

192. *Same: Falsity of pretence alleged must be shown by State.* On the trial of an indictment for obtaining \$125 from the treasurer of a church, by the false pretence that the prisoner was a regularly ordained minister of that denomination of Christians, it is necessary for the State to prove the falsity of that pretence; it does not come within the rule that a fact peculiarly within the knowledge of the accused, must be established by him; *Ib.*

193. *Same: False pretences must be made with design of obtaining money, and money*

parted with on faith of such pretence. And under such indictment, if it appear that the prisoner did not seek employment from the church from which the money was obtained, but that the church applied to him to serve as pastor, though he represented himself as a minister, it cannot be said that the money was obtained by that pretence. And so if the money was paid in consideration of services already rendered the church as pastor, then it was not obtained by the pretence that he was a minister. The false pretence must be made with a design of obtaining the money, and not merely with the view of obtaining employment by which the money could be earned as wages for his employment; *Ib.*

XXXIV. Forgery.

194. *Evidence: Admissibility of rebutting, in case of.* On the trial of a prisoner on the charge of forgery of auditor's warrants, there being no positive proof of the forged warrants having been seen in the possession of, or uttered by the prisoner, but there was proof that the signature to the warrant was in prisoner's handwriting, and also conflicting proof on this point. It was also in proof, that the prisoner was a clerk in the auditor's office; that he had official custody of the books of the office, including the register, in which a description of all the warrants issued was inserted; that he had free access to them at all times, and that the forged warrants described in the indictment, corresponded in all material respects with the description of the genuine warrants in the register. The prisoner then proposed to prove that the register was not always, nor even generally, in his custody, but was carelessly thrown about the office, accessible to all that might casually enter it, and that the office was frequently for a considerable time, under the care of a single servant. This was rejected; *Held*, that the evidence was competent rebutting testimony, and should have been admitted; *Fagaud's Case*, 5 S. & M. 491.

195. *Evidence confined to charge preferred.* On a trial for forgery of a bank bill, it will be illegal to allow the introduction of evidence tending to show that three or four years before the alleged crime, the defendant was guilty of passing counterfeit bank bills; *Morris' Case*, 8 S. & M. 762.

XXXV. Gaming.

See sub-divisions Accessory, 8. District Attorney, 128. Indictment, 331.

196. *Indictment need charge, only general name of game.* An indictment for gaming, which charges that the defendant played at a certain game of cards, is sufficiently certain, without setting out the particular or specific name of the game, as "euchre," "seven up," or the like; *Johnson's Case*, 7 S. & M. 58.

197. *Inn keeper leasing room, no defence.* It is no defence to an indictment against an

inn keeper for knowingly permitting gaming in his house, that he rented the room in which the gaming took place for one month, in good faith, without suspecting that gaming was to be carried on there, and that the gaming took place during that time; *Mount's Case*, 7 S. & M. 277.

198. *Evidence: Proof of result of presidential election by parol.* On the trial of a prisoner indicted for betting on a presidential election, it is competent for the State to prove by parol the result of such election, it being a matter of such great public interest as to be universally known, and can, therefore, be proved with absolute certainty by parol evidence; *Williams' Case*, 12 S. & M. 58.

199. *Proof: Variance: Money, not United States treasury warrants.* An indictment charging the betting of money, will not be sustained by proof that the defendant bet United States treasury warrants and his antagonist bet money. Such warrants are not, in legal contemplation, money, and even if the indictment had charged the bet to have been made by them as valuable things, their value must have been proved to warrant a conviction; *Ib.* See post, 207.

200. *Accessories in felonies: Principals in misdemeanors.* A party is guilty of gaming, though he did not bet the money himself, but gave it to another to make the bet for him. In such case, he would be equally guilty as the person who made the bet, as there are no accessories before the fact in misdemeanors, but all who, if the case were a felony, would be such accessories, are in misdemeanors, principals; *Ib.*

201. *Statutes remedial, not penal.* All laws against gaming being declared remedial, and not penal, a strict construction will not be applied to them; *Seal's Case*, 13 S. & M. 256; *S. P., Cain's Case*, *Ib.* 456.

202. *Same: Record: Caption.* The caption to the record of a conviction for gaming, recited that "the venire being returned into the court, executed by the sheriff, the following named jurors appeared and answered to their names, to wit, &c. Whereupon the following named persons of the same were duly drawn, elected, empanelled, sworn and charged as a grand jury for the term;" *Held*, that it appeared with sufficient certainty in a gaming case, where only reasonable certainty was required that the grand jury was composed of good and lawful men of the county, especially as no plea to the panel had been interposed; *Ib.*

203. *Bet on an election to be held on a day fixed by law a sufficiently certain event.* An indictment for betting on an election, charged that the bet was made on the result of an election "for electors to vote for president and vice-president," to be holden on a day named, which was the day fixed by law for holding that election; *Held*, that the event was sufficiently certain, and it was unnecessary to charge that the election was actually holden; *Cain's Case*, 13 S. & M. 456.

204. *Mutual agreement to give each other*

valuable thing is a bet. A mutual agreement between two persons to give each other anything of value, according to the result of an election, is a mere evasion of the gaming law, and a bet; *Ib.*

205. *Election past, result not known, betting on.* Betting on an election which has taken place, but the result of which is not known, is unlawful and indictable; *Terrall v. Adams*, 1 C. 570; S. P., *Miller's Case*, 4 G. 356.

206. *Election in another State.* It is gaming, under the statute, to bet on the result of an election in another State; *Sharkey's Case*, 4 G. 353.

207. *Proof: Variance.* If the indictment charges that bet was made before the election, proof that it was made afterwards, and before result was known, is sufficient for conviction; *Miller's Case*, 4 G. 356. But a charge of betting on the result of the election of presidential electors in a particular State, is not sustained by proof of a bet on the result of an election for President in that State; *Gamble's Case*, 6 G. 222.

208. *Billiards: Loser paying fees at licensed tables not gaming.* It is not gaming for the loser at a game of billiards, played on a licensed table, to pay, by agreement, the fees for the game, this being one of the rules of the table; *Blewett's Case*, 5 G. 606.

209. *To convict of gaming, prisoner must have an interest in wager.* The defendant cannot be convicted under an indictment charging him with having wagered money on the result of a game of hazard or address, if it appear that he merely played the game, and that by-standers bet on the result of it, without his being interested directly or indirectly in the money wagered. He is guilty, however, of encouraging gaming; *Strawhern's Case*, 8 G. 422.

XXXVI. Good Character.

See *ante*. 169a, 141a, 141b.

210. *Evidence of should be confined to nature of charge.* When evidence of general good character is admitted, it ought to have reference to the nature of the charge against the prisoner. In case of homicide, the inquiry should be in reference to the character of the accused for peace or violence; *McDaniel's Case*, 8 S. & M. 401.

211. *Proof of when admitted.* It seems that proof of good character should only be admitted when the evidence leaves the prisoner's guilt in doubt. The prosecution may introduce opposing evidence, and the presumption arising from such evidence is, it seems, of little weight; *Ib.* (On first proposition overruled. See *Wesley's Case*. 8 G. 327. As to weight, no definite rule; *Ib.*

XXXVII. Grand Jury.

See *ante*, Ga. 6, 1; *post*, 383c.

1. Organisation of, and Record.

212. *Caption of indictment: Swearing*

grand jury. It is not necessary that the caption of the indictment should allege that the grand jurors were then and there sworn; *Shaffer's Case*, 1 H. 238. If it appear from the record that the grand jury were sworn, it will be presumed they were "then and there sworn;" *Woodside's Case*, 2 H. 655. Where the record showed in what court, at what term, and in what county, the grand jury were empanelled and sworn, it was held sufficient without the words "then and there" being prefixed to the word sworn; *Gresson's Case*, 5 H. 33.

213. *Indictment: Allegations: Grand jurors of State of Mississippi.* It is proper that the indictment should allege the grand jurors to be grand jurors of the State of Mississippi; *Shaffer's Case*, 1 H. 238.

214. *Same: Illustrated: Case in judgment.* The caption of the indictment, which was "State of Mississippi, W— county, ss. The Circuit Court of W— county, October term, A. D. 1835. The grand jury of the State of Mississippi, at the term aforesaid, in the name, and by the authority of the State of Mississippi," &c., sufficiently alleges that the grand jury were of the State of Mississippi, and County of W—; *Morrison's Case*, 2 H. 655.

215. *Foreman of: Evidence of appointment.* When it appears by the record that A. B. was sworn as foreman of the grand jury, it is sufficient evidence of his appointment. The swearing him as such is good, without any formal appointment; *Ib.*; S. P., *Cody's Case*, 3 H. 27; *Byrd's Case*, 1 H. 247.

216. *Record: Oath of grand jury.* The record must show that the grand jury was sworn, it is not sufficient if it merely shows that the foreman was sworn; *Cody's Case*, 3 H. 27; and a recital that they were sworn contained in the indictment, will not do. The authority of the grand jury to return the indictment must be shown by the record, and the indictment is no part of the record until returned by a competent grand jury; *Abram's Case*, 3 C. 589; S. P., *Foster's Case*, 2 G. 421.

217. *Grand jurors: Qualifications: Presumption: Record.* Grand jurors are presumed to have the qualifications prescribed by law, unless the record shows the contrary, a legal organization will be presumed; and a person whose name is endorsed on an indictment as foreman, will be presumed to have been appointed, unless the record show the contrary; but the contrary may be shown by plea and proof before trial, but not afterwards; *Cody's Case*, 3 H. 27; *Easterling's Case*, 6 G. 210; Later clause changed by Code 57 p. 499 art. 131; Code 1871, § 729.

218. *Grand jury: Empanelling of. Conclusion of legality of body and qualification of its members.* By art. 131, Rev. Code 1857, p. 499; Code 1871, § 729, no objection, by plea, or otherwise, shall be raised to empanelling the grand jury, but the empanelling shall be conclusive of its competency and qualification, and after it is organized and charged, it is too late to prefer objections, although any person, whose conduct may be

the subject of inquiry or investigation, "may challenge or except to the array for fraud;" *Heal's Case*, 44 M. 731; S. P., *Durrah's Case*, 44 M. 789.

219. *Record: Venue of grand jury.* The record must show that the grand jury who returned the bill were selected from the proper county; *Carpenter's Case*, 4 H. 163; see *ante*, 218.

220. *Certificate of probate clerk, of regularity of panel.* Where the clerk of the Circuit Court failed to draw a grand jury, the certificate of the clerk of the Probate Court, that the list of grand jurors, by whom a bill of indictment was found, was drawn in the Probate Court in the mode prescribed by law, is evidence to the Circuit Court that the panel has been properly drawn; *Nixon's Case*, 2 S. & M. 497.

221. *Power of court to summon other grand jurors, and order special venire under H. & H. 498, § 68, and H. C. 888, art. 10, § 2.* Where a part of the persons summoned to compose the grand jury are in attendance the court may order the grand jury to be completed by summoning from the by-standers. The statute (H. & H. 498, § 68), authorizes the issuance of a special venire only where there are no jurors in attendance; *Dowling's Case*, 5 S. & M. 664; S. P., *Johnston's Case*, 9 S. & M. 58; Where (under H. C. 888, art. 10, § 2) none of the regular grand jurors are in attendance, the Circuit Court may issue a special venire facias for a grand jury. Where the regular grand jury were illegally drawn, it has no power to quash the venire, and order a special venire for another grand jury, and if it do so a grand jury so summoned will be illegal, and an indictment found by it will be quashed upon defendant's plea in abatement; *Baker's Case*, 1 C. 243. See *ante*, 218.

222. *Objections to qualification of grand jurors and to legality of organization.* Whether objections to the personal qualification of persons composing the grand jury, or to the legality of the mode in which they were summoned, can affect any indictment found after it has been received and filed in court, *Quære? Ib.* But see *McQuillen's Case*, 8 S. & M. 587; S. P., *Barney's Case*, 12 S. & M. 68. *Quære* resolved in favor of right of prisoner to have indictment preferred by a grand jury of requisite qualifications and organized according to forms of law. (But see 218 *ante*.)

223. *Grand jurors: Qualifications: Presumptions.* By-standers who have been summoned by the sheriff and organized on the grand jury, will be presumed to have the requisite legal qualifications if the record do not show affirmatively the contrary; *Dowling's Case*, 5 S. & M. 664; S. P., *Easterling's Case*, 6 G. 210.

224. *Same: Record: Presumptions.* It is not necessary that the record should show that the court charged the grand jury; this duty will be presumed to have been discharged unless the contrary appear; *McQuillen's Case*, 8 S. & M. 587. If a

grand juror be excused from serving, it will be presumed to be legally done; *Collin's Case*, 2 G. 504.

225. *Grand jury: Substitutes.* In forming a grand jury the court has no right to receive substitutes for the persons summoned on the regular panel, and if this be done the grand jury will be illegal and indictments found by it will be abated; *Rawl's Case*, 8 S. & M. 599.

226. *Record: Caption recitals of, how far contradictable.* Where the caption to the record recites that the grand jury were empanelled from the persons summoned on the regular venire for the first week, it is competent to show that such is not the truth by introducing in evidence the regular venire itself whereby it appears that there are names on the grand jury which are not on the venire, and it is also competent to show that the court accepted substitutes for persons summoned on the venire, and that these substitutes are on the grand jury; *Ib.*

227. *Grand jury: Rights of accused in: Must be lawful men in toto.* The interest of an accused person under an indictment, so far as the grand jury are concerned, commences at the time of finding the indictment; and it must be found by at least twelve men who are good and lawful men at that time, and however numerous the grand jury may be, if there be one among them not qualified by law he vitiates the whole of the grand jury; *Barney's Case*, 12 S. & M. 68. See *ante*, 218, 222.

228. *Grand juror must be freeholder or householder.* By statute, the grand jurors must be either freeholders or householders at the time of finding the indictment; and the want of such qualification in any one of the grand jury, is a good plea in abatement of the indictment; *Ib.* The right to plead in abatement to the indictment the illegality of the grand jury who found it, is strictly personal to the accused, and can be exercised by him only on his appearance. Sureties on his bail bond cannot defend against their liability on the same ground; *Borroum's Case*, 3 C. 203.

229. *Same: Must be drawn as law requires.* The grand jurors must not only possess the requisite qualifications, but they must also be drawn and empanelled in accordance with the directions of the statute; and hence it is a good plea in abatement that the grand jury who found the bill were not drawn from box No. 1, in which the statute required the clerk to keep the names of the householders and freeholders of the county (citing *McQuillen's Case*, 8 S. & M. 587; *Barney's Case*, 12 S. & M. 68); *Porter's Case*, 1 C. 578; S. P., *Stokes' Case*, 2 C. 621. And the law requires the assessor to return annually a list of the names of persons qualified to serve as jurors, and these names are to be put in this box, No. 1, with the other names already placed there, and from this box the grand jury is to be drawn; and the assessor has no power to do this duty by deputy or private agent. Hence, if such list be made out by such agent or dep-

nty, a grand jury drawn therefrom will be illegal; *Stokes' Case*, 2 C. 621. It is no objection to a grand juror under the act of 1830, that his name was not returned in the assessor's list for that year as a competent grand juror. If he had been returned in a previous list, and his name put in box No. 1, and drawn from it, that will be sufficient, if otherwise competent; *Sumrall's Case*, 7 C. 202. If 40 names (instead of 36, as the law requires) be drawn from the jury box and summoned for the first week of the Circuit Court, a grand jury drawn from that list will be illegal; *Leather's Case*, 4 C. 73.

230. *Grand jury sworn: How determined.* Whether the grand jury was sworn or not, according to law, can be ascertained only by an inspection of the record. That question cannot be raised by a plea in abatement; *Smith's Case*, 6 C. 728.

231. *Counts.* It is no ground for arresting the judgment, that it appears by the record, that more than the legal number of persons required to constitute a grand jury, were summoned and in attendance; and out of these the grand jury were drawn, the venire being no part of the record, unless made so by bill of exceptions, cannot be considered on a motion to arrest the judgment; *Green's Case*, 6 C. 187 (citing *Brantley's Case*, 13 S. & M. 468; *Organ's Case*, 4 C. 78; *Byrd's Case*, 1 H. 253).

231a. *Same: Illegal organization of: How taken advantage of.* If the record show the illegal organization of the grand jury, the objection may be made by motion in arrest of judgment; *Miller's Case*, 4 G. 356.

2. Waiver of Objections to.

232. *Same: Objections to, waived.* The High Court will not, after plea of not guilty and trial and conviction, without objection to the grand jury, go back and look for defects in the organization of that body; *Brantley's Case*, 13 S. & M. 468; S. P., *Green's Case*, C. C. 687; *McCarty's Case*, 4 C. 299; *Organ's Case*, 4 C. 78.

233 *Record: Act of 1854 and 1856: Organization of grand jury under.* The record need not show that the grand jury organized under the special act of 1854 (made general in 1856), were summoned five days before court, or that its members were over twenty-one, and under sixty years of age; or that they were taken equally from each police district in the county; *Week's Case*, 2 G. 490. Nor is it essential that a grand jury shall have been summoned five days before court, to make its organization legal under the Acts of 1854 and 1856; *Johnson's Case*, 4 G. 363. A grand jury organized under these acts, need not be composed of twenty men. The number is fixed by the previous law; *Week's Case*, 2 G. 490. If composed of nineteen men, it is void; *Wilson's Case*, 4 G. 356. It must have not less than thirteen, nor more than eighteen; *Box's Case*, 5 G. 614. Manner of selecting a grand jury from persons summoned, is, under these acts, in the discretion of the court: see last case.

234. *Record: Minutes: Foreman.* Initial of the Christian names of grand jurors sufficient in the minutes of the court; *Cotton's Case*, 2 G. 504. And the foreman, in signing the endorsement on the indictment that it is "a true bill," need not use his Christian name in full; *Easterling's Case*, 6 G. 210.

235. *Indictment: Recitals concerning grand jury.* If the indictment, after reciting the State, county, and term of the court, aver "that the grand jurors of the State of Mississippi, being good and lawful men of the county of Winston aforesaid, and then and there duly elected, empanelled, sworn," &c., it is sufficient to show that the grand jury was composed of duly qualified men; *Week's Case*, 2 G. 490.

236. *Grand jury: Power of court over, after empanelled.* After a grand jury has been empanelled and sworn, the court has no power to discharge one of them on account of the sickness of his wife. If it do so, and sufficient remain to make a lawful grand jury, the discharge will not affect its validity; but if on discharging the grand juror another be summoned and sworn in his stead, this is illegal, and vitiates the whole grand jury, and indictments found by them will be quashed on the defendant's plea in abatement; *Porter's Case*, 1 C. 578.

236a. *Same.* Another grand juror can be sworn only when one is sick or absent; *Ib.*

3. Proceedings Before.

237. *Grand jury: Proceeding before produced in evidence in court.* While it is the duty of grand jurors not to make what transpires in the jury room the subject of comment and conversation out of it; and if they do so in respect to an offence then under investigation before them, whereby an offender may escape, they will be liable to indictment as accessories after the fact; yet it is not contrary to the policy of the law to allow grand jurors to testify in court as to disclosures made to them by witnesses examined before them, if in the sound discretion of the court such testimony is proper to be given; and such testimony was held to be rightfully allowed in an action of slander, for words spoken to the grand jury by a justice of the peace in giving information as to offences done in his county; *Sands v. Robinson*, 12 S. & M. 704; *Rocco's Case*, 8 G. 357.

237a. *Grand jury: Constitution, 1870.* Art. 1, sec. 13, of the constitution of 1870, and Act of 20th July, 1870, abolish property qualification for jury service, and impose the duty on all citizens alike who are not specially exempted; but the previous laws regulating the manner of selecting, summoning, and empanelling juries, and preferring objections thereto, still apply, unless abrogated by the constitution and said acts; *Head's Case*, 44 M. 731.

XXXVIII. High Court.

See HIGH COURT.

1. Judgment by.

See *post* 370; *ante*, 232, and sub-divisions New Trial and Instructions.

238. *Judgment by.* On quashal of an indictment in High Court for want of form, prisoner will be held for a new indictment; *Petr's Case*, 3 H. 433. So when judgment is arrested by High Court for a fatal defect in indictment, prisoner will be remanded for a new indictment; *Jones' Case*, 11 S. & M. 315.

239. *Same: Cause remanded for judgment.* Where the sentence was improperly pronounced in the absence of the prisoner, or is erroneous in not fixing a date for the commencement of the imprisonment, the judgment will be set aside without disturbing the verdict, and the cause remanded that the sentence may be properly pronounced; *Kelly and Little's Case*, 3 S. & M. 518. When an illegal judgment has been pronounced on a valid verdict the High Court in reversing a judgment, will pronounce the proper sentence; *Authon's Case*, 13 S. & M. 263.

240. *For what will reverse.* Every defect in an indictment which would have been fatal on demurrer or in arrest of judgment, will be sufficient to procure a reversal; *Kirk's Case*, 13 S. & M. 406. The foregoing relates to matters of substance in charging offences, but the rule is different where the error complained of relates merely to the regularity or formality of the proceedings in the court below; in such cases, unless objection was made in the court below, the irregularity will not be noticed here, (citing *Brantley's Case*, 13 S. & M. 468; *Loper's Case*, 3 H. 427.) *Jesse's Case*, 6 C. 100.

241. *Judgment.* Where there is no judgment, or where the judgment is a nullity, the writ of error will be dismissed, and the prisoner will be remanded to be sentenced; *Kelly & Little's Case*, 3 S. & M. 518; *S. P., Easterling's Case*, 6 G. 210. It seems he would be entitled to his discharge where the judgment imposed a penalty not authorized by law; *Wharton's Case*, 41 M. 680. See *ante*, 239.

2. Miscellaneous.

242. *High Court will not entertain points not made in court below.* It is settled that this court will take no cognizance of points not presented in the court below; *Dyson's Case*, 4 C. 362. Nor will this court go back and look into objections to the organization of the grand jury, after plea of not guilty, and trial in the court below, without objections; *Brantley's Case*, 13 S. & M. 468. See *ante*, 232.

243. *Evidence in High Court that indictment was found at special term.* The certificate of the clerk and the allegation in the indictment that it was found at a special term, is sufficient evidence of that fact in the High Court; *Byrd's Case*, 1 H. 247.

244. *High Court: New trial.* This court will not grant a new trial on the ground that the evidence did not sufficiently prove the venue, unless exception on that particular point were taken in the court below, and a

motion for a new trial on the general ground of insufficiency of evidence to sustain the verdict, is not a sufficient exception on that point; *Hamilton's Case*, 6 G. 214.

245. *Same: Where will not reverse for error in instruction.* This court will not reverse a judgment for the error of the court below, in charging the jury upon the weight of evidence, or in assuming in an instruction that a fact is established, if it appear that the fact about which the court erroneously charged, was so clearly established by the proof, that there was no room for the jury to doubt on the subject; *Wesley's Case*, 8 G. 327. See *post*, 353a, 304, 326, 327, 366, 527.

Ante, 147, 185.

XXXIX. Homicide.

1. Murder, Manslaughter, Justifiable.

246. *Presumption.* On a trial of an indictment for murder, it was charged to the jury, "that every homicide is presumed to be committed with malice aforethought, &c., and it devolves on the prisoner to prove the circumstances which excuse the act." It was held that the charge was too broad and unrestricted, and it ought to have contained these additional words, "unless they arise out of the evidence produced against him;" *McDaniel's Case*, 8 S. & M. 401; *S. P., Green's Case*, 6 C. 687; *Hague's Case*, 5 G. 616; *Head's Case*, 44 M. 731. See 366, *post*.

247. *Same: Essential ingredients.* To constitute murder there must be not only a killing, but it must be done with malice. Both of these facts must be proven by the State to the satisfaction of the jury, and if upon the whole evidence, the jury doubt either as to the fact of killing, or the malice of the act, the prisoner is entitled to the benefit of such doubt, and to be either acquitted entirely, or convicted of a crime of less grade than murder, according to the circumstances. The jury may resort to presumptions, but when the killing is clearly proven, and all the attendant circumstances, and it is shown that there was express malice, or no malice at all, then there is no room to resort to presumptions. But in cases where the killing is proven, and no accompanying circumstances appear in the evidence, the law presumes the killing was done maliciously. So where the killing is proved, and the circumstances attending it are shown, though no express malice may appear from the proof, it may be presumed from some attending fact, as from the use of a deadly weapon, or from circumstances of barbarity and cruelty. And these presumptions, if unopposed, may amount to full proof of the fact. They stand until the contrary is proven, or until such facts are proven as are sufficient to raise a contrary and stronger presumption; *Id.*

248. *"Premeditated design."* The words "premeditated design," used in the statute, in defining murder, are in legal effect the same as "malice aforethought;" *Id.*

249. *Killing to prevent trespass.* No tres-

pass on the personal property of another will justify the killing of the trespasser; and such killing, if committed with a deadly weapon, will be murder; *Ib.* On a trial for murder, this charge was held properly refused, "that if the jury believed the deceased had taken the horse of the accused, and was riding him off beyond the reach of probable recaption, and that the accused, after having repeatedly hailed him, slew the trespasser, it is not murder." For if, under such circumstances, the killing was with a deadly weapon, it would be murder; *Ib.* So a party has no right to kill in order to prevent an entry upon the slayer's land and the carrying away his rails: it is a mere trespass; and if a party kill a trespasser to prevent the trespass, it is murder, if done with a deadly weapon, in the absence of proof which would tend to rebut the presumption of malice arising from the weapon used; *Lambeth's Case*, 1 C. 322 (citing *McDaniel's Case*, 8 S. & M. 418.)

250. *Same: Statutory definition of justifiable.* By statute, homicide is declared to be justifiable when committed in resisting any attempt to murder the slayer, or to commit any felony on him, or in any dwelling house in which such person shall be; it is not, therefore, justifiable when intentionally committed in resisting a mere trespass or larceny, though the killing were actually necessary to prevent the trespass or larceny; *McDaniel's Case*, 8 S. & M. 401.

251. *Murder: Charge defining.* On a trial, the prisoner's counsel asked the court to instruct the jury "that unless they find from the evidence that the prisoner, with a premeditated design, or in some act dangerous to others, evincing a depraved mind regardless of human life, killed the deceased, they cannot find a verdict of guilty of murder;" *Held*, that the charge, being couched in the language of the statute, was improperly refused; *Bole's Case*, 9 S. & M. 284.

252. *Manslaughter: Sudden passion: Provocation.* The law will not put an act, done upon sudden impulse, and in the heat of passion, on the same footing with a deed deliberately performed. The indulgence in such cases proceeds on the supposition that the reason or judgment of the party perpetrating the act, has been temporarily suspended or overthrown by the sudden access of violent passion. But a high degree of sudden and resentful feeling will not alone palliate an act of homicide committed under its influence. It is essential, to have this palliating effect, that the excited and angry condition of the party should be superinduced by some insult, provocation or injury which would naturally and instantly produce in the minds of ordinarily constituted men the highest degree of exasperation; *Preston's Case*, 3 C. 383.

253. *Same: Case in judgment.* The prisoner went to deceased's house and called him to the gate; they there conversed together in a low tone of voice, and the prisoner was heard to say to deceased, that "he could not

stand it," and deceased replied, "he could not stand it either;" the deceased then stepped back, and the prisoner shot him: *Held*, there was nothing in the evidence to reduce the killing to manslaughter; *Ib.*

254. *Self-defence: Imminent danger.* In order to justify a killing on the ground of self-defence, there must be some overt act, indicating a present intention to kill the party, or do him some great personal injury, and the danger of such design being accomplished must be imminent, that is to say, immediate, pressing and unavoidable at the time of killing. Mere fears of a design to commit a felony, or to do some great personal injury to the party, though honestly entertained by the slayer, unaccompanied by any overt act, indicating a design immediately to commit the felony, or to do the injury, will not justify the killing; *Dyson's Case*, 4 C. 362; S. P., *Wesley's Case*, 8 G. 327. To justify a homicide on the ground of self-defence, the danger must be actual, present and urgent, or the slayer must have reasonable grounds to apprehend a design on the part of the deceased to commit a felony, or to do him some great bodily harm, and that there is imminent danger of such design being accomplished; see case last cited. In every case where a homicide is sought to be justified on the ground of self-defence, it must appear from the testimony in the cause, that the danger was urgent, present and imminent, and that no reasonable mode of warding it off or escaping from it existed, except to take life; *Evans' Case*, 44 M. 762, citing *Wesley's Case*, 8 G. 327. Every man is justified in protecting his own life and limb, at whatever hazard; but the danger must be present, imminent and immediate. A mere fear or apprehension, arising from previous threats communicated, afford no excuse, unless, at the time of killing, an effort was being made to put the threats into execution, and a real or apparent necessity existed at the time to slay, in order to prevent it; *Head's Case*, 44 M. 231. Whilst the danger should be apparently imminent, yet it is not essential that it should be *immediate* and impending at the very moment of the killing. A party may anticipate the attack of his antagonist, and justifiably slay him, if, under all the circumstances, such course be necessary to protect himself; *Cotton's Case*, 2 G. 504.

255. *Same: Apparent danger defined.* Apparent danger means such overt, actual demonstration by conduct and acts, of a design to take life, or to do some great personal injury, as would make the killing apparently necessary to self-preservation; *Evan's Case*, 44 M. 762. The "great personal injury," the danger of which the law allows a party to resist by slaying his antagonist, does not mean slight blows with the fists, or injury by other means not calculated to endanger the life or limb of the party. The phrase is equivalent to great bodily harm, or danger of life or limb; *Green's Case*, 6 C. 687.

256. *Deadly weapon: Presumption.* The court, for the State, instructed the jury, in a trial for murder, "that malice is implied by

law from the nature and character of the weapon used; and that the use of a deadly weapon in a fight, and not in necessary self-defence, is in law evidence of malice." The court also, at the instance of the State, gave this instruction: "If defendant entered into the fight with a deadly weapon drawn, intending to use it, he is guilty of murder; but if he did not enter into the fight intending to use the weapon, and only resorted to it in the heat of conflict, he is guilty of manslaughter;" and also this one, "that if the jury believe, from the evidence, defendant entered into the fight, having upon his person a deadly weapon, intending from the first to use the same, if necessary, to enable him to overcome his antagonist, and did, in the fight use it, and kill his antagonist, he is guilty of murder, though he habitually carries the weapon." (There was proof of express malice.) *Held*, that the principle of the instruction first above granted, is sanctioned by the authorities. But it could not prejudice the defendant (if wrong), as it was directed to implied malice, and the evidence went to show, beyond all reasonable doubt, express malice; and, second, whatever prejudicial effect it might have, as it stood, was removed by the instructions subsequently given and above quoted, and all together contained a true exposition of the law; *Green's Case*, 6 C. 687.

257. *Same: Use of.* The fact that the accused sought and brought about a rencontre, being armed at the time with a deadly weapon, with which he killed deceased, does not necessarily render him guilty of murder; for if he commenced the conflict intending from the beginning to commit little or no violence, he may justifiably slay his antagonist if the danger of his own destruction be immediate and impending and otherwise unavoidable; *Cotton's Case*, 2 G. 504. See *Wray's Case*, 1 G. 65, for case in which the High Court holds it manslaughter only, though the slayer made previous preparations for the conflict. And when in such a case, the necessity to kill does not exist, if the killing be not in pursuance of a premeditated design, but on a sudden quarrel, it is manslaughter only; *Cotton's Case*, 2 G. 504.

258. *Malice presumed.* The following instruction is correct: "If the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed unless some excuse or provocation should be shown, for if the law infers that the natural and probable consequences of an act deliberately performed were intended by the agent;" *Mask's Case* 7 G. 77; S. P., *Jeff's Case*, 10 G. 593; *Had's Case*, 44 M. 731. Hence the use of a deadly weapon is *prima facie* evidence of malice, but if used to disable an adversary in the very act of a murderous and malicious assault, then the presumption of malice is overcome; *Ib.*

259. *Same: Evidence of.* The preparation and concealment by the prisoner of a deadly weapon previous to entering into a conflict,

which he provoked, and with the determination to use it if necessary to overcome his antagonist, is evidence of malice, and if death ensue from the use of the weapon, it is murder; *Price's Case*, 7 G. 531.

260. *Same: Mutual combat.* In a case of mutual combat, if a party enter into a contest dangerously armed, and fight with an undue advantage, and kills the adversary, it is murder. And the use of a deadly weapon, concealed from his antagonist, is an undue advantage, and makes the killing murder; *Ib.*

261. *Justifiable: Wife.* A homicide by the husband is justifiable in defence of the wife's chastity; so, if he has reasonable ground to apprehend great personal injury to the wife, and there be imminent danger that it will be accomplished; *Staten's Case*, 1 G. 619.

262. *Express malice: When proved: Subsequent killing, is presumptively murder.* Proof of express malice fixes the character of subsequent killing, unless the defendant shows circumstances altering the presumption, in such a case, no mere provocation at the time of killing, will rebut the express malice; *Rigg's Case*, 1 G. 635. Express malice defined; *Wray's Case*, 1 G. 675.

262a. *Right to bear arms: Constitution.* By the laws of this State, a citizen has the right to wear a deadly weapon, and that he is so armed, though he be the aggressor, amounts to no proof of criminality against him, unless he provided himself with it, with the view of using it, if necessary, in overcoming his antagonist; *Cotton's Case*, 2 G. 504.

262b. *Same.* It was not error to refuse to instruct the jury, "that if an armed person (not armed with reference to a controversy with deceased) became involved in a difficulty with deceased, and took his life with such weapon, that malice cannot be inferred simply from the fact of the use of such weapon." The mere fact, that the law permits a man to bear arms for self-defence, does not, in the slightest degree, diminish his responsibility for their improper use; *Head's Case*, 44 M. 731.

2. Slaves.

263. *How far embraced.* The killing of a slave may be murder, manslaughter, or justifiable, according to the circumstances; *Jones' Case*, W. 83.

264. *Same: Reasonable creature.* The term reasonable creature, in the definition of murder, embraces idiots, lunatics, unborn children and slaves, and the term "in the king's peace," has reference to the jurisdiction over the place where the crime is committed, and embraces persons attainted, outlawed, and even alien enemies not engaged in battle; *Ib.*

265. *Slave.* When a slave is killed by his master or overseer, in inflicting chastisement on him, if done in a cruel and unusual manner, the rules of the common law, upon the subject of homicide, will regulate and

define the nature and character of the offence; *Kelly & Little's Case*, 3 S. & M. 518.

266. *Same: Trial of white man for killing.* On the trial of a white man for killing a slave, it is not competent to prove that the slave was generally impudent and insolent, to white persons, when the proof shows that he was not so to the defendant at the time of the killing; *Jolly's Case*, 13 S. & M. 223.

266a. *Same: Trial of slave for killing overseer.* A slave cannot show, in defence of a homicide by him, of his overseer, the general management of the deceased on the plantation, with reference to violence and cruelty, or specific acts of merciless cruelty committed by him on other slaves, whilst acting as the overseer; *Wesley's Case*, 8 G. 327.

3. Drunkenness.

267. *Excuse.* Mere intoxication is no extenuation or excuse for crime. It may be a circumstance for the consideration of the jury, when the sole question is, whether the act was premeditated or done only with sudden heat and impulse. But how slight that consideration should be, is readily conceived from the presumption that the design to commit a crime may have previously existed, and intoxication been resorted to, to carry it out; *Kelly & Little's Case*, 3 S. & M. 518.

268. *Same.* The law discriminates between the delusion of intoxication and the insanity which it may ultimately produce; for if the mere fit of drunkenness is always to be held as an excuse for crime, there is at once established an emancipation from criminal justice; *Ib.* See *post*, 333.

4. Venue.

269. *At common law: Statute.* It seems doubtful at common law, whether, if the mortal blow be inflicted in one county, and the death occur in another, the slayer can be indicted in either county; but however this may be, in this State, by statute, the indictment may be found in the county where the death occurs, and in view of the doubts as to the right to indict at common law, in either, an indictment found in the county where the blow was stricken will be quashed, and the prisoner remanded for an indictment in the county where the death took place; *Stoughton's Case*, 13 S. & M. 255; S. P., *Rigg's Case*, 4 C. 51. See Rev. Code of 1857, 613. art. 246; Code of 1871, § 2756.

270. *Same: Proof.* In a case of homicide (under the statute of 1822, H. C. 314), if the proof only show that the mortal blow was stricken in the county where the indictment was found, and fail to show where the party died, it will be insufficient to show venue, for he may have died in another county, in which event, under the statute, the indictment must be found in the county where he dies; *Turner's Case*, 6 C. 684.

5. Miscellaneous.

271. *Manslaughter included in charge of murder.* On an indictment for murder, the accused may be convicted of manslaughter; *King's Case*, 5 H. 730; S. P., *Howard's Case*, 13 S. & M. 261. An indictment for murder embraces within it an indictment for manslaughter; and the statute which prevents prosecutions for all offences, except murder, larceny, and certain other excepted crimes, unless the indictment be found within one year from the date of their commission, will prevent a conviction for manslaughter under an indictment for murder, where the indictment was not found within a year previously, as if the indictment was for manslaughter. And if the State relies on the provision which excepts from the limitation cases where the accused fled or absconded to avoid the prosecution, the State must show flight, &c.; *Howard's Case, supra*; S. P., *Rigg's Case*, 1 G. 635.

272. *Proof: Variance.* Proof that the deceased was killed with duck shot discharged from a gun, is sufficient to sustain an allegation in the indictment for murder, that he was shot by one leaden bullet; *Goodwynn's Case*, 4 S. & M. 520.

273. *Declarations.* Effects of declarations made by party procuring deadly weapons, that he did not intend to use them unless others interfered. See *Wray's Case*, 1 G. 675.

274. *Character of deceased: When admissible.* The peculiar character of the deceased for peace or violence, is a fact to be considered in determining whether the accused acted in self defence or not; *Cotton's Case*, 2 G. 504; but is admissible only when a part of the *res gestæ*; *Wesley's Case*, 8 G. 327.

275. *Same: Evidence.* In a case of homicide the accused cannot introduce in evidence a violent, unprovoked, and dangerous assault committed on him by the deceased several weeks before the killing, in order to show the dangerous character of the deceased, and the apprehension he was under at the time of the killing that he was in danger of life and limb from the deceased, if the evidence showed that at the time he killed deceased he was then in no immediate danger, either actual or apparent; nor in such a case is such evidence admissible, though the deceased after the assault and battery, in a conversation in reference to it, threatened the life of the accused, if such threats were not communicated to him before the killing; *Newcomb's Case*, 8 G. 383. As to *res gestæ* in a case of murder, see S. C. That uncommunicated threats are inadmissible, see *Ib.*

XL. Identity of Prisoner.

276. *Plea.* The plea of non-identity, which is pleaded *ore tenus*, is never allowed, except where the prisoner has escaped after verdict and before judgment, or after judgment and before execution; *Thomas' Case*, 5 H. 20.

XLII. Ignorance of Law. *

277. *No excuse.* Ignorance of the law is no excuse for its violation, and it will not, therefore, be error to refuse to charge the jury "that when a party is charged with the violation of a penal statute, it is necessary to a conviction, that he did wilfully and knowingly violate the statute;" *Whitting's Case*, 8 G. 379.

XLII. Indictments.

See *ante*, 209, 162, 16a. *Post*, 415.

1. Caption and Record.

278. *What.* That part of the record which shows the organization of the court, and the empanelling of the grand jury, constitute the caption to the indictment, and if this show a due and regular organization of the grand jury, and that it was sworn, it will be sufficient without a recital of it in the indictment; *Swinney's Case*, 8 S. & M. 576.

279. *Same: Sufficiency of: Case in judgment.* The following caption to the record of the conviction of a principal in murder, was held in this case sufficient, when the record was offered in evidence on the trial of an accessory:

"Pleas and proceedings had and done before the Hon. George Coulter, Judge of the 3d Judicial District of the State of Mississippi, at a Circuit [note that 'court' is omitted] began and held in and for Hinds county, at the court [omitting 'house'] thereof, in the town of Raymond, on the 3d Monday of November, A. D. 1846, it being the 16th day of said month;" *Keithler's Case*, 10 S. & M. 192.

280. *Same: Must show that court was held at proper place in the county.* The caption to the indictment must show that the court was held at the proper place within the county; *Sam's Case*, 13 S. & M. 189; citing *Carpenter's Case*, 4 H. 163; *Kelly's Case*, 3 S. & M. 518. See *post*, 285.

281. *Same: Pea.* In 1846, the court house of Issaquena county was established by law at Tallula. In January, 1848, an act was passed allowing the Board of Police of the county to locate it where they saw proper, and in April, 1848, this indictment was found, to which the prisoner pleaded in abatement, that Tallula was not at that time the county seat: *Held*, to be a good plea; *Sam's Case*, 10 S. & M. 189.

282. *Same: Must show va'id organization of grand jury.* The caption to the indictment must show that the grand jury were selected and empanelled from the county in which the indictment is found; a recital of that fact in the indictment itself, will not do, as it becomes no part of the record until returned, and the other parts of the record must show that it was legally returned; *Carpenter's Case*, 4 H. 161. See *post*, 286.

283. *Record: Sufficient if it show that prosecution was carried on in the name of the State.* A formal statement in the indictment that it was found by the authority of

the State, is not necessary, if it appear from the record that the prosecution is carried on in the name of the State; *Greeson's Case*, 5 H. 33.

284. *Same: Foreman of grand jury: Return of bill.* Where it appeared by the record that a foreman was appointed, and the indictment was returned signed by him, and the caption stated that the grand jury returned the bill into court by their foreman, it was held sufficient to show that the bill was returned, by authority of the grand jury; *Ib.*

Where an indictment is endorsed "a true bill," and returned by the whole of the grand jury, it is good without the special appointment of a foreman; *Friar's Case*, 3 H. 422; *Peter's Case*, 3 *ib.* 433.

285. *Caption: Place of holding court.* An act of the Legislature located the county seat of Smith county on a particular part of a certain quarter section of land. The town of Raleigh was afterwards incorporated, with limits including the land on which the court house was built. The caption of the indictment stated that the court was held at the court house of the county of Smith, in the town of Raleigh: *Held*, that it sufficiently stated that the court was held at the proper place; *Kelly & Little's Case*, 3 S. & M. 518. The caption recited that the proceedings took place in the Circuit Court of Harrison county, at a regular term thereof, begun and held at the court house thereof, in Mississippi city, on the 1st Monday in March, 1848: *Held*, the recital was amply sufficient to show the term of the court, and the house in which it was held; *Seal's Case*, 13 S. & M. 286. See *ante*, 202.

286. *Record: Return of bill.* The record stated that on the 3d day of April, 1844, the following entry was made on the minutes of the court, to wit: "The grand jurors returned into court an indictment against William S. Goodwynn, endorsed thereon 'A true bill. William M. C. Mims, foreman of the grand jury,'" and returned to consider, &c. "Said indictment is in the following words and figures, to wit," and then followed in the transcript an indictment against Goodwynn for murder: *Held*, that it sufficiently appeared that the indictment for murder had been duly returned; it not being necessary to mention in the entry on the minutes, the nature of the offence charged in the indictment; *Goodwynn's Case*, 4 S. & M. 520. The record must show clearly that the indictment under which the trial took place, was found and returned into court; in such a case this fact cannot be supplied by inference or presumption; *Laura's Case*, 4 C. 174.

The record, where there had been a change of venue, sent from the court in which the indictment was found, contained this entry: "No 400. The State v. George N. Green. This day the grand jury, under the care of their proper officers, by the hand of their foreman, John Robertson, returned into court a bill of indictment against George N. Green, the defendant in this case, for murder, endorsed by the foreman of said grand jury, a

true bill." Then followed immediately the indictment, answering the description in the entry, and numbered and endorsed in the same manner as the entry, and immediately following is another entry of the case, with the same number and style of parties as above, showing an arraignment of the indictment, and a plea of not guilty: *Held*, that from these it sufficiently appeared that the indictment appearing in the record is the one found by the grand jury, and that the grand jury returned the indictment into court; *Green's Case*, 6 C. 687.

The record must show that the indictment was returned into court by the grand jury; *Jenkins' Case*, 1 G. 408; S. P., *Hague's Case*, 5 G. 616. If the record show that on 4th November, at the October term, 1853, the grand jury returned an indictment against the prisoner for the murder of deceased, and the indictment show on its face that it was found at the November term, 1853, and there be no other proof of identification, it does not appear with sufficient certainty that it was returned into court; *Hague's Case*, *supra*. The following entry on the minutes of the court, "The grand jury elected, empanelled, charged and sworn at the present term of the court, this day returned into court the following bill of indictment: 173. *The State v. Josephine (a slave), George (a slave)*. Murder. Endorsed a true bill. James B. Smith, foreman of the grand jury. No prosecutor," is sufficient to show that an indictment for murder, marked "filed" by the clerk, against the above named parties, numbered and endorsed as above, was legally returned into court by the grand jury; *Josephine's Case*, 10 G. 613.

287. *Same*. The grand jury need not return with the indictment the names of the witnesses, or the evidence. Nor is it necessary that it should appear from the record that the witnesses upon whose testimony the bill was found, were sworn. The presumption is that they were sworn; *King's Case*, 5 H. 730.

288. *Same*: *Record*: One part helped by another. It is a well settled rule, that if there be any uncertainty in one part of a record, it may be helped by another part of it. Hence, if the entry of the return of an indictment on the minutes be uncertain and insufficient, and if there be another entry on the minutes, made at the same term, which removes the uncertainty, the record will be sufficient; *Goodwyn's Case*, 4 S. & M. 520.

288a. *Special terms*. An indictment may be found at a special term; *Young's Case*, 2 H. 865.

2. Essentials and Averments of.

289. *Commencement and conclusion*. An indictment commencing with "The State of Mississippi," and ending with "against the peace and dignity of the same," sufficiently complies with that clause of the constitution which declares that all prosecutions shall be carried on by the authority, and in the name of the "State of Mississippi," and shall con-

clude "against the peace and dignity of the same;" *Johnson's Case*, W. 392; S. P., *Green's Case*, 5 H. 33. See *ante*. 282.

290. *Then and there*. If the words "then and there" precede every material allegation, it is sufficient, though these words may not precede the conclusions drawn from the facts; *Johnson's Case*, W. 392.

291. *Averment of impossible date vitiates*. An allegation in an indictment which contradicts a known law of nature, vitiates it; as where the indictment charged the offence to be committed A. D. 1030, and thereby presupposing that the defendant had lived 800 years; *Serpentine's Case*, 1 H. 256; it is also invalid, because the State was not then in existence, and could not have had its laws then violated; *Ib.* Changed by Code of 1857, p. 616, art. 266; Code of 1871, § 2803.

292. *"Nature and cause of accusation"*. The 3d section of the Act of 22d February, 1842, which provides that in indictments for selling vinous and spirituous liquors to slaves, it shall not be necessary to aver the kind of liquor sold, nor the name of the owner of the slave, is constitutional; and an indictment charging the sale "to a negro man slave, without permission of the master," &c., is good, though not naming the slave or his master; *Noonan's Case*, 1 S. & M. 562.

293. *Same*. The constitution provides that any one charged with crime, "has a right to demand the nature and cause of the accusations against him." This was intended to secure to the accused such a specific designation of the offence laid to his charge, as would enable him to make every preparation for his trial, necessary to his full and complete defence, and also, such identification of the offence as that he might not be charged by the grand jury with one offence, and put on his trial for another, and so that after his conviction or acquittal his subsequent protection might be ensured, should he be again questioned about the same offence; *Murphy's Case*, 2 C. 590.

294. *Same*. A law which dispenses with the identification of the offence, is unconstitutional; *Ib.*

295. *Same*: *Case in judgment*. The Legislature passed an act prohibiting trading with slaves without the consent of the master, owner, &c., and provided that in indictments under the law, it should not be necessary to specify the commodity sold to, or purchased from, the slave, nor the name of the slave, nor the name of his owner: *Held*, that the act was unconstitutional, as it dispensed with that designation of the offence charged, necessary to enable the accused to make his defence; *Ib.*; S. P., *Williams' Case*, 42 M. 328.

296. *Same*. Such an indictment should either specify the name of the owner, or of the commodity. But where the commodity alone is mentioned in the indictment, the day the crime is alleged to have been committed becomes a necessary descriptive part of the offence, and must be proved as laid; *Ib.*; S. P., *Garrard's Case*, 3 C. 469; *Murphy's*

Case, 6 C. 637. (NOTE. These cases do not seem to overrule *Noonan's Case*, *supra*, 1 S. & M. 562, in that it was confined to a single article, vinous and spirituous liquors, which was named in the indictment, though not the particular kind. Besides the case of *Noonan*, and the principle it established are cited with approbation, and confirmed in *Riley's Case*, 43 M. 397.)

297. *Same: Certainty and precision in charge* The facts and circumstances which constitute the offence as charged, must be stated with precision and certainty; and every material circumstance in regard to time and place, must be averred with that degree of certainty, which is sufficient to exclude every other intent; *Rigg's Case*, 4 C. 51.

298. *Same: Case in judgment.* An indictment for murder contains three distinct propositions: 1st. That the deceased was murdered. 2d. That the defendant was the perpetrator of the deed. 3d. That the felony was committed in the county in which the indictment is found; and the circumstances of each proposition must be averred with precision and certainty. An indictment for murder was regular in every respect, and contained the proper charges of venue, up to the sentence: "and of which mortal wounds the said Hunt did then and there languish, and languishing did live for the space of twenty four hours, and did then die:" *Held*, that it did not sufficiently charge that the death occurred in the proper county, and that the omission of the words "and there," before "die," was fatal; *Ib.* See Code of 1857, p. 616, art. 266; Code of 1871, § 2803.

299. *Same: Constitution: Specification of charge.* The constitution secures the accused the right to have the facts which constitute the alleged crime, stated in the indictment with sufficient certainty, to enable him to know with what offence he is charged, and to prepare his defence, both by plea of not guilty, and of former acquittal or conviction; *Norris' Case*, 4 G. 373.

300. *Same: Case in judgment.* Under the statute, H. C. 981, § 4, providing for the trial and punishment of persons stealing property in another State, and bringing it into this State, the indictment should charge a stealing in another State, and a bringing into this State; *Ib.*

301. *Same: Right not waived.* The constitutional right of the accused, to demand "the nature and cause of the accusation against him," cannot be waived or surrendered, and, therefore, if the indictment do not contain sufficient description of the offence, to notify the accused of "the nature and cause of the accusation," it is a nullity, and may be objected to at any time; *Newcomb's Case*, 8 G. 383.

302. *Same.* Art. 7, p. 573, of Rev. Code of 1857, which provides that all objections, either to the form or substance of an indictment, shall be made before verdict, applies to those cases only, where the defect is of such a character, that the accused may waive it either expressly or by his silence; *Ib.*

303. *Same.* An indictment for murder, framed under Rev. Code of 1857, p. 616, art. 265; Code of 1871, § 2802, which omits to set out the manner and means of the commission of the offence, is good; *Ib.*

304. *Averments unnecessary: When must be proved.* Unnecessary averments, when descriptive of identity must be proved; e. g., that a slave is a negro need not be averred, but if averred must be proved; *Dick's Case*, 1 G. 631; S. P., *John's Case*, 2 C. 569. Ownership of slave need not be alleged, if alleged must be proved, though not beyond reasonable doubt. See *ante*, 162.

304a. *Indictment: Figures in.* Numerical figures are a part of the English language, and are admissible to express numbers and dates in an indictment, but, if they are illegible, the indictment will be bad, for uncertainty; *Kelly & Little's Case*, 3 S. & M. 518.

304b. *Indictment: Essential: Signature of district attorney not.* The signature of the district attorney to an indictment, is not necessary to its validity, either by common law or statute, but it is essential that it should be endorsed, "a true bill," and this endorsement be signed by the foreman of the grand jury; *Keithler's Case*, 10 S. & M. 192.

304c. *Indictment: Common law.* It is no objection to an indictment for murder, that it is in the common law form, when the punishment is under the statute; *McCann's Case*, 13 S. & M. 471.

3. On Statutes.

305. *Must be negative when.* In an indictment under the Act of 1830, prohibiting any person other than Indians, from settling within their territory, it is necessary to aver that the defendant is not an Indian; *Craft's Case*, W. 409.

306. *Same: Exceptions in enacting clause: Rule: In separate clause: Rule.* When the enacting clause of the statute describes the offence with certain exceptions, it is necessary to state all the circumstances that constitute the offence, and to negative the exceptions. Where exceptions are in separate clauses of the statute, they may be omitted in the indictment; and the defendant must show that his case comes within them, to avail himself of their benefit; *Kline's Case*, 44 M. 317.

307. *Same: Illustrated: Case in judgment.* The indictment against Sunday traffic, omitted to negative exception (exception being in the enacting clause), by inserting the words, "not being a druggist, apothecary or physician, as contained in enacting clause:" *Held*, that the omission was fatal to it; *Ib.*

308. *Indictments on statutes: Rule of charging.* It is a general rule, that all indictments, upon statutes especially the most penal, must state all the circumstances which constitute the definition of the offence in the statute, so as to bring the defendant precisely within it. The indictments must also pursue the precise and technical language employed in the statute in the defini-

tion or description of the offence; *Anthony's Case*, 13 S. & M. 263; S. P., *Ike's Case*, 1 C. 525; *Scott's Case*, 2 G. 473; *William's Case*, 42 M. 328. (But see *Kline's Case*, 44 M. 317.) If the offence is certainly and substantially described in words of equivalent import, it is enough. Merely formal and technical words shall not be deemed necessary (indictments), so the offence be certainly and substantially described therein; See *Rév. Code* of 1857, p. 573, art. 7, *Code* of 1871, § 2834; *Kline's Case*. *Supra*.

309. *Same*. It is true, as a general rule, that indictments on statutes are sufficient, if they charge the offence in the language of the statute; but this is true only where the description of the offence in the statute, taking into consideration its nature, and the natural and legal import of the words and terms used in designating it, is such as to convey a certain and full idea of the offence intended to be created, and to embrace every ingredient necessary to constitute it, though the words used in the statute be not the same as would be required in indictments for similar offences at common law. But if the words used in the statute do not describe the offence, so as to convey to the mind a full and clear idea of everything necessary to constitute the crime, then the full measure of the offence must be charged by the use of such words as are necessary and proper, under established rules of law, to characterize it; *Jesse's Case*, 6 C. 100.

310. *Same: Case in judgment*. Therefore, under the statute, H. C. 521, § 35, which declares "if any slave shall be guilty of burning any dwelling house, &c., or shall be accessory thereto, he shall, on conviction, suffer death," it is necessary to charge in the indictment the crime as at common law; and hence, the omission from the indictment of the word "maliciously" (technically essential in arson at common law), will be fatal to the indictment; *Ib.* (See *ante*, 33.) S. P., *Sarah's Case*, 6 C. 267. An indictment under the statute must aver that the preparation or administration of poison was done with intent to kill and murder, "with malice aforethought." That though, as a general rule, it is sufficient to charge the offence in the words of the statute, yet this rule does not apply where there is not a sufficient description of the offence in the statute. That in the statute the words "intent to kill," mean an intent "to commit murder," and that malice prepense being of the essence of the offence of murder, it must be charged in the indictment. (In the last case *Handy, J.*, dissented.)

311. *Indictment: Poisoning: H. C. 521, § 53*. Under the statute H. C. 521, § 53, which provides that "if any slave, free negro, &c., shall prepare, exhibit, or administer to any person or persons, in this State, any medicine whatsoever, with intent to kill, he shall be guilty of a capital felony." It is not necessary to aver in the indictment that the person for whom the poison was prepared was in this State at the time; the words "in this

State," refer to the felonious act, and not to the persons against whom it is directed; *Sarah's Case*, 6 C. 267.

312. *Same*: The indictment charged the accused with the wilful, malicious, and unlawful administration to certain persons, "of a certain medicine called arsenic, being then and there a deadly poison, by then and there mixing and mingling the said arsenic in certain coffee, which had been then and there prepared for the use of said 'persons,' with intent then and there that the said coffee should be administered to them, for their drinking the same; and the said coffee, with which the said arsenic was so mixed and mingled, as aforesaid, afterwards, namely, in the county aforesaid, was delivered to the said 'persons,' then and there to be drunk; and said 'persons,' not knowing the said arsenic to have been mixed with said coffee, did, afterwards, &c., in the county aforesaid, take, drink, and swallow, &c., a large quantity of said arsenic, so mixed and mingled with said coffee, by the accused, with intent then and there to kill the said 'persons,' contrary," &c. *Held*, that this count was not faulty for duplicity in charging two distinct offences; that so much of it as charged the mixing the poison with coffee was not charged as a distinct felony, but only as a part of the means and manner of administering it; *Ib.* See *George's Case*, 10 G. 570.

4. Counts in.

313. *Joinder of*. Counts for robbery and larceny may be joined in the same indictment; *Damewood's Case*, 1 H. 262.

314. *One good and one bad: Verdict on*. If there be one good count and one or more, bad in the indictment, it will be sufficient to support a general verdict of guilty; *Kliffeld's Case*, 4 H. 304; S. P., *Müller's Case*, 5 H. 250; *Brantley's Case*, 13 S. & M. 468; *Wash's Case*, 14 S. & M. 120. And this is the rule as well in capital felonies as in misdemeanors; *Wash's Case*, *supra*; *Scott's Case*, 2 G. 473. See *post*, 571.

315. *When improperly joined: Mode of objecting*. When counts are improperly joined, the proper mode to raise the objection is not by demurrer, or motion in arrest of judgment, but by motion to quash, or to compel the prosecutor to elect on which count he will proceed; *Wash's Case*, 14 S. & M. 120; S. P., *Sarah's Case*, 6 C. 267; *Strawhern's Case*, 8 G. 422; *George's Case*, 10 G. 570. It seems this motion to quash, or compel election, must be made before plea. It is not a legal right of defendant to have the indictment quashed, or to compel the public prosecutor to elect on which count he will proceed. It is addressed to the sound discretion of the court, and it will not, therefore, be error for the court to refuse to do it; *Wash's Case*, *George's Case*, and *Sarah's Case*, *supra*. The court has no right, after the defendant has been arraigned and plead to the indictment, to sustain his motion to quash, because counts in several distinct felonies are joined, nor to compel the State to

elect on which count the prisoner shall be tried; *George's Case*, 10 G. 570.

316. *Distinct felonies: Counts for, joined.* The rule is well settled, that it is not illegal to embrace several distinct felonies of the same degree, in the same indictment, against the same offender; *Wash's Case*, 14 S. & M. 120; *Sarah's Case*, 6 C. 267; *Strawhern's Case*, 8 G. 422; *George's Case*, 10 G. 570.

316a. *Less offence in greater: May be joined in counts.* Under the statute (H. C. 983, § 22), which provides that on the trial of an indictment for any offence, the jury may acquit of the offence charged, and find the prisoner guilty of an inferior degree of that offence, an indictment for an offence consisting of different degrees, is an indictment for it in all its degrees, and hence it will not be error to embrace in it a count for an inferior degree, for at most the count could be only surplusage, and under this statute counts for an assault with intent to kill, and for an assault and battery, may be joined in the same indictment; *Brantley's Case*, 13 S. & M. 468; Rev. Code, 1857, p 622, art. 305; Code 1871, § 2809.

5. Larceny.

317. *Indictment: Negro.* An indictment for stealing a negro, must allege he is a slave; *McGraw's Case*, W. 208.

318. *Same: "Steal."* The omission of the word "steal," in an indictment for larceny, will not vitiate it if the indictment charge that the goods were feloniously taken and carried away by the defendant; *Damewood's Case*, 1 H. 262.

319. *Same: Bank note.* It is not sufficient, in an indictment for stealing a bank note, that it be described "as a promissory note, for the payment of money." It should be described as a promissory note for the payment of money, purporting to be a bank note (see *King v. Craven*, 2 East P. C. 601); *Ib.* (Overruled by *Greeson's Case*, 5 H. 33, in which it is held they are well described in an indictment for larceny, as promissory notes *eo nomine*.)

6. Time in.

See 291, 296, *ante*.

320. *Immateriality of.* The time of the commission of the offence as averred in the indictment, is immaterial; proof of the offence on any other day, is admissible; *Oliver's Case*, 5 H. 14. Nor is the immateriality of the time laid in the indictment affected by the fact that there has been a change in the law providing for the punishment within the period prescribed as a limitation for the prosecution of the offence; and if the time laid is under the last law, proof may be introduced that the offence was committed under the former law, and it will be for the court, upon verdict of guilty, to pronounce judgment under the proper law (the first act being expressly continued in force for the trial and punishment of offences committed under it). But nevertheless, in a case of that sort, if the judgment of the court below be pronounced

under the former law, and there be no evidence reported to this court in the bill of exceptions, this court, upon refusing a new trial, will pronounce judgment under the last law, according to the time charged in the indictment; *Oliver's Case*, *supra*.

321. *Same.* In an indictment for retailing, the date of the offence may be stated to be any day prior to finding the indictment, and within the period prescribed by the statute of limitations for prosecution of the offence; *Miazza's Case*, 7 G. 613. S. P., in all cases where time is not a necessary ingredient of the description of the offence, nor of its essence, proof that the offence was committed either before or after the day laid in the indictment, but before the indictment was found, and within the period prescribed by the statute of limitations, is sufficient; *McCarty's Case*, 8 G. 411.

7. Amendment of.

322. *Right of court to amend.* Under the Rev. Code of 1857, p. 615, art. 262, Code of 1871, § 2799, an indictment for retailing may be amended by striking out the words, "and to divers other persons," inserted after the name of the person to whom the illegal sale is charged to have been made; *Rocco's Case*, 8 G. 357. (See *McGuire's Case*, 6 G. 366; this case was before the Code of 1857.)

323. *Same: In felony.* The right to amend an indictment for felony in a material matter, after the expiration of the term of the court, at which it was found, and without the consent of the accused, is questionable; *Unger's Case*, 42 M. 642.

The court, at a subsequent term to which an indictment is found, has no right to allow an amendment which is material and substantial to the charge.

e. g. An indictment against accused for Sunday traffic having omitted to negative "that he was a druggist, apothecary, or physician." Held, that court could not at subsequent time, allow an amendment inserting them; *Kline's Case*, 44 M. 317.

8. Prosecutor.

324. *Libel.* If the prosecutor be referred to in a libel under a fictitious name, it will be competent for the indictment to show its reference to him, by averring "that it was published of and concerning him;" *Chace's Case*, W. 384.

325. *Prosecutor's name must be marked on bill.* An indictment will be bad if the name of the prosecutor be not marked on it; *Cody's Case*, 3 H. 27. S. P., *Peter's Case*, 3 H. 433. The name of the foreman of the grand jury may be marked on the indictment as prosecutor; *King's Case*, 5 H. 730. It is settled in this State, that an indictment will be defective unless the name of the prosecutor be marked on it, and it seems it should be so marked before the indictment goes to the grand jury; it cannot be put on it after verdict, and on writ of error the indictment will be

quashed, no objection or challenge being made before; *Kirk's Case*, 13 S. & M. 406.

The Code of 1857, p. 64, art. 254, provides as follows: It shall be the duty of the foreman of the grand jury to endorse or mark on all bills of indictment, the name of the prosecutor, if one appears; and if no prosecutor appears, he shall mark thereon "No prosecutor;" and if the foreman fails to perform this duty, and the court on hearing the case, should be of opinion that the indictment was frivolous or malicious, he may be taxed with the costs thereon; but no indictment shall be deemed defective for the want of the endorsement of the name of the prosecutor, or for any mistake therein. (This seems omitted in Code of 1871).

9. Miscellaneous.

326. *Indictment: Principal and accessory: Antecedent.* An indictment against an accessory to murder, charged that the mortal blow of which the deceased died, was inflicted on the "8th of September, 1835, and that from that day, that he, the said L., until the 13th of September, 1835, in said county, did languish, and languishing did live, on which said 13th day of September, 1835, he died, and the said A. W. then and there, &c., was present, aiding, &c., the said S. W. and R. W. in the felony and murder aforesaid in manner and form aforesaid;" *Held*, that it was sufficiently certain as to which of the antecedents reference is made in charging the accessory; *Woodside's Case*, 2 H. 655.

327. *Copy of indictment and venire: By whom served.* The sheriff, as one of the officers of court, may serve on the prisoner a copy of the indictment and venire; *Friar's Case*, 3 H. 422.

328. *Clerical error.* Where, in an indictment for robbery, the assault is charged to be upon one Richard Ganes, and that said Richard Ganes was put in fear of his life, and the property violently taken was described as belonging to said Richard Ganes, and then recited that it was the property of said Robert Ganes, the word Robert was held a clerical error, and that the indictment was good; *Greeson's Case*, 5 H. 33.

329. *Indictment: Power of district attorney to quash on his own motion.* The district attorney may at any time before the defendant is arraigned and put on his trial on an indictment, quash it; it is a matter entirely in his discretion, and the defendant cannot complain of his action, as the quashal is not a matter to his prejudice; *Clark's Case*, 1 C. 261.

330. *Same: Words: Court: Judicial knowledge.* An indictment under the statute prohibiting the buying from a slave of any corn, fodder, &c., "or any commodity whatever," which charged the defendant with buying "cotton" from a slave, is good, without charging that cotton is a "commodity;" the court will judicially know the meaning of words and that cotton is a commodity; *Borroums Case*, 1 C. 477.

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331. *Indictment: Gaming: Proof.* In an indictment for gaming it must be proven that the defendant was directly or indirectly interested in the money wagered, or he cannot be convicted; *Strawhern's Case*, 8 G. 422 (see *ante*, 209).

332. *Indictment: Sufficiency of.* An indictment which charges that the accused "wilfully and maliciously did place an obstruction on a certain named railroad" which obstruction was of such a nature as to endanger the lives of persons being carried on said road, is sufficient under art. 164, p. 600, Rev. Code of 1857; *McCarthy's Case*, 8 G. 411.

XLIII. Insanity.

See *ante*, 268.

333. *Must be disease of the mind, not merely a delusion from a fit of drunkenness.* The law discriminates between a mere delusion produced by a fit of drunkenness and the insanity which it may ultimately produce; to hold the former to be an excuse for crime, would establish a complete emancipation from criminal justice; *Kelly & Little's Case*, 3 S. & M. 518.

334. *Defence of homicide: Plea of insanity.* To sustain a defence on the ground of insanity, it must be clearly proven that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the acts he was doing, or if he did understand them, that he did not know that he was doing what was wrong; *Ib.*

335. *Same: Insanity moving cause.* To absolve from responsibility there must not only be mental delusion, but the crime must have been committed under its direct or necessary influence; *Bovard's Case*, 1 G. 600.

336. *Same: Partial.* Partial insanity is no excuse if the party can distinguish between right and wrong, and knows the act is criminal and punishable by law; *Ib.* The rule on this subject in *Com. v. Rogers*, 7 Met., approved; *Ib.*

XLIV. Instructions.

See INSTRUCTIONS. See *post*, 387, 408.

1. Control of Circuit Judge over.

337. *Right of judge to modify.* In a criminal case the circuit judge is not bound to give or refuse the instructions in the precise terms asked by counsel on either side. He may modify the charges on both sides, so as to make them conformable to his views of the law; *Bole's Case*, 9 S. & M. 284; S. P., *Ciceley's Case*, 13 S. & M. 202 (citing *Walker v. McDowell*, 4 S. & M. 118, and *Bole's Case*, 9 S. & M. 284). Where instructions asked do not explain the law as fully as is necessary under the peculiar facts of the case, the court is authorized to explain

the rules governing the case, more fully and distinctly to the jury on the points of law embraced in the instructions; *Green's Case*, 6 C. 687. The circuit judge has the right to modify the instructions so as to make them conform to his views of the law; and if they be correct as modified by him, it will not be error that they were also correct as asked; *George's Case*, 10 G. 570; S. P., *Mask's Case*, 7 G. 77. Course is recommended to give as asked if correct.

338. *Same: Illustrated: Case in judgment.* Hence, when an instruction has been asked and given in these words: "Killing is justifiable when done in lawfully protecting oneself from great personal injury, imminent and designed by another, and there is imminent danger of such design being accomplished;" the court may give the following as explanatory thereof; "That by great personal injury the law does not mean slight blows with the fist, or injury by other means not calculated to endanger the life or limb of the party; *Green's Case*, 6 C. 687. See *ante*, 255.

339. *Hypothetical.* The court, in charging the jury, may give an hypothetical opinion of the prisoner's guilt; as "if the jury believe so and so," they will find the defendant guilty; *Kliffeld's Case*, 4 H. 304.

340. *Modification of given orally.* The circuit judge on the trial of a person charged with crime, has the right to modify instructions asked on behalf of the State or prisoner, and to give that modification to the jury orally, without reducing it to writing, the Act of 1846 requiring such modifications to be in writing, not applying to criminal cases; and if the prisoner objects to the modification, he must except to it at the time and embody the modification in a bill of exceptions that the High Court may judge of its propriety; if he omit to do this, and permit the jury to retire, it will be too late to object to it afterwards, and it will not be error for the judge to refuse the request of the prisoner to call the jury back and repeat the modifications to them, nor to refuse to allow the modifications when written out by the judge after the retirement of the jury, to be sent into the jury, although the prisoner's counsel stated that they understood the verbal modifications given to the jury to be different from those written out by the judge; the latter stating that they were the same; *Keithler's Case*, 10 S. & M. 192. This is changed by statute, Rev. Code of 1857, p. 504, art. 161; Code of 1871, § 643.

341. *Same: Objection to, waived.* Under the law of 1846, which provides that all charges to the jury and modifications thereof shall be in writing, unless by consent of both parties, modifications given orally which the record does not show were objected to at the time, will be considered as having been given by consent of the parties; *Ib.*

342. *Same: Right of circuit judge to add explanation.* The prisoner being tried for murder asked this charge: "If the jury, after weighing the evidence, have a reasonable doubt that the prisoner is guilty, they are

bound by law to find a verdict of not guilty," which was given to the jury with this addition: "To warrant the jury in finding the prisoner guilty, there should be evidence before them sufficient to satisfy their minds of her guilt beyond a reasonable doubt; that which amounts to mere possibility or conjecture or supposition, is not what is meant by a reasonable doubt; the doubt which should properly induce a jury to withhold a verdict of guilty, should be such a doubt as would reasonably arise from the evidence before them, and if such a reasonable doubt should arise from the evidence, the prisoner should have the benefit of the doubt." *Held*, that the explanation was correct, and did not vary the rule laid down in the instructions as first presented; *Cicely's Case*, 13 S. & M. 202; where the instruction as asked by prisoner's counsel substantially and almost literally as the one herein asked first by prisoner's counsel, was refused by the court, and in lieu of it one was given substantially and almost literally as the explanatory one given by the court in *Cicely's Case*; it was held improper to refuse the prisoners', as it was correct; it should have been given, and if the judge deemed further explanation necessary, then he might properly give the explanation, and this course ought to be adopted; *Stoughton's Case*, 13 S. & M. 255. See *ante* 141.

343. *Instruction in case of circumstantial evidence wholly not applicable to case where there is positive proof.* Where the fact of killing by the prisoner is proven, in a trial for murder, by positive evidence, the rules of law which regulate the application of circumstantial evidence to cases where there is no positive proof, do not apply; it is not therefore error in such a case for the court to refuse to instruct the jury as to the nature and application of these rules, even though the instructions asked be correct as abstract principles of law. Hence, it was held in a case where there was positive proof of the killing, not error to refuse to charge "that the jury must acquit if, upon considering the whole evidence, they conceive there is one material fact, or more, of a character inconsistent with the hypothesis of guilt; *McDaniel's Case*, 8 S. & M. 401.

344. *Judge may refuse when already substantially given.* The court was asked to charge the jury in a trial for murder, where the evidence was entirely circumstantial, "that unless they were as well satisfied from the evidence of the guilt of the accused as they would be from the testimony of a single witness testifying directly to the fact, they should acquit," and it was refused: *Held*, that the refusal was proper, though it embraced a correct legal proposition; but it had already been substantially given in the foregoing instruction (in No 342) in relation to reasonable doubts, and that as propounded to the jury, it applied a rule neither practical nor safe, in this, that it not only required the juror to be convinced from the circumstances beyond a reasonable doubt, but exacted from

him a comparison of his convictions with what they would have been had there been direct evidence of the guilt of the accused; *Cicely's Case*, 13 S. & M. 202.

2. Abstract Principles of Law.

345. *Court not bound to give.* The court is not bound to give a charge upon an abstract proposition of law, or to state legal propositions to the jury, however true they may be, which are not applicable to the facts, nor pertinent to the questions raised by the evidence; *Preston's Case*, 3 C. 383; S. P., *Browning's Case*, 1 G. 636; S. C., 4 G. 48. The court should not give, as an instruction, an abstract proposition of law, which is more likely to confuse than enlighten the jury. Such as this, *e. g.*, "Whenever the possibility of guilt is of a definite and limited nature, whether in the proportion of 100 to 1 or 1000 to 1, or any other limited ratio, it cannot safely be made the ground of conviction;" *Browning's Case*, 1 G. 656; S. C., 4 G. 48; *Oliver's Case*, 10 G. 526; *Cothran's Case*, 10 G. 541; *Frank's Case*, 10 G. 705; *Evans' Case*, 44 M. 762; *Durrah's Case*, 44 M. 789. These cases establish that it is *erroneous* to give instructions not applicable to the case as made by the evidence. It will be error for the court to give an instruction applicable alone to a state of facts which the evidence does not tend to prove; *Cothran's Case*, 10 G. 541; S. P., *Frank's Case*, 10 G. 705.

346. *Instructions should be applicable to case made by evidence.* Instructions should have regard to the case made by the evidence and explain the law clearly with reference to it; it will be error, therefore, if the court in charging the law, in reference to a case supposed in an instruction, exclude from the consideration of the jury a material question presented by the evidence; *Oliver's Case*, 10 G. 526.

347. *Same: Not erroneous if substantially correct.* It is no ground for reversing a judgment in a criminal case, that an instruction given on behalf of the State is philologically inaccurate, if substantially the law is expounded correctly in it; *Ib.*

348. *Same: Should be clearly stated.* In a felony case the defendant has a right to have the law distinctly declared to the jury in instructions; *Staten's Case*, 1 G. 619; S. P., *Cothran's Case*, 10 G. 541. Instructions to the jury ought to be framed in clear and distinct, and not in vague and uncertain, language. They ought to explain to the jury the principles of law applicable to the facts of the case, and not leave unexplained principles which are necessarily involved in the verdict they are to find. It will be error, therefore, for a court to instruct a jury, on a trial of an indictment for perjury, that, if the prisoner swore falsely to the statement contained in the indictment, they will find him guilty, "if the case is otherwise made out;" *Cothran's Case*, *supra*.

3. When Erroneous will Reverse.

349. *Not where verdict is right, and erroneous instructions not likely to mislead jury.* If the verdict be clearly right, and in accordance with law and justice, it will not be set aside because an erroneous instruction was given, which was irrelevant and immaterial, and not likely to mislead the jury; *Mask's Case*, 7 G. 77. An erroneous ruling of the court, which, under the evidence in the case, could have no effect in procuring the verdict which is rendered, is immaterial, and therefore, no cause for setting aside the verdict; *Josephine's Case*, 10 G. 613; S. P., *Head's Case*, 44 M. 731. Nor is it error to refuse to grant instructions asked, when the true principles of law applicable, are already embraced in those already given; *Head's Case*, 44 M. 731; *Evans' Case*, 44 M. 762; *Durrah's Case*, 44 M. 789. Instructions should have reference to the facts of the case, and give the jury the law applicable thereto; and if the conviction is right on the evidence, and the jury could not have been misled by instructions to the prisoner's prejudice, looking to the tenor of all the instructions, then the verdict ought not to be disturbed; and it is only where it appears by the whole record, that injury has been done the defendant, that the court will interfere to correct the error; *Durrah's Case*, *supra*.

350. *Same: When wrong is error, unless manifestly not prejudicial.* If an erroneous instruction be given on a material point in a cause, a judgment rendered in accordance with it will be reversed, unless it manifestly appear from the whole record, that no prejudice was thereby done to the party complaining, and that the judgment was clearly correct; *Josephine's Case*, 10 G. 613.

351. *Same: Case of circumstantial evidence.* In cases depending on circumstantial evidence, which are rarely ever so presented as to be entirely clear of doubts, which from their nature require the greatest caution and circumspection, both in the court and jury, and in which the determination of the jury is so conclusive of the case, it is of the highest importance that the jury be not misdirected as to the rules of law applicable to the case; for it will but rarely occur that the court can say in such cases that the jury were uninfluenced in their verdict by the misdirection; *Ib.*

352. See sub-division Homicide, *ante*, 256, as to erroneous charge corrected by subsequent one, which is correct.

353. *Must be construed together.* All the instructions must be construed together; and when so construed, if the law be correctly expounded, it will not be error that a single instruction, taken by itself, was too broad in its terms; *Mask's Case*, 7 G. 77; S. P., *Evans' Case*, 44 M. 731.

353a. *Refusal to give correct, will not reverse where no prejudice.* A new trial will not be granted for the refusal of the court to give a correct and proper instruction, if it be manifest from the whole record that the pris-

oner was not injured thereby. And, therefore, although the court should, in all cases when requested, instruct "that if the jury have a reasonable doubt of defendant's guilt, they should acquit," yet the refusal to so instruct, is no ground for reversal, where the evidence establishes the guilt of the accused clearly and conclusively, and leaves no room for a reasonable doubt; *McGuire's Case*, 8 G. 369.

4. On Weight of Evidence.

354. *Error to charge on.* The court charged the jury "that the confession of the accused of his guilt, when confirmed by circumstances, becomes the highest evidence of his guilt; and the jury have a right to receive a portion of the confession and reject the other portions, if the attending circumstances warrant such rejection." *Held*, that the instruction was erroneous in being a charge upon the weight and grade of evidence, and in assuming that the statements made by the prisoner amounted to a confession. The court should have admitted the evidence as competent, and left it to the jury without comment, to determine upon its weight and effect; *Hogsett's Case*, 40 M. 522 (citing *Brown's Case*, 3 G. 433).

355. *Same.* An instruction on the weight of evidence, or assuming that a material fact is proven, is wrong; but it is no ground for reversal where the fact is so clearly established by the proof, that there is no room to doubt about it; *Wesley's Case*, 8 G. 327.

356. *Same; Case of instruction not on weight of evidence.* The following charge is not liable to the objection that it instructs the jury on the weight of evidence: "If a party, through mere fear of his life, there being no real or apparent danger, kill another, it is not justifiable;" *Ib.*

357. *Same; Case of, objectionable, as being on weight of evidence.* On the trial of an indictment for receiving stolen goods, knowing them to be stolen, the court charged the jury as follows: "The discovery of the goods in possession of the defendant (they having been proven to be stolen) shortly after they were missed by the prosecutor, and the denial that he had any such goods in his possession, is presumptive evidence that he received them knowing them to be stolen." *Held*, to be erroneous, 1st, because it is a charge on the weight of evidence; and 2d, because it lays down an improper rule for the guidance of the jury. The presumption in such case from his possession, is that he is the thief, and not a receiver from the thief with knowledge that the goods were stolen; *Sartorius' Case*, 2 C. 602. (See sub-division Receiving Stolen Goods, *post* 474.)

5. Part of Record. What.

358. *No part of record unless made so by bill of exceptions.* The statute, H. C. 893, which makes instructions to the jury marked "given" or "refused," by the clerk, part of the record without bill of exceptions, does not apply to criminal cases; *Stoughton's*

Case, 13 S. & M. 253; *S. P., Cain's Case*, *Ib.* 456. (Changed by Code, 1857, 1871. See *ante*, 340.)

359. *Same.* Instructions in a criminal case are no part of the record, unless made so by bill of exceptions; *Preston's Case*, 3 C. 383; *S. P., Haynie's Case*, 3 G. 400; *Brown's Case*, 3 G. 433. (Changed by Code, 1857, p. 504, art. 161. Code of 1871, sec. 643.)

360. *Same: When bill of exceptions contradicts mark on instruction made by the clerk.* Where on the margin of an instruction was written the word "refused," yet the body of the bill of exceptions recited that the instruction was given, it was held that the latter recital must prevail; *Keithler's Case*, 10 S. & M. 192.

360a. *Statute.* Rev. Code, 1857, p. 504, art. 161, Code, 1871, § 643, provides as follows: No judge in any court, civil or criminal, shall sum up or comment on the testimony or charge the jury as to the weight of evidence, but it shall be lawful for the judge to charge the jury upon the principles of law applicable to the case at the request of either party, provided that all instructions asked by either party shall be in writing, and all alterations or modifications of instructions given by the court to the jury or refused, shall be in writing, and may be taken out by the jury on their retirement, the clerk having first marked all instructions asked by each party, or given by the court, as being given or refused, as the case may be; and all instructions so marked shall be a part of the record on appeal or writ of error, without a bill of exceptions.

6. Miscellaneous.

361. *Indictment: Proof: Variance.* The indictment for murder charged that the killing was done with one leaden bullet, the proof was that it was done by "duck shot." The prisoner asked the court to charge the jury "that if they believed from the evidence that the deceased came to his death by means of the shot aforesaid, and not by one leaden bullet, discharged from said shot-gun, as alleged in the indictment, they must find a verdict for the accused." The court refused, but charged "that said proof was sufficient to sustain the said bill as alleged in the indictment." *Held*, that the charge given was proper, and referred solely to the proof of the contents of the gun; *Goodwyn's Case*, 4 S. & M. 520.

See *ante*, 272.

362. *Instruction construed with reference to evidence and limited by it.* On the trial of an accessory before the fact, for murder, the court charged the jury that "it made no difference to the merits of the case whether the principal conceived the design to murder the deceased before his interview with the prisoner or not; if the prisoner encouraged him in the design by falsely stating to him threats of the deceased, the prisoner was guilty." *Held*, that the instruction was not erroneous; it was to be taken in connection with the evi-

dence, and the instruction in terms embraced the idea that the prisoner knew of the design of the principal to kill, for he could not encourage him in a design of which he had no knowledge; *Keithler's Case*, 10 S. & M. 192. A general term capable of a construction which would render an instruction erroneous, will be limited by the facts and circumstances of the case; and if, with reference to them, the jury could not be misled by it, the instruction will not be erroneous on that account. Hence, in a prosecution for larceny, if an instruction for the State use the term "lost property," instead of stolen property, it will not be erroneous, if there be no evidence tending to show the property was casually lost; *Belotes Case*, 7 G. 97.

363. *Must not be vague.* This instruction was asked in a trial for murder: "That if prisoner killed deceased on a sudden heat, though voluntarily; if he had been greatly provoked and had received other indignities and acted under passion, the law puns that regard to human frailty, as not to put a hasty and deliberate act on the same footing; and after being greatly provoked, or having received other great indignities, though no absolute necessity existed for the act, yet it is not murder, but manslaughter, there being no previous notice:" *Held*, that the instruction was objectionable, in that the terms employed, were too broad and unqualified; that it left to the jury not only the degree of provocation under which the prisoner acted, but the sufficiency of the cause of that provocation, and with no fixed standard to decide by, but the peculiarities or habits of thought of each juror; *Preston's Case*, 3 C. 383. See *ante*, 252, 348.

364. *Instruction: Manslaughter: Limitations.* The court, on a trial for murder, at the instance of the State, instructed the jury that they cannot convict of manslaughter if twelve months elapsed between the killing and finding the indictment: *Rigg's Case*, 1 G. 635; citing *Howard's Case*, 13 S. & M. 261. See *ante*, 271.

365. *Instruction: Verdict not set aside for refusal: When prisoner has got the benefit of it.* A verdict of manslaughter will not be set aside for the erroneous refusal to give an instruction, the object of which was to reduce the crime from murder to manslaughter, as that is secured by the verdict; *Ogle's Case*, 4 G. 384.

366. *Homicide: Burden of proof: Instruction.* It is erroneous to charge the jury in a case of homicide, that "It is incumbent on the State to make out its case, or prove the allegations in the indictment; where a killing has been proved, the burden of proof changes, and it is then incumbent on the defendant to show excuse or justification, and if he has failed to do this, the jury may then find him guilty." The true proposition of law is, "If there be no excuse or justification for the homicide by the defendant, shown in the evidence adduced by the State, then he is guilty of murder, unless he has by his evidence shown excuse or justification; *Head's Case*,

44 M. 731; S. P., *McDaniel's Case*, 8 S. & M. 401.

XLV. Intent.

See Sub-division Assault and Battery with Intent to kill.

367. *When intent must be charged or proved as alleged.* Where the evil intent accompanying an act is necessary to constitute the act a crime, the intent must be alleged in the indictment, and proved as charged; the proof of another evil and criminal intent will not do. Hence, when the indictment charged an assault and battery with intent to murder, a verdict of guilty of an assault with intent to commit manslaughter, will not do. The two offences are separate and distinct, and the verdict cannot be supported on the ground that it was for a lesser degree of the same offence; *Mormon's Case*, 2 C. 54; citing *Morgan's Case*, 13 S. & M. 242, and 11 ib. 317.

XLVI. Judge.

370. *No tribunal to decide right of, to discharge functions when challenged in his own court.* The judge had been counsel for the prosecution. After verdict and before judgment, he became judge, and though objected to, pronounced sentence. It was held that the High Court had no power to interpose. That it was a matter of discretion with the judge whether he would act or not. That the maxim was recognized that a judge should never sit in a case where he was interested, or where, from any cause, his mind may likely have received a bias or prejudice. That he should never preside where there is any just ground to impute partiality. But that there was no tribunal adequate to decide a challenge to a judge when made in his own court; *Thomas' Case* 5 H. 20.

371. *Member of bar to preside: Statute not applicable in criminal cases.* The statute allowing the selection of a member of a bar to preside when the judge is disqualified, does not apply to criminal cases; *Peters' Case*, 6 H. 326.

XLVII. Judgment.

See *ante*, 239, 241.

372. *Court has no power over, after term closes.* A party was convicted of murder and sentenced, but not executed at the term. At a subsequent term certain proceedings were had in the case: *Held*, that any error in these proceedings could not affect the judgment previously rendered; *Woodside's Case*, 2 H. 655.

373. *In absence of prisoner, is error: Record must show his presence.* Sentence of the prisoner pronounced in his absence, is error, and the record must show affirmatively his presence; if it do not, the verdict will be set aside; *Kelly & Little's Case*, 3 S. & M. 518.

374. *Must fix date of penitentiary sentence.* A sentence of the court, inflicting the punishment of imprisonment in the penitentiary, should fix the date from which the imprison-

ment will commence, or it will be erroneous; *Ib.* Such a judgment is a nullity, and the prisoner may be sentenced by the court at a subsequent term; *Wharton's Case*, 41 M. 680 (citing *Easterling's Case*, 6 G. 210). The verdict will not be disturbed.

375. *Same: Case in judgment.* An entry on the minutes, recording a verdict of guilty, and ordering that the State recover of the defendant ——— dollars, is no judgment, and the court may render the proper judgment, at a subsequent term, upon the verdict thus recorded; *Easterling's Case*, 6 G. 210.

XLVIII. Jury.

1. Constitutional Right of Trial by.

See JURY. See sub-division Special Venire.

376. *Constitution does not state how jury is to be constituted: Refers to common law.* The constitution in securing the right of trial by jury, does not state how it shall be constituted; it refers to the common law for this; and the jury in a criminal case must be composed of twelve persons, and the record must show this affirmatively, or the verdict will be bad; *Carpenter's Case*, 4 H. 163.

377. *Act of 1836, taking away right of challenge to array, except in certain cases, does not impair.* The Act of 1836, which takes away challenges to the array, except in capital cases, for partiality or corruption in the officer summoning the jury on the special venire facias, and which further enacts that no regular venire facias shall be quashed for any cause, does not impair the right of jury trial; *Hove's Case*, 4 H. 187.

378. *Statute limiting challenges constitutional.* The statute which limits the number of challenges to twelve, in capital cases, is constitutional; *Dowling's Case*, 5 S. & M. 664.

379. *What it is.* The trial by jury, as secured by the constitution, is a trial by twelve free and lawful men, who are not of kin to either party, and are impartial between them. Any legislation which points out the mode of arriving at this object, though changing the common law rule on the same point, but does not change it in any of its essential ingredients, is not an infringement of the right; *Ib.*

380. *Impartiality of jury essential to constitutional right of trial by.* The court consider at length the law on the subject of the impartiality of jurors, and reach the conclusion that no rule of universal application could be laid down; that it is the duty of the court to see that an impartial jury is empanelled and composed of men above all exception; that the great value of the trial by jury consists in its fairness and impartiality, and the right of trial by such a jury is secured by the constitution; that a juror is impartial whose mind is not inclined to either side; and he is partial if it has taken a direction in favor of either; that this direction may be so slight as to be no impediment to the arriving at a just conclusion; or it may be so strong as to prevent the judgment from having fair scope; in the one case he would be competent, in the other, not; that his competency must

depend on the nature and character of the opinion, and not the source from which it is derived, nor on the fact that it has been concealed or expressed; and that the belief of the juror that he can do justice, can have but little weight in determining his competency. But that circumstances may exist, as of very great notoriety, and very general concern, which would render a relaxation of the rule necessary; but the relaxation should go no farther than the necessity demanded, and that the nearer the approach to absolute freedom from preconceived opinion, the nearer is the approach to the perfection of the system of trial by jury; *Sam's Case*, 13 S. & M. 189.

380a. *Not judges of the law.* The jury in a criminal case, are not the judges of the law; *Williams' Case*, 3 G. 389.

380b. *Legislature may sub-divide a county in drawing jury.* The Legislature may divide a county into districts and provide for holding a circuit court in each of them, and for the drawing of the jury for each court from the district in which it is held; *Alfred's Case*, 8 G. 296.

2. Standard of Impartiality.

381. *Hypothetical opinion.* A hypothetical opinion, formed on rumor, subject to be changed by evidence on the trial, does not disqualify the person holding it from acting as a juror; *Flower's Case*, W. 318; *Johnson's Case*, 1b. 302; *S. P., King's Case*, 5 H. 730; *Nelm's Case*, 13 S. & M. 500; but this case recognizes it as a departure from strict principle and commends its avoidance, except in cases of necessity, arising out of great notoriety of case; *S. P., Sam's Case*, 13 S. & M. 189. But if the juror has formed or expressed an opinion, on what he has heard some one say some of the witnesses told, he is disqualified, though the juror has heard none of the witnesses on the subject, and this, though he stated on his *voir dire*, that his opinion was not such as would influence his verdict, but that he would be governed by the evidence; *Nelm's Case*, *supra*, also *Sam's Case*, *supra*. In this case two of the jurors were challenged for cause by the prisoner. One stated on his *voir dire* he had formed an opinion from rumors he had heard, the other, from arguments of counsel he had heard on the day before, while trying an accomplice, to which the witnesses were the same; each stated that he thought it would require some testimony to remove the impression from his mind, and each thought he could decide the case free from bias: *Held*, they were not impartial, and, therefore, not competent, it not being shown that there was any such notoriety in the case, as to render the formation of an impartial jury impossible.

382. *Same.* The doctrine of all the cases referred to in *ante*, 381, so far as they sustain that hypothetical opinion of juror, based on rumor, does not disqualify, though he may say he feels as free to act as if he had heard nothing, are overruled; See *Cotton's Case*, 2 G. 504. It will be error if the prisoner objects on this ground, and objection is overruled, and he be requested to accept or chal-

lenge peremptorily; *William's Case*, 3 G. 389; *Alfred's Case*, 8 G. 296; though in *Ogle's Case*, 4 G. 383, a majority of the court seem to go back to overruled cases, yet *Alfred's Case*, *supra*, establishes the doctrine fully, that an opinion, though based on mere rumor, if it be such as it would require evidence to remove, will disqualify, and this has long been the rule of practice with circuit judges.

383. *Impartiality as affected by conscientious scruples.* A person who, on his *voir dire*, states that he has conscientious scruples against the infliction of capital punishment, and that such scruples would bias his judgment as a juror, is incompetent as a juror in a capital case; *William's Case*, 3 G. 389; but he is competent where he declares "that it would be against his conscience to render a verdict by which a party would be subject to the punishment of death, but that he thinks he could do justice between the State and the prisoner;" *Id.*

383a. *For what reason, affecting impartiality, court may reject juror.* That there is reasonable grounds to believe that he will act under undue influence, is sufficient ground for the court to set him aside; and it is a valid objection to a juror, that he stands indicted and untried for an offence similar to that charged against the prisoner; *McGuire's Case* 8 G. 369.

383b. *Impartiality of juror: Misdemeanor: Felony.* In a misdemeanor case, a juror, on his *voir dire*, answered "that he had not formed or expressed an opinion as to the guilt or innocence of the accused, that he heard the testimony in another case for the same offence, just tried in court, and that it had produced an impression upon his mind as to the guilt or innocence of defendant in this case, which it would require testimony to remove, the witnesses in the other case speaking of the defendant's connection with this case; but that he believed he could impartially decide between the State and the defendant, or that he had no settled or fixed opinion: *Held*, he was competent, but the court stated it might be different in a capital case; *Noe's Case*, 4 H. 330. See *ante*, 382.

383c. *Grand juror who found the bill.* One of the grand jury who found the bill is incompetent to sit as a petit juror to try the defendant's plea in abatement, denying the validity of the indictment; *Beason's Case*, 5 G. 602.

383d. *Bias or prejudice to make incompetent.* When the issue to be tried under an indictment for murder, is on the special plea of the accused relying upon a former acquittal, it is not proper in interrogating the person summoned as a juror, as to his competency, to ask him whether he has formed or expressed an opinion as to the guilt or innocence of the accused of the crime charged in the indictment. His examination should extend only to his bias or prejudice in respect to the issue to be submitted to him, and to his personal animosity, bias, good or ill will to the prisoner; *Josephine's Case*, 10 G. 613.

383e. *When challenged.* A juror cannot

be questioned as to his bias or prejudice until he is challenged; *Flower's Case*, W. 318. A juror must be sworn as such and challenged before he can be interrogated as to his qualifications; *King's Case*, 5 H. 730.

3. Challenge to the Array.

384. *To what it relates.* A challenge to the array relates to the acts of the sheriff, or other officer, and should charge him with a particular default or partiality in arranging the panel, and the want of a qualification in a juror placed on the panel is no ground to challenge the panel; *Woodside's Case*, 2 H. 655.

385. *For what only allowed.* By the Act of 1836, no challenge to the array will be allowed, nor any *venire facias* quashed for any cause whatever, except corruption in the officer who may summon the jury; *Thomas' Case*, 5 H. 20; S. P., *King's Case*, *Id.* 730. (See *ante*, 377.)

4. Power and Duty of Court in Empanelling,

386. *To see that impartial jury is empanelled.* It is the duty of the court in a capital case, to see that an impartial jury is empanelled, and to this end, the court may examine the juror as to his competency, and reject him if incompetent, without challenge by either party; *Marsh's Case*, 1 G. 627; S. P., *McGuire's Case*, 8 G. 369. May be rejected any time before evidence is offered to jury; citing *Lewis' Case*, 9 S. & M. 115. So the district attorney may, after a juror has been tendered to him in a capital case, examine him further as to his competency, and if found incompetent, he may challenge him for cause; *William's Case*, 3 G. 389; S. P., *Head's Case*, 44 M. 731. The Circuit Court has large discretion in this matter, and its action will not be reversed in Supreme Court, except for violation of law, or grossly injudicious exercise of discretion.

387. *Same: Case in judgment.* A juror was examined as to his qualifications, and accepted by both the State and the prisoner, in a trial for murder; after taking his seat, he voluntarily declared (not having been examined on that point) that he was conscientiously opposed to capital punishment, and that he could not conscientiously take the oath of a juror in that case, thereupon the court without challenge by the State, excused the juror: *Held*, that it was the duty of the court to see that an impartial jury, composed of persons above all exceptions, should be empanelled, and that in the exercise of this duty, the court at any time before evidence given, might set aside an incompetent juror, and that the action of the court in this case was correct; *Lewis' Case*, 9 S. & M. 115.

387a. *Power of Circuit Court to issue writ of venire facias.* The Circuit Courts, as courts of *oyer and terminer*, have power independently of any statute, to issue a *venire facias* in criminal cases, tested and returnable at the same term of the court; *Woodside's Case*, 2 H. 655.

387b. *Special venire*. It is no objection to the writ of special *venire facias* that it commands the sheriff to summon the panel "from" the county, instead of "of" the county; *Ib.*

387c. *Same*: *Sheriff's return*. The return of the sheriff that he has served the prisoner with a list of the jury, is conclusive, and cannot be questioned collaterally; *Ib.* See ante. 327.

387d. *Juror answering falsely or erroneously on voir dire*. A new trial should be granted, if it be proven after verdict, that one of the jury, who, on his *voir dire*, answered that he was impartial, had previously expressed an opinion unfavorable to the prisoner; *Cody's Case*, 3 H. 27; S. P., *Sam's Case*, 2 G. 480. The last case adds, "if his prejudice were unknown to the prisoner and his counsel when he was taken."

387f. *Discredit of witness: Proving prejudice*. In such a case, if it do not appear affirmatively, that the witnesses proving the prejudice, were disbelieved by the circuit judge, a new trial will be granted by the court; *Sam's Case*, 2 G. 480.

387e. *Act of court in dismissing sheriff from duty of summoning jurors*. The act of the court in dismissing the sheriff from the duty of summoning *tales* jurors, in a criminal case, on the ground of his gross ignorance, and assigning that duty to his deputy, is void, and because void, it will not be error, since the record shows that the jury were summoned by the deputy sheriff, whose act in law, is the act of the sheriff; *Kelly & Little's Case*, 3 S. & M. 518.

387g. *Juror when accepted must remain under care of court or sworn officer*. In a criminal case, a juror who has been elected, must remain under the care of the court or a sworn officer, before as well as after he is sworn. To permit jurors after their election to disperse, without the consent of the prisoner, is error; *McQuillen's Case*, 8 S. & M. 587.

387h. *Right of accused in a capital case to have jury out of special venire*. The accused in a capital case, has a right to select the jury by which he is to be tried, out of the special *venire* summoned and in attendance, so far as is practicable for him to do so, by exercising his right of peremptory challenge and for cause. Hence, the court has no power to excuse a juror in attendance from serving, if he be found competent, on the ground that his wife is sick and that he desired to be with her; and if one of the *venire* be so excused against the prisoner's consent, it will vitiate the verdict, and be ground for a new trial; *Bole's Case*, 13 S. & M. 398; S. P., S. C., 2 C. 445.

387i. *Same*. But this right is not impaired where the court finding one or more of the special *venire* absent, and refusing to answer to their names, proceeds with the call of the others against the prisoner's consent. If the whole *venire* in attendance were exhausted before a jury were empanelled, then, probably, it would be the duty of the court, as a general rule, if the prisoner apply

for an attachment against the absentees, to grant it, and require their attendance, so the jury might be selected from them; but even then there might be circumstances which would justify the court in refusing to delay the trial, until the absentees could be obtained; *Bole's Case*, 2 C. 445.

387i. *Same*. And so it will not be error if John W. be returned on the *venire* as summoned, and James W., who was in fact also summoned, answer to the name, if the court should refuse to suspend the call until John W., who was absent, could be produced; *Ib.*

387j. *Same*. And if the sheriff summon persons on the special *venire* who have not the legal qualifications of jurors, it will not be error, nor ground for quashing the *venire*, nor prevent the court from selecting a jury from those who are competent and in attendance; *Ib.*

387k. *Right of prisoner to copy of regular venire*. After the exhaustion of the special *venire* summoned in a capital case, the prisoner is not entitled to a copy of the regular *venire* in attendance, before proceeding with the selection of the remainder of the jury from that body; *McCarty's Case*, 4 C. 299.

387l. *Right of court to see that impartial jury is empanelled*. If the State challenge a juror for cause, the court may, nevertheless, in the discharge of its duty to see that a fair and impartial jury is empanelled, examine into the competency of the juror, and tender him to the prisoner, although the prisoner, when the challenge was made, gave his consent that the challenge be sustained; *Ib.*

387m. *Court must not charge jury without request*. The court, of his own motion, and without being requested by either party, has no right to give a charge to the jury, though the matter of it be strictly correct; *Williams Case*, 3 G. 389.

387n. *Jury laws directory*. By Rev. Code, 1857, art. 250, p. 613, Rev. Code, 1871, § 2843, the courts are instructed to regard all the modes of selecting, summoning and empanelling juries, as directory merely. After they are empanelled and sworn, though it be in an irregular and informal mode, they must be deemed legal and competent in both civil and criminal proceedings; *Head's Case*, 44 M. 731.

487o. *Keeping of jury*. It seems that it is not absolutely necessary that the jury should be in charge of a bailiff specially sworn for that purpose; if in charge of a bailiff sworn generally to take charge of juries, it will probably be sufficient; *McCann's Case*, 9 S. & M. 465.

5. Misconduct, Separation, Exposure to Tampering.

388. *If purity of verdict may have been affected, this is enough*. If the jury were so circumstanced that the purity of the verdict might have been affected, it will be set aside; if it could not have been affected, it will be

good. A verdict on which doubts rest cannot be good. Hence, when a person, who was not a sworn officer, was permitted to go into the jury room, where the jury were deliberating on their verdict, and to have charge of them for eight or ten minutes, when the bailiff was absent, it is good ground for a new trial; *Hare's Case*, 4 H. 189. If jury be exposed to improper influence, which may have tainted their verdict, it will be set aside, unless it appear affirmatively that no such influence was exerted; *McCann's Case*, 9 S. & M. 465; *Pope & Jacob's Case*, 7 G. 121; *Caleb's Case*, 10 G. 722.

389. *Same: Illustration.* A new trial in this case was granted because the jury, for a considerable part of the time of their retirement, was under the charge of an unsworn officer; the court holding that whenever the jury were exposed to improper influence, which might taint the verdict, and it did not affirmatively appear that such influence was not exerted, it will be set aside; *McCann's Case*, 9 S. & M. 465.

390. *Same.* One of the jurors, during the argument of prisoner's counsel, was engaged in conversation, and in carrying on a written correspondence with a person not of the jury. On a motion for a new trial this was proven, and the State introduced the affidavit of the juror, stating that the conversation and correspondence were not about the case, but about a private matter of business: *Held*, that the conduct of the juror was highly reprehensible, and deserved punishment; that the trial by jury should be preserved free from all extraneous influences, and that confidence in the administration of justice can be preserved only by removing even the shadow of a suspicion from those in whose hands it is intrusted; but whether this conduct alone would vitiate the verdict was not determined, a new trial having been granted on other grounds; *Lewis' Case*, 9 S. & M. 15. As to officer having jury in charge, *Nelm's Case*, 13 S. & M. 500.

391. *Same.* After the jury, in a capital case, had retired, they were taken from the jury room, by consent of the prisoner, to a neighboring hotel to get refreshments, and to remain until they had agreed. They dined at the public table, an officer sitting between them and the other guests, and a barber was admitted to their room to shave some of them, and remained there more than an hour, and for a few minutes without the presence of the officer having them in charge. There was no proof of tampering with them by any person; on the contrary, the officer testified that he heard no one speak to them on the subject of the trial, though the barber might have whispered to them, or delivered to them written communications on that subject: *Held*, that the prisoner was entitled to a new trial; that it was not necessary for him to show that the verdict was corrupt; that it was enough that the common law rule, which prohibits the jury from being spoken to by any one, was violated; *Bole's Case*, 13 S. & M. 398; citing *Hare's Case*, 4 H. 187.

392. *Same.* One officer in charge of a jury in a capital case, said in their hearing that it was "a worse case than Dyson's." Another said, "Public opinion was against the accused:" *Held*, this was good ground for a new trial; *Nelm's Case*, 13 S. & M. 500.

393. *Same.* If the jury in a capital case, be permitted to take their meals at the public table at a hotel, and if a private room be furnished them adjoining the room in which they deliberate, into which they are allowed to go separately to take intoxicating drinks, and if the officer in charge go to sleep at ten o'clock, P. M., and allow the jury to remain all night without any officer awake in a room not locked up, and if they are permitted to have and use playing cards and a fiddle all the night, the verdict will be bad; *Rigg's Case*, 4 C. 51.

394. *Same.* If one of the jury, without being attended by an officer, separate from the others for two or three minutes, and pass out of the court room through a crowd of bystanders, whereby an opportunity was offered for tampering with him, this will vitiate the verdict; and his testimony will not be admissible to show that no such tampering took place; *Ib.* (citing *Bole's Case*, 13 S. & M. 398; *Organ's Case*, 4 C. 78; *Hare's Case*, 4 H. 187).

395. *Same.* If it be shown that the jury were exposed to an improper influence which might have produced the verdict, the presumption of law is against the purity of the verdict; but it will not be set aside if it appear from opposing evidence, that such influence failed to have any effect on the verdict; *Pope & Jacob's Case*, 7 G. 121; *e. g.*, if intoxicating liquors be introduced into the jury room in sufficient quantity to produce drunkenness, the presumption is against the purity of the verdict; but if it be shown that liquor was used by one of the jury only who was sick, and that he was not intoxicated, the verdict will not be disturbed; *Ib.*

396. *Same.* It is not every improper or illegal act of the bailiff in charge of a jury, or of the jury themselves, that will constitute good cause for setting aside the verdict; to vitiate the verdict, it must appear that the jury, during the trial, were exposed to influences which might have affected the purity of their verdict; and whenever such exposure is shown, the verdict will be set aside, unless it appear affirmatively that such influence failed to have any effect in procuring the verdict; *Caleb's Case*, 10 G. 722 (citing *Pope & Jacob's Case*, 7 G. 121), as if the bailiff inform them they shall have neither meat nor drink till they are agreed, this will not vitiate the verdict; *e. g.*, in this case the jury were taken under charge of two sworn bailiffs to a room in a hotel three hundred yards from the court room, to consider of their verdict; but it was shown by the testimony of the bailiffs, that no person whatever had any communication with them during their retirement: *Held*, that such conduct was no good ground for setting aside the verdict; *Ib.*

396a. *Same.* See *Browning's Case*, 4 G.

48, in which it was held that irregularity of the jury during trial, in eating and lodging at a public hotel, but together and under the supervision of sworn officers, did not vitiate the verdict; *Ned & Taylors' Case*, 4 G. 364, in which a juror ballooning to a person in the street to tell his wife to send him his supper, and a person bringing the supper, as requested, did not vitiate.

397. *Separation of jury in capital case, ipso facto, vitiates the verdict.* The separation and dispersion of a jury in a capital case, though by consent, or at the request of the prisoner, vitiates a conviction; *Hood's Case*, 43 M. 364.

397a. *Same: Court will not inquire whether improper influences were exerted in such case.* If it appear that the jury trying a capital case in which a conviction was had, were allowed to separate and disperse during the trial, that fact alone will nullify their verdict, and the court will not inquire whether improper influences were actually exerted or not. The only safety for the purity and integrity of jury trials, is in the absolute exclusion of all opportunity during the trial, for the exertion of improper influences on the men composing the jury; *Ib.*

397b. *Verdict: Juror not competent to impeach or sustain.* A juror's affidavit is not competent to impeach his verdict; *Frizar's Case*, 3 H. 422; S. P., *Rigg's Case*, 4 C. 51; *Pope & Jacob's Case*, 7 G. 121. A juror is not a competent witness to show his own misconduct, or that of his fellows, but he is to show the misconduct of the officer in charge of the jury, even to the extent of impeaching the verdict; *Nelm's Case*, 13 S. & M. 500.

6. Incompetency how Waived.

398. *Failure to inquire as to competency.* The law affords every person charged with a crime an opportunity of inquiring into the qualifications and competency of the jurors before whom he is to be tried, and if he fail to make such inquiry, and thereby an incompetent person becomes a member of the jury, he will be held to have waived the objection; and he cannot, therefore, after conviction, insist upon a new trial on account of the incompetency of a juror and of his ignorance of such incompetency at the time of trial; *George's Case*, 10 G. 370 (citing *Williams' Case*, 8 G. 407); S. P., *Frank's Case*, 10 G. 705.

399. *Same: Cases in judgment.* If a person, over sixty years of age, sit without objection, as a juror, the verdict will not for that cause be vitiated; *Williams' Case, supra.* The fact that one of the jurors was an unnaturalized alien will in no wise vitiate the verdict, or be grounds for a new trial; *George's Case, supra.*

The fact that one of the jurors was not a householder, or freeholder, does not vitiate the verdict; objections to a juror on that ground come too late after verdict, even in a capital case, where the juror upon his examination

by the judge, under a mistake answered that he was a householder or freeholder; *Frank's Case, supra.*

7. Oath of.

400. *How set out in record.* It is not the duty of the clerk in making up the record of proceedings in a cause to set out the oath administered to the jury; all that he is required to do is to state in the record that the jury were sworn, and if he undertake to do more, in courts of general jurisdiction, his action will be unofficial and no evidence of the contents of the oath actually administered to the jury, and will not destroy the legal presumption that the jury were properly sworn; *Dyson's Case*, 4 C. 362.

401. *Same: Objections how brought to notice of High Court.* And hence, if objections are to be made to the oath administered to the jury, a bill of exceptions should be taken and the oath incorporated in it; *Ib.*

402. *Same: Record must show that jury was sworn.* The record must show that the jury were sworn, but it is not necessary, nor even, according to the practice, that the contents of the oath should be set out; the fact that they were sworn appearing in the record, it will be presumed that they were sworn properly unless a bill of exceptions be taken showing the contrary; *Ib.*

XLIX. Larceny.

See *ante*, 9, 313.

1. Subjects of.

403. *Bonds, bills, &c.* By statute, obligations, bonds, bills single, bills of exchange and promissory notes for the payment of money, or notes for the payments of any specific property, lottery tickets and bills of credit, are subjects of larceny and robbery; *Damewood's Case*, 1 H. 262.

404. *Same.* Bank bills are *eo nomine* the subject of larceny, they are regarded as cash, goods and chattels; *Greeson's Case*, 5 H. 33, overruling *Damewood's Case*, 1 H. 262. See *ante*, 319.

405. *Runaway slave: Lost property.* A runaway slave may be the subject of larceny; *Randal's Case*, 4 S. & M. 349. If the finder of lost goods appropriate them to his own use, not knowing the owner, it is not larceny; *Ib.*; S. P., *Coons' Case*, 13 S. & M. 246. Otherwise if he knew the owner or had the means of knowing; *Ib.* Evidence in *Randal's Case, supra.* reviewed and decided not sufficient to uphold the conviction, or even to put the accused on proof of explanation; *Coon's Case, supra.*

2. What Constitutes.

406. *Intent, animus furandi.* To constitute the offence of larceny, the goods must have been taken wrongfully or fraudulently, with intent to convert them to the taker's own use, and make them his own property. If there be no such intention, the taking

amounts to a trespass only. If the taking be open, and in the presence of the owner or other persons, this carries with it evidence that it is only a trespass; *McDaniel's Case*, 8 S. & M. 401.

407. *Same: Lucri causa not essential.* The *lucri causa* is not essential to larceny, and hence, the taking of a slave from the owner, with intent to carry him to a free State and there emancipate him, is larceny; *Hamilton's Case*, 6 G. 214.

408. *Claim of taker to the property must be boni fide.* It is incorrect to charge that "a man who takes property, claiming it for himself or another, commits no larceny," for it is not enough to do away with the criminal intent, that there should be a mere false claim of property: it must be fair and *bona fide* to have this effect; *McDaniel's Case*, 8 S. & M. 401.

409. *Trespass necessary with co-existent intent.* If a person by color of legal process, or other fraudulent means, obtain possession of goods (though with the owners consent), with the felonious intent existing at the time, to deprive the owner of them, and does in fact so deprive him, it is larceny; *Watson's Case*, 7 G. 593.

409a. *Presence and intent.* The presence of the accused, with intent to aid and abet the other parties' stealing the property, makes him guilty, though he did not lay hands on the stolen property; but his presence without such intent, does not make him guilty; *Hogsett's Case*, 40 M. 522. See *Mc Carty's Case*, 4 C. 299.

3. Value and Verdict.

410. *General verdict of guilty.* Under an indictment for grand larceny containing two counts, a general verdict of guilty, without a special finding that the goods stolen were worth \$20, which is the statutory line between grand and *petit* larceny, is a verdict of guilty of grand larceny, although the jury were authorized to find the prisoner guilty of *petit* larceny; *Wilborn's Case*, 8 S. & M. 345.

411. *Value.* Under an indictment for grand larceny, if the jury find the defendant guilty, they must also find the value of the property stolen; *Shine's Case*, 42 M. 331; *S. P., Unger's Case*, 42 M. 642.

412. *Same.* On the trial of an indictment for grand larceny, where the jury find the defendant guilty as charged in the indictment, and fail to find the value of the property stolen, the court has no power to fix the value of the property and grade of the offence, and if it do so, and on the proof fix the grade of the offence as *petit* larceny, and pronounce sentence accordingly, it will be error, for which the High Court will reverse; *Ib.* (NOTE. This case seems to overrule *Wilborn's Case*, *supra*. 8 S. & M. 345.)

413. *Same: Case in judgment.* S. was indicted for the larceny of "two yearling calves, of the value of fifteen dollars each, and in the aggregate of thirty dollars in value, being the personal property of John D. Hart." The

jury returned as their verdict, "guilty, as charged in the bill of indictment." *Held*, that the failure of the jury to find the value of the property stolen was error, which the court had no power to correct, and itself fix such value, and direct that a verdict of guilty of *petit* larceny be entered on the minutes, and then pronounce sentence on the verdict thus entered; *Ib.*

414. *Same: Several articles: Separate value.* Where the prisoner is charged in one count with the larceny of several articles, the separate value of each being stated, the jury may find him guilty as to part, and not guilty as to part, and a verdict of guilty as to part, without any express finding as to the others, is equivalent to not guilty as to those not specially found; *Swinney's Case*, 8 S. & M. 576.

415. *Grand and petit.* Under an indictment for grand larceny the prisoner may be found guilty of *petit* larceny; *Ib.*

416. *Punishment.* Under the Penitentiary Code of 1839, the punishment for *petit* larceny was imprisonment in the penitentiary, at the discretion of the court, provided it were not less than two years; *Ib.*

417. *Venue.* A thief, bringing stolen property into this State, may be indicted for larceny in any county into which he may carry it, as every moment's continuation of the original trespass amounts to a new theft of the goods; *Watson's Case*, 7 G. 593. See Rev. Code of 1857, p. 612, art. 245, Code of 1871, § 2755.

418. *Ownership of property.* An indictment for larceny must state the entire Christian name, as well as the surname of the owner of the property; whenever the name of the owner cannot be ascertained, the indictment should aver the larceny of the property of some person to the jurors unknown; and if the owner of the property should be discovered on the trial, the accused will be acquitted; *Unger's Case*, 42 M. 642.

419. *Same: Statute of jeofails: Case in judgment.* Plaintiff in error was indicted for the larceny of two bales of cotton, the property of D. W. Humphreys, which was amended, by leave of the court, to D. G. Humphreys. On the trial, the cotton was proven to be the property of David George Humphreys: *Held*, that this was a defect in the indictment, which could have been taken advantage of before verdict; after verdict the defect was cured by the statute of jeofails; *Ib.* See Rev. Code of 1857, p. 573, art. 7, Code 1871, § 2884.

4. Evidence.

420. *Possession of goods recently stolen.* The possession of stolen goods recently after they were stolen, raises a presumption that the possessor stole them; there is no definite time settled in which the goods must be so found in possession of the accused, to raise presumption, which is strong or weak as the time is short, or extended from the time of the loss until the period of finding is so remote that this presumption is altogether de-

stroyed; this presumption is also indulged for a longer period of time in cases where the goods are bulky, or inconvenient of transmission, or unlikely to be so transferred, than where they are light and easily passed from hand to hand, and likely to be so passed; *Jones' Case*, 4 C. 247; *S. P. Jones' Case*, 1 G. 653; *Belote's Case*, 7 G. 97; *Unger's Case*, 42 M. 642.

421. *Same: Case in judgment.* In a prosecution for stealing a saddle, the finding of it in prisoner's possession, after the lapse of five months from the theft, was held insufficient alone to warrant a conviction; *Ib.*

422. *Same: Explanation of accused of possession.* If the account of his possession, given by the accused, be reasonable, the prosecution must disprove it, *aliter* if it be unreasonable; *Jones' Case*, 1 G. 653.

423. *Same: Conduct of accused.* If the conduct of the accused, found in possession of stolen goods, be consistent with the account given by him of his possession, it is a circumstance in his favor. So also is open possession of the goods, when they are liable to apprehension by the owner; *Ib.*

424. *Same: Sufficient account of his possession.* What will be sufficient to account for the possession, or to remove the presumption of guilt arising from it, will depend much upon the time between their loss by the owner and their discovery in possession of the prisoner, the nature and character of the goods, and the circumstances; *Belote's Case*, 7 G. 97.

425. *Proof of intent.* For the purpose of proving the intention with which the goods were taken by the accused, in a prosecution for larceny, the State may show that the prosecutor was of weak and imbecile intellect, and under the prisoner's care and protection, and that he procured a bill of sale of the goods from the prosecutor by fraud, and without consideration, and under pretence that it was to protect the prosecutor's title; *Watson's Case*, 7 G. 593.

426. *Same.* And to show the character of defendant's possession in this State, it may be proven that the goods were stolen by him in another State; *Ib.*

L. Limitation of Prosecution.

427. *Mayhem.* The prosecution of an indictment for mayhem, is not barred if the indictment be not found within one year from the commission of the offence, if the defendant absconded and fled from justice; *Clark's Case*, 1 C. 261.

See sub-division Homicide 271. See *ante*, 364.

LI. Malice.

427a. *Presumed.* Presumption of a malicious intent may arise from the nature of the weapon used; *Woodside's Case*, 2 H. 656; *S. P., McDaniel's Case*, 8 S. & M. 471.

428. *Express and implied: Distinction.* There is a plain distinction between express malice and implied malice. The former is characterized by a sedate, deliberately formed

design, evidenced by external circumstances. The other is the offspring of sudden impulse; *Anthony's Case*, 13 S. & M. 263.

LII. Motive.

See *post*, 438.

LIII. Master and Slave.

428a. See *Oliver's Case*, 10 G. 527.

LIV. Merger.

429. *Doctrine of, does not apply to conspiracy by slave to murder white man.* The doctrine of merger does not apply to a conspiracy to commit murder on a white man by a slave. The offence is complete within itself, and besides is punished capitally, just as the commission of the murder is; *Laura's Case*, 4 C. 174.

LV. Misnomer.

430. *Cured after verdict on plea.* After a verdict on plea of not guilty, it is immaterial that the defendant, in some parts of the indictment, was called "yeoman," and in another part innkeeper, and in some parts of the record "Cliffield," and in others "Kliffield;" *Kliffield's Case*, 4 H. 304.

LVI. Murder.

431. *When crime complete.* The crime of murder is not complete till the death of the person, whose murder is charged takes place; *Harrell's Case*, 10 G. 702.

See sub-division Homicide.

LVII. New Trial.

See NEW TRIAL. See *ante*, 158e, 166, 319, 432 to 434, 437 to 438, 449 to 451.

1. Miscellaneous.

432. *Withdrawal of witness.* The voluntary withdrawal of a State's witness, is no ground for a new trial; *Blennerhussel's Case*, W. 7.

433. *Excessive fine.* A new trial will not be granted, because the fine assessed by the jury is excessive, unless it be so much so as to evince partiality or corruption in the jury; *Ib.*

2. Misconduct of Juror and Officer in Charge of.

See sub-division, Jury, *ante*, 390, 392, 389, 391, 393, 394, 395, 396, 397a, 397b.

434. *Incompetency of juror.* A new trial will not be granted, because one of the jurors was an alien, and incompetent, unless the prisoner shall show he was ignorant of the fact when he accepted him. Would that do unless it were also shown the juror was then examined as to his competency; *Quære? Seal's Case*, 13 S. & M. 286. See *ante*, 398, 399; see especially, *Frank's Case*, 10 G. 705.

435. *Juror answering falsely, or erroneously, on voir dire.* A new trial will be

granted, if the juror be shown to be prejudiced and mislead accused on his *voire dire*; *Cody's Case*, 3 H. 27; S. P., *Sam's Case*, 2 G. 480. See *ante*, 387d.

436. *Same*. In such a case, if it do not affirmatively appear, that the witnesses proving the prejudice were disbelieved by the circuit judge, a new trial will be granted by the High Court; *Sam's Case*, 2 G. 480. See *ante*, 387d.

3. Evidence.

437. *When new trial will be granted on*. A new trial will not be granted on the evidence alone, unless the verdict be opposed by a decided preponderance of evidence, or based on no evidence; *Cicely's Case*, 13 S. & M. 202; S. P., *McMann's Case*, *Id.* 471. And power to set aside on the ground that verdict is opposed by decided preponderance of evidence, is exercised with great caution; *McMann's Case*, *supra*. This is especially so in cases of circumstantial evidence; *Browning's Case*, 4 G. 48.

438. *Same: Case in judgment*. In this case, the court review all the evidence, and reach the conclusion that the verdict was right; and among the circumstances which showed guilt, the court noticed: 1st. The motive of the accused. 2d. Traces of his presence at the scene of the murder, and the absence of all traces of the presence of any other person. 3d. When blood was discovered on her clothing, her attempt to reopen an old wound, so as to make it bleed. 4th. Her possession of the purse of the deceased, and her ignorance of the amount of its contents. 5th. The fact that the blood on her clothes was in "spots," showing that when it got there, it was warm and uncongealed. 6th. Her contradictory statements in relation to the affair. 7th. Her attempts to excuse herself before she was accused. 8th. Her statement that she was present when the murder was committed, and that it was done by five men, and the utter absence of all traces of any person's presence, but the witness and her own. 9th. The exact correspondence between her foot-prints and the foot-prints found at the scene of the murder. 10th. Her statement that she and the victims were pursued by the same robbers, and that she escaped by flight, and that the deceased was killed by the murderers where she lay, when it was impossible at the time she made the statement that she could know where the deceased lay, unless she had remained until after the victim's death. 11th. Being a servant in the family (the husband and wife and one child being murdered), she went to a neighbor's, and communicated the intelligence. Her tracks on the road showed she walked deliberately, and did not run as one terrified would likely do; after arrival at the neighbor's she waited fifteen minutes before giving the alarm; and when she did so, and a light was made, she kept herself in the dark; *Cicely's Case*, 13 S. & M. 202. See *ante*, 155.

439. *Accomplice*. In this case the prisoner

was indicted as an accessory to murder and found guilty, the principal, being convicted, was a witness, and swore positively to the guilt of the accused, but as he had made contradictory statements, and his testimony was in part contradicted, the court entered into an elaborate examination of the other testimony in the case and after a review of it, came to the conclusion that whilst there were powerful reasons to question the credibility of the principal, yet the verdict was not given without corroborating circumstances, and must stand; *Keith's Case*, 10 S. & M. 192.

440. *Material writing: Absence of*. An affidavit of a third person showing the existence of a writing material to the prisoner's defence, is not sufficient to grant a new trial; the prisoner not presenting his own affidavit, alleging sufficient reason why it was not produced on the trial and showing an expectation that it could be produced on a subsequent trial; *Friar's Case*, 3 H. 422.

441. *Improper evidence admitted: Immaterial and Inoperative*. The admission of improper and illegal evidence manifestly immaterial and inoperative on the verdict, will be no ground for a new trial; *Browning's Case*, 4 G. 48, S. P.; *Lyne's Case*, 7 G. 617. When the illegal evidence could not have influenced the verdict, it will not be disturbed; *Lyne's Case*, *supra*.

442. *Same*. And illegal evidence admitted to prove a fact fully established by other evidence, cannot affect the verdict, and will be no ground for setting it aside; *Ib.*

443. *Weight and credit of witness*. A new trial will not be granted on the ground that the jury gave improper weight and credit to the testimony of a witness; *Newcomb's Case*, 8 G. 383.

444. *Cumulative evidence*. A new trial will not be granted to allow a party to introduce new evidence which is merely cumulative, and which does not appear to have been unknown to him before the trial, or out of his reach; *Ib.*

445. *Ex parte affidavits*. The court may disregard ex parte affidavits made in support of a motion for a new trial, when they are highly improbable and inconsistent with the facts appearing on the trial; *Ib.*

446. *Newly discovered evidence*. A new trial will not be granted for newly discovered evidence, where it appears from the affidavits read in support of it, that the party asking the new trial must have necessarily been aware of the evidence when the trial was had; *Frank's Case*, 10 G. 705.

447. *Surprise of counsel*. Motion for a new trial on affidavit of counsel of prisoner that he was taken by surprise upon trial of said cause; that when the case was called, he understood the sheriff to report that all the witnesses for the defence were present but one, for whom subpoenas had been issued, and therefore went into trial of said cause. After the testimony had been adduced on the part of the State, affiant was informed by the sheriff that only two witnesses for defence were present, and these unimportant; that

affiant had misunderstood said sheriff, and was thereby surprised, and not prepared with the expected testimony in said cause (a motion for a continuance on account of absent witnesses had been overruled): *Held*, that motion for new trial was properly overruled; *Lundy's Case*, 44 M. 669.

4. Instructions.

448. *Erroneous, not prejudicial.* A new trial will not be granted for erroneous instructions which are not prejudicial; *Wesley's Case*, 8 G. 327; *McGuire's Case*, 8 G. 369.

See sub-division Instructions, *ante*, 353a, 355.

449. *Record: Instructions "given," or "refused."* A new trial will not be granted upon the ground that the record does not show that instructions asked for by the plaintiff in error, were either given or refused; *Hamilton's Case*, 6 G. 214.

450. *Same: Presumption.* And if the bill of exceptions show that a motion for a new trial was made because the jury disregarded the instructions of the court, it will be presumed that instructions appearing in the record, as asked by the applicant for a new trial, were given; *Ib.*

5. Effect of.

451. *Several counts: Verdict, guilty on some, not guilty on some.* When verdict is not guilty on some counts and guilty on others, a new trial granted will only extend to the counts on which the prisoner was convicted, he having been acquitted of the others; *Morris's Case*, 8 S. & M. 762; *S. P., Hurt's Case*, 3 C. 378. See *post*, 555.

LVIII. Nuisance.

452. *Obstructing streets.* A person obstructing the streets of a town in building a railroad track therein without proper authority, is indictable for committing a nuisance; *Donaher's Case*, 8 S. & M. 649.

LIX. Obstructions to Railroads.

453. *Part of charter Miss. C. R. R. Co.; Public law; Repeal.* So much of the charter of the Miss. C. R. R. Co. as makes provision for the punishment of persons placing obstructions on its track, is a public law of the State, and is superseded and repealed by arts. 163 and 164, p. 600, of the Rev. Code, of 1857; *McCurty's Case*, 8 G. 411.

454. *Indictment.* As to indictment for, see *ante*, 332.

LX. Pardons.

455. *Before conviction: Costs.* A pardon before conviction is a bar to a judgment against the accused for court costs and witness fees; *White's Case*, 42 M. 635.

LXI. Partners.

456. *Liability of, for acts of each other.* The 19th art. of Rev. Code of 1857, p. 199,

introduces a change in the common law as to liability of partners in retailing, and where jointly indicted under that art., they may be convicted and punished, although one of them may have been wholly ignorant of the illegal acts, each being responsible for the illegal acts of his partner, whether he participated in it or not; *Gathing's Case*, 44 M. 343. See *post*, 503b.

LXII. Perjury.

457. *What constitutes.* To constitute perjury, the false swearing must not only be wilful, but corrupt, or intentionally false; and it will be error, therefore, for the court to instruct the jury that they must convict, if the false swearing be wilfully done, without stating substantially that it must be also corrupt; *Cothran's Case*, 10 G. 541.

458. *Affidavits.* Perjury may be committed in an affidavit for a warrant to search for stolen goods in which no particular person is charged with the larceny; *Carpenter's Case*, 4 H. 163.

458a. *Oath to habeas corpus petition.* Perjury may be committed in an oath administered by a justice of the peace, to a petition for a *habeas corpus*, it being within the jurisdiction of a justice of the peace to administer such an oath; *White's Case*, 1 S. & M. 149.

458b. *Materiality of falsehood.* But the falsehood must be material. Hence, if a petitioner for a writ of *habeas corpus* swear falsely in his petition that he was forced to trial, before the justice of the peace who committed him to jail in the absence of his witness, the statement is wholly immaterial as the writ is a writ of right to be always issued upon a sworn petition, stating that the applicant is illegally detained; whatever else he may swear to as inducement is wholly immaterial; *Ib.*

458c. *Same.* Where the record of the proceeding in which the perjury is alleged to have been committed, is produced before the court on the trial for perjury, the materiality of the false statement to the issue in that cause, is a question of law for the court, and it will be error to submit that question to the jury for determination; *Cothran's Case*, 10 G. 541.

458d. *Variance.* If the indictment charges that the perjury was committed in giving evidence in a cause, proof that the party made a false affidavit will not do, unless it be shown that the affidavit was allowed by the parties to be used as evidence; and if the perjury was committed in an affidavit, the indictment must charge either that the accused did corruptly swear and make affidavit of it in writing, or, that he did produce and exhibit a certain affidavit in writing; *Copeland's Case*, 1 C. 257.

LXIII. Pleading and Practice.

See sub-divisions High Court. Indictment. Instructions Jury, *ante*, 397a, 397b. Bail, 78, 79.

459. *Prosecutor.* A prosecutor is not bound to elect whether he will abandon a

civil or criminal prosecution for the same offence, but may proceed with both; *Blenerhassett's Case*, W. 7.

460. *Trial: Sentence.* Defendants separately indicted for the same assault and battery, may be tried jointly against their consent; *Ib.* *Vice versa.* Persons jointly indicted may be tried separately, at option of the State; one may be acquitted and another convicted; but where several are convicted, sentence must be several; the imposition of a joint fine will be erroneous; *Gathing's Case*, 44 M. 343.

461. *Same: Venire.* If a prisoner pleads not guilty and goes to trial, he waives the privilege given by the statutes of having a copy of the indictment of special venire, two days before the trial; *Johnson's Case*, W. 392; S. P., *Durrah's Case*, 44 M. 789. That copy has not been served on prisoner or his counsel, is no ground for quashing, and is ground for postponing the trial; but this is waived by going on in trial; *Durrah's Case*, *supra*.

462. *Plea in felony.* A plea in a felony case must be in proper person; it will be a nullity if the record shows it was put in by an attorney; *McQuillan's Case*, 8 S. & M. 587; S. P., *Wilson's Case*, 42 M. 639. See *ante*, 25.

463. *Same: Record.* The record in a felony case must show that the prisoner was arraigned; *Ib.* See *ante*, 25.

464. *Indictment: Courts: Improper joinder of.* The proper mode to raise the objection of improper joinder of counts, is not by demurrer or motion in arrest of judgment, but by motion to quash, or to compel the prosecutor to elect on which he will proceed; *Brantley's Case*, 13 S. & M. 468. See *ante*, 315.

465. See sub-division Bail, 78, 79.

466. *Demurrer to defendant's plea in abatement: Misdemeanors: Judgment in.* In misdemeanors, if a demurrer be sustained to the defendant's plea in abatement, or be overruled to the replication, the judgment is *respondeat ouster*; *McGuire's Case*, 6 G. 366. See *ante*, 5.

467. *Pleading withdrawn.* The action of the court in overruling a demurrer to a pleading, cannot be assigned as error if the pleading be withdrawn; *Rocco's Case*, 8 G. 357.

468. *Retailing: Indictment.* In an indictment against a druggist for illicit sale of intoxicating liquors, it is not necessary to allege the name of the person to whom it was sold; *Riley's Case*, 43 M. 397.

469. See sub-division Jury, 397a, 397b.

LXIV. Poisoning.

470. *Medicine.* Under the statute (H. C. 521, § 53), it is not necessary to prove that the poison was administered as a medicine; *Sarah's Case*, 6 C. 267.

See sub-division, Indictment, 311.

LXV. Rape.

As to evidence in case of rape, see sub-division. Evidence, 279, 280. See *post*, 521.

471. *Surplusage not duplicity.* An indictment for an attempt to commit a rape, charged the prisoner "with force and arms, in the county aforesaid, in and upon one Eliza Conely, feloniously did make an assault, and her, the said Eliza Conely, feloniously did attempt to ravish, and carnally know, by force, and against her will, and in said attempt did forcibly choke and throw down the said Eliza Conely;" *Held*, that the indictment was not liable to the objection of duplicity, as the last allegation, about the choking, was mere surplusage; *Green's Case*, 1 C. 509.

LXVI. Receiving Stolen Goods.

472. *Possession: Presumption from.* The finding of stolen goods, shortly after the theft, in possession of the accused, and his denial of having them, is not, *per se*, presumptive evidence that he received them knowing them to be stolen, but rather that he stole them. This is the presumption that would generally arise, though there might be circumstances connected with it which would raise the presumption that he was the guilty receiver of stolen goods; *Sartorius' Case*, 2 C. 602.

See *ante*, 357.

473. *Purchase at undervalue.* The purchase of stolen goods under their value, will not alone raise the presumption that the buyer knew they were stolen. But the purchase of such goods, under circumstances calculated to awaken suspicion, and at a price greatly below their value, will raise such presumption; *Ib.*

474. *Denial of possession.* The denial by a party that he has goods (which have been stolen) in his possession, is presumptive evidence of guilty knowledge. But if such denial be the result of a misunderstanding, or from fear of consequences, it will not have that effect. And the prisoner has a right to have that view of it submitted to the jury by a charge, especially when the evidence shows that he was a foreigner, and did not understand our language well; *Ib.*

LXVII. Record.

See sub-divisions. Grand Jury. Jury. Indictment. Instructions. High Court.

475. *Time and place of holding court.* If the time and place of holding the court appear in any part of the record, it is sufficient; *Loper's Case*, 3 H. 429.

476. *Construed together.* The whole of a record must be construed together; and that which is uncertain in one part, may be rendered clear by that which is certain in another; *Ib.*

477. *Certificate of clerk.* A separate certificate of the clerk to each paper in the record is sufficient, and if they be styled "originals," by him, it will be regarded as a clerical error; *Ib.*

478. *May aid indictment.* The record

may aid the indictment, in showing that the grand jury were sworn, but not *e converso*; *Cody's Case* 3 H. 27.

479. *Caption*. The caption to the indictment must set out with certainty not only the style of the court, the judge presiding, but the time and place when and where it was found, and the jurors by whom it was found; *Thomas' Case*, 5 H. 20.

480. *Entry of proceedings of former term by clerk*. It is incompetent for the clerk to enter on the minutes of the court what transpired at a prior term of the court; where, therefore, it was recited in a criminal case, "that the said defendant having been arraigned at the last term of this court, pleaded not guilty, and put himself upon the country," and there was in fact no arraignment or plea at the last term appearing on the minutes thereof, it was held that it did not appear that the accused was legally arraigned, and it was error; *McQuillan's Case*, 8 S. & M. 587.

481. *Forged or altered*. Anything produced as a record, may be shown to be forged or altered; *Rawl's Case*, 8 S. & M. 299.

482. *Certificate of clerk*. The following certificate by the clerk to the record of conviction of the principal, is sufficient to make the record evidence on the trial of the accessory: "The State of Mississippi, Claiborne county, ss.: I, Dan. McDougal, clerk of the Circuit Court in and for the State and county aforesaid, do hereby certify, that the foregoing sixteen pages and this page, contain a full and perfect transcript of the papers in relation to the change of venue from Hinds county, now on file in my office, as well as of the papers now on file in my office in relation to the proceedings in this court, and also a perfect transcript of all proceedings had here in the case stated, viz.: *The State of Mississippi v. Jack Fountain Silas*, charged and convicted of the crime of murder, and sentenced as set forth in said transcript, as full as the same appears on record in my office, given under my hand and seal of office," &c; *Keithler's Case*, 10 S. & M. 192. See *ante*, 477.

483. *Caption*. When the caption to the record shows the proper organization of the court at the time at which the trial was had, it is unnecessary that there should be another caption showing the organization of the court at the time when the indictment was found; *McCarty's Case*, 4 C. 299. See *ante*, 479.

484. *Record: What must show*. The record must show affirmatively those indispensable facts without which the judgment would be void; such as the organization of the court; its jurisdiction of the subject matter, and of the parties; that a cause was made up for trial; that it was (if proper for a jury) submitted to a jury sworn to try it; that a verdict was rendered and a judgment awarded; and also out of regard for the constitutional provision that the accused shall be confronted with the witnesses against him, it is also held that the record must show that he was present during the trial; but the rule extends no further, and does not require that the inci-

dental steps taken during the trial, which are matters *in pais*, such as swearing the witnesses and their examination, or the disposition made of the jury during the trial; as to these and other incidents of the trial the presumption is that they were rightly done, and if an irregularity in that respect be complained of, it must be shown by a bill of exceptions; *Dyson's Case*, 4 C. 362.

485. *Same: Nothing presumed for or against*. It is true that nothing can be presumed for or against a record, except what appears substantially on its face; but this rule applies only to statements of the record, or omissions of statements of the record in relation to matters which by law must be incorporated in it; *Ib.* See *ante*, 400, 401, 402.)

486. *Same: Special venire*. A special venire *facias* is no part of the record in a criminal case, and objections to it will not be noticed in the High Court, unless incorporated in a bill of exceptions; *Newcomb's Case*, 8 G. 383.

487. See sub-division Indictment, *ante*, 286.

LXVIII. Repeal of Criminal Statute.

488. *Statutory pardon*. Where an act is passed imposing a new and greater penalty for the commission of an offence, there is no statutory pardon of offences committed before its passage, if the old law be expressly continued in force as to offences committed under it; *Oliver's Case*, 5 H. 14.

489. *Statute after verdict: Before judgment*. A verdict of guilty was found against the defendant, and before judgment a statute was passed making three degrees in the crime, and affixing a punishment to each degree: *Held*, that before judgment, it must be ascertained by verdict in which of these degrees the defendant is guilty; *Thomas's Case*, 5 H. 20. See *post*, 576.

490. *Mitigated punishment*. Where, after an offence is committed, the punishment is mitigated by the Legislature, the defendant, on conviction, can elect which punishment shall be inflicted; but if he fail to elect, it will be proper to punish him according to the law when the offence was committed, in a case where the last act expressly provides that nothing in it shall affect any offence, penalty or forfeiture committed or incurred before its passage, and directs the mitigated punishment to be inflicted; *Clarke's Case*, 1 C. 261.

491. *Statute changing offence from felony to misdemeanor*. If after the commission of a crime, its grade is reduced from a felony to a misdemeanor, it is indictable and punishable as a misdemeanor only; *Harlan's Case*, 41 M. 566.

492. *Effect of repeal or expiration of law*. After the repeal or expiration of a law, no penalty can be enforced or punishment inflicted for its violation, committed whilst it was in force, unless some special provision be made for that purpose by statute; *Teague's Case*, 10 G. 516.

493. *Same: Case in judgment.* A party was indicted for selling liquors in violation of a statute which prohibited the sale of vinous and spirituous liquors within a certain locality, in any quantity whatever; he entered into recognizance for his appearance, which he forfeited, and judgment *nisi* was entered against him and his sureties. The act under which he was indicted was then repealed, but the repealing act provided "that it should not be so construed as to release or discharge from punishment any who had violated the act intended to be repealed by selling vinous and spirituous liquors in less quantities than one gallon." *Held*, that this act must be so construed as to save a prosecution under the first act, although the indictment did not charge the sale in less quantities than one gallon, and that on a trial of that indictment, after the date of the repealing act, the State should be held to prove that the sale was in less quantity than one gallon, and therefore the judgment *nisi* ought to be made final; *Id.*

494. *Rights and remedies.* Rev. Code of 1857, art. 6, p. 44, which provides "that no offence committed previous to the time the code went into operation, and no indictment or prosecution pending at that time, should be affected by the adoption of the code, but should remain subject to the laws in force before the adoption of the code, except that all proceedings had after the code took effect, should be conducted according to its provisions," applies the code only to the modes and forms of proceeding upon indictments for offences committed prior to its adoption, and does not affect the rights of parties prosecuted for such offences as to any substantial rights of defence which existed under the law in force when the code went into operation; *Josephine's Case*, 10 G. 613.

495. *Same.* The right to be informed by the indictment as to the degree of guilt charged in it, whether as principal or accessory, existed by the law of the State when the Rev. Code of 1857 went into effect. This right is substantial and material to the defendant; and hence, is not taken away as to offences committed prior to its passage, by art. 2, p. 572, which allows an accessory before the fact to be indicted as a principal; *Id.* See *ante*, 15.

LXIX. Recognizance.

See RECOGNIZANCE.

See sub-division Bail.

496. *Conditions.* The condition of a recognizance being that a defendant shall appear before the Circuit Court of the county, on the 4th Monday in May, that being the time fixed by law for the commencing of the court, and no year being specified, held sufficient to fix the liability of the surety in case of default at next term of court of principal to appear; *Kellogg's Case*, 43 M. 57.

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LXX. Retailing.

1. Indictment and Proof.

497. *Duplicity.* An indictment for retailing, which charged that the defendant did unlawfully sell and retail vinous and spirituous liquors, to wit: wine, rum, gin, brandy, and whiskey, in a less quantity than one gallon, to persons to the jurors unknown, and that the said defendant did then and there suffer and permit the said vinous and spirituous liquors so sold and retailed in less quantity than one gallon, to be drunk in and about the house of him, the said defendant, contrary, &c., is good; *Kliffeld's Case*, 4 H. 304; *S. P., Noe's Case*, 4 H. 330; *Contra, Miller's Case*, 5 H. 250.

498. *Innkeeper.* And a count charging that the defendant, as a tavern and innkeeper, did unlawfully and gratuitously, and without special charge therefor, offer, give, and deliver vinous and spirituous liquors, to wit: wine, gin, rum, brandy and whiskey in less quantities than one gallon, to divers persons to the jurors unknown, which said persons were then and there the guests of the said defendant, contrary, &c., is good; *Id.*; *S. P., Noe's Case*, 4 H. 330; *Miller's Case*, 5 H. 250.

499. *General charge of violation of statute not good.* But a count charging that the defendant, tavernkeeper and innkeeper, &c., did then and there, by evasion and subterfuge and chicanery, violate the plain meaning and intent of an act and law of the State of Mississippi, entitled an act, &c., for the suppression of tippling houses, &c., being but a general charge of the violation of a criminal statute, is bad; *Id.*; *S. P., Noe's Case*, 4 H. 330.

500. *Locality material.* When, by law, the license for retailing, and the fines for violating the retailing law go to a city in which the retailing is done, it is necessary in an indictment for the act of retailing without license in that city, to aver that the retailing was done in the city, and proof of the locality is material, and if the proof show the crime committed outside of the city, but in the county, there can be no conviction; *Legori's Case*, 8 S. & M. 697.

501. *Same: Allegata: Probata.* And in such case if the indictment charges the retailing in the county, and the proof be that it was in the city, there can be no conviction, for under the indictment no proof was competent, except of a retailing in the county outside of the city limits; *Bolto's Case*, 4 C. 108.

502. *Proof.* Where the indictment charges the prisoner with selling rum, whiskey, brandy, and gin, proof that he sold any of them in violation of law, is sufficient; *Murphy's Case*, 6 C. 637.

503. *University of Mississippi.* The sale of vinous and spirituous liquors within five miles of the University of Mississippi is regulated by special acts provided for that express purpose, and is not within the general law of the State, which prohibits druggists, &c., from selling such liquors for culinary, medicinal

and sacramental purposes, unless they first file an affidavit on that subject in probate clerk's office; *Henwood's Case*, 41 M. 579.

503a. *Druggist: Good faith.* A druggist selling vinous and spirituous liquors in less quantity than one gallon, must show by proof other than the declarations of the purchaser, that it was for medical purposes, to exempt him from the penalties of retailing; *Haynie's Case*, 3 G. 400; S. P., *McGuire's Case*, 8 G. 369.

503b. *Partners.* As a general rule, a partner is not liable for the criminal act of his associate done without his knowledge or consent; but this rule is changed by Rev. Code of 1857, p. 199, art. 9, in relation to sales made by licensed retailers to an intoxicated person; in such cases, one partner is liable for the act of the other, though he were not present and did not consent thereto; *Whitton & Ford's Case*, 8 G. 379; S. P., *Gathings's Case*, 44 M. 343; *Riley's Case*, 43 M. 397. See *ante*, 456.

503c. *Sales to intoxicated persons: Belief of sellers.* It is not necessary to a conviction under this article that the purchaser was intoxicated; it is sufficient if he actually were so, and the seller had good reason to believe it; *Ib.*

2. License.

504. *When void.* A license granted to retail vinous and spirituous liquors in less quantities than one gallon, is void, unless there was a petition signed by a majority of the legal voters in the town, recommending the licensee to be of good reputation and a sober and suitable person; and unless, further, said petition lay over one month for consideration and for counter petitions; and this rule of the general law on this subject is also the rule for the granting of licenses in the town of Holly Springs; *House's Case*, 41 M. 737.

505. *License: Proof of.* In a trial for retailing, the State need not prove the negative averment that the defendant had no license; *Easterling's Case*, 6 G. 210; S. P., *Thomas' Case*, 8 G. 353. Defendant must show his license if he relies on this fact as a defence; *Thomas' Case*, *supra*.

505a. *Incorporated cities and towns: Act of 1865* Under act of November 4th, 1865, the corporate authorities of all cities and towns in this State have the exclusive right to grant or refuse licenses to retail vinous and spirituous liquor within their corporate limits; and a license from such corporate authorities, duly obtained, authorized the holder of it to sell without any action by the Board of Police of the county as a prerequisite to the exercise of such right of sale. The Boards of Police might tax the privilege after it was granted by the corporate authorities, but the power to grant was wholly with the corporate authorities; *Lick's Case*, 42 M. 316. (Code of 1871, §§ 2,457, 2,459, are substantially, on this subject, same as act of November 4th, 1865.)

3. Sale.

506. *What is.* Where any act is to be done by the vendor, in order to ascertain the value, quantity or quality of the goods sold, the sale is not complete; and if the sale be of a part of liquors, or other goods, in bulk, the sale is not complete until the part sold be measured and separated from the remaining goods of the vendor; but if there be a partial measurement to the purchaser, and a delivery to, and acceptance by the vendee, of the part so separated, the sale is complete as to that part; *Thomas' Case*, 8 G. 353.

507. *Same.* Therefore, a contract for the sale of a gallon of vinous and spirituous liquors, but a measurement and delivery of a part only, is a sale of a less quantity than a gallon, and will subject the unlicensed seller to the penalty of the act against retailing without license; *Ib.*

508. *Agreement to sell: Cash: Credit.* On the trial of an indictment for retailing, proof of an agreement to sell is not sufficient, but there must be proof of an actual delivery of the liquors. There need not be proof of payment, because a sale on a credit is as much a violation of law, as a sale for cash; *Riley's Case*, 43 M. 397. See *ante*, 188.

LXXI. Robbery.

509. *What constitutes.* To constitute robbery, it is not necessary that the person robbed should have been first put in fear of his person or property; if the goods be taken either by violence or putting in fear the owner, it is sufficient to make the felonious taking a robbery; *McDaniel's Case*, 8 S. & M. 401.

510. *Same: Statutory.* The statutory definition of robbery in the first degree, viz: "The felonious taking the personal property of another in his presence, or from his person, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person," does not alter the common law definition of robbery; *Ib.*

LXXII. Slavery, as affected by Crime.

511. *Slaves: Criminal protection of.* Murder may be committed by killing a slave, as well as a freeman; *Jones' Case*, W. 83. The ancient laws of Rome giving power over the life of the slave, were never in force here; *Ib.*

512. *Same: Common law.* The rules of the common law on the subject of homicide, apply to the killing of a slave by the master or overseer, in inflicting on him cruel or unusual punishment; *Kelly & Little's Case*, 38. & M. 518. See sub-division Homicide, 265.

513. *Same: Statute.* By the statutes of this State, the master may be indicted for inflicting cruel or unusual punishment on his own slave; *Ib.*; S. P., *Scott's Case*, 2 G. 473.

514. *Same.* What is cruel and unusual punishment to a slave, is a matter for the consideration of the jury; *Ib.*

515. *Traffic with.* A permission given to a slave by a master, to sell or buy any commodity, is sufficient to enable him to sell it to, or buy it from, any person whatsoever; it is not necessary that the permission should be given to the buyer or seller; *Jolly's Case*, 8 S. & M. 145.

516. *Same: Permission given for purpose of detection.* The delivery, by the master, of money to a slave, with instructions to buy whiskey from a person who he suspects has been selling whiskey to his slave, contrary to law, and for the purpose of detecting him, does not excuse the sale of the whiskey to the slave; *Ib.*

517. *Same.* And in such a case, it will not legalize the selling that the master, with the view of detecting the prisoner in an illegal sale, and without the prisoner's knowledge, gave the negro permission to sell certain articles to the prisoner, for which the negro received, in exchange, the liquor; the master being present, also, without the prisoner's knowledge (citing *Jolly's Case*, 8 S. & M. 145); *Bond's Case*, 13 S. & M. 265.

518. *Negro prima facie slave.* A negro is, by the laws of Mississippi, *prima facie* a slave, and if a person, not the owner, take up a runaway slave, with the intent of feloniously converting him to his own use, knowing, or having the means of knowing, his master or owner, it will be larceny; *Coon's Case*, 13 S. & M. 246. See sub-division Larceny, *ante*, 405.

519. *Permission of master: Absence of must be averred and proved.* It is no offence to sell vinous and spirituous liquors to a slave; it is only so when done without the permission of the master, &c.; and hence, this want of permission is an essential part of the offence, and must be proven affirmatively by the State; upon mere proof of the sale, the burden is not thrown on the accused to show the permission; *McGuire's Case*, 13 S. & M. 257.

520. *Express malice.* The statute defining the capital offence of an assault, by a slave, with intent to kill and murder a white man with "express malice," uses the words express malice as descriptive of the offence, and they must be used in the indictment; the use of the words "malice aforethought," will not do, as they include implied as well as express malice; and if the jury in their verdict find the assault was with "express malice," it will not aid the indictment. Without the use of these words, the offence will only be a misdemeanor, and, on conviction, will be punished as such; *Anthony's Case*, 13 S. & M. 263.

521. *Rape by slave.* There was no statute in 1850, in this State, punishing the offence of rape, by a slave, on a white female, unless such offence was embraced in sec. 55, p. 521, *Hutch. Code*, which provided for capital punishment where there was an attempt to commit such offence; *Wash's Case*, 14 S. & M. 120; *S. P.*, *George's Case*, 8 G. 316. Our statute, defining and punishing rape, does not specifically include a rape by a slave on a

female slave, and an indictment for such an offence is a nullity; *George's Case*, *supra*.

522. *Ownership of.* Whether it is essential to the conviction of a slave of a capital offence to prove his ownership as laid in the indictment; *Quære?* But if the indictment charge that he is the property of A., and proof shows him to be the property of A. and B., it is sufficient. Hence, in such a case, if there be proof tending to show he is the property of A., it will not be error to exclude testimony on behalf of prisoner which tends to show that he belongs to A. and B., since if this were proven, it would be of no benefit to the prisoner; *Wash's Case*, 14 S. & M. 120.

523. *Indictment: Capital offence.* It is unnecessary in an indictment against a slave for an assault with intent to kill and murder his master, or employer, in resistance of legal chastisement, in order to charge a capital offence, that it should be charged to have been done with express malice: *Aliter*, where the charge is for an assault with intent to kill and murder a white person not the master, &c., and not in resistance of legal chastisement (see *Anthony's Case*, 13 S. & M. 263); *Ike's Case*, 1 C. 525.

524. *Agent: Surplusage.* An indictment against a person having control of a slave for permitting him to be quartered in a city or town on a lot not adjoining that on which the defendant lived, is not bad, by virtue of the averment that the defendant was agent and controller of the slave; the word agent in that connection has no meaning, and may be rejected as surplusage; *Tift's Case*, 1 C. 567.

525. *Proof: Statute.* Under the 3d section of the Act of 1850, to suppress trading with slaves, if it be proven that the slave came out of the prisoner's house with spirituous liquor which he did not take into the house, it will be presumed that the prisoner knew of his getting it; *Murphy's Case*, 6 C. 637.

526. *Same.* Under that act, neither the identity of the slave (with whom the traffic was carried on), nor his ownership, is an ingredient of the offence; but if alleged, they must be proven; but the same strictness is not required in the proof as in proof of the *corpus delicti*; *Ib.*

See *ante*, 296, 304.

527. *Homicide: Evidence.* A slave indicted for the murder of his overseer, cannot introduce as evidence in his defence, that the deceased, a few hours before the killing, had forced the prisoner's wife to submit to sexual intercourse with him, and that this had been communicated to him before the killing; *Alfred's Case*, 8 G. 296.

528. *American slavery.* Slavery, as it exists in the United States, was unknown to the common law of England; and hence, its provisions are inapplicable to injuries inflicted on or committed by slaves in this State; *George's Case*, 8 G. 316.

529. *Same: Statutes.* Statutory enactments do not extend to or include slaves, either to

protect or punish them, unless they be specially named or be included by necessary implication; *Ib.* See *ante*, 511, 512.

530. *Master and employer: Meaning of.* The son-in-law of a non-resident owner of a plantation and slaves, who resides on the premises and manages and controls the slaves, though without an agreement as to the terms on which this is done, is a master and employer of the slaves within the meaning of the statute providing for the punishment of an assault and battery with intent to kill, by slaves on their master and employer; *Jeff's Case*, 8 G. 321. And under that statute, the specific intent to kill is the gist of the offence, and must be shown, though the unlawful use of a deadly weapon is presumptive evidence of such intent; *Ib.*; S. P., S. C., 10 G. 593.

531. *For rule regulating power of master to subdue his rebellious slave, and duty of slave to submit to master's authority*, see *Oliver's Case*, 10 G. 526.

LXXIII. Special Venire.

532. *Return.* A return, "served a true copy of the indictment, *venire facias* and *venire* on the prisoner," is a sufficient service of the panel; *Shaffer's Case*, 1 H. 238.

533. *Must come from body of the county.* A command to the sheriff in a special *venire*, to summon a jury "residing as near as may be to the place where the offence was committed," is ground for reversing the judgment; *Ib.*

534. *"From" instead of "of," no objection.* It is no objection to a *venire facias*, that it commands the sheriff to summon the panel "from," instead of "of the body of the county;" *Woodside's Case*, 2 H. 655. See *ante*, 387b.

535. *Power of circuit courts as oyer and terminer courts.* The circuit courts as courts of oyer and terminer, have power to issue writs tested and returnable within the same term; and the Act of 1833, prescribing the mode of summoning and empanelling juries in capital cases, is only declaratory of the powers which the circuit courts before possessed; *Ib.* See *ante*, 387a.

536. *Waiver.* If the prisoner go to trial without objecting that a copy of the *venire* and indictment had been served on him according to law, it is a waiver; *Loper's Case*, 3 H. 429.

537. *Objection to venire.* It is no objection to a special *venire*, that the same person's name appears on it twice, as being summoned thereon, it appearing to have occurred from inadvertence, without collusion or improper design; *McCarty's Case*, 4 C. 299; S. P., *Browning's Case*, 4 G. 48. A mistake in the copy of the special *venire* furnished to the prisoner, as to the Christian name of one of the persons summoned, if unintentional, is no ground for prisoner's objection to proceed with the trial; *Browning's Case*, *supra*.

538. *Return.* The sheriff need not state in his return on a special *venire*, that the jurors are good and lawful men of the county; *Week's Case*, 2 G. 490.

539. *Special venire is no part of the record.* A special *venire* is no part of the record in a criminal case; *Newcomb's Case*, 8 G. 383. See *ante*, 486.

540. *Cause for quashal of.* The causes for which a special *venire* may be quashed, must be some fraudulent misconduct of the officer, or some manifest error in selecting, or summoning, or drawing, not pursuing the law. Hence, it is no ground of quashal, that one of the jurors named in it, was not a citizen of the United States; that would have been good cause of challenge, but is not a defect in the writ; *Durrah's Case*, 44 M. 789.

LXXIV. Threats.

541. *Admissibility in evidence.* The accused in a charge of homicide, cannot give in evidence in his defence, threats made by the deceased, unless they were communicated to him before the killing; *Newcomb's Case*, 8 G. 383. See *ante*, 185.

542. *Defence in homicide.* Threats however deliberately made, do not justify an assault and battery, much less the taking of life of the party making them; *Evan's Case*, 44 M. 762.

LXXV. Time.

543. *Same.* See *Oliver's Case*, 5 H. 14. Need not be proved as laid, unless an ingredient or descriptive of the offence; *McCarty's Case*, 8 G. 411.

LXXVI. Trial.

544. *Waiver.* If the defendant go to trial without objection, he cannot complain that copies of the indictment and special *venire*, were not served on him according to law; *Loper's Case*, 3 H. 429 (see sub-division Special *Venire*, *ante*, 536; citing *Johnson's Case*, W. 392); S. P., *Durrah's Case*, 44 M. 789.

545. *Time of trial.* A prisoner may be tried on an indictment at the same term at which it is found; *Noe's Case*, 4 H. 330.

546. *Constitutional "speedy trial."* By a speedy trial, as guaranteed by the constitution to a person indicted for crime, is intended a trial according to fixed rules, regulations and proceedings of law, free from vexatious, capricious and oppressive delays, manufactured by the ministers of justice; and any delay which necessarily arises from an observance of these rules, is not included in the meaning of the constitution; *Nixon's Case*, 2 S. & M. 497.

547. *Two days to examine indictment and copy of venire.* The statute of this State, which gives the accused a right to examine the indictment, "at least two entire days" before the trial, intends thereby two entire judicial days, excluding from the computation the fraction of that day on which it is served; *Ib.* (By Code of 1857 and 1871, reduced to "one day.")

548. *Power of court to continue case. without violating right to speedy trial.* When a prisoner indicted for murder, demands a trial at the then present term of the court, but refuses to waive the two days allowed to him to examine the indictment, and after allowing that time, the trial could not commence before Saturday, the last day of the term, it was held proper for the court to refuse to commence the trial, which could not reasonably be expected to be concluded at that term, and to continue the case till next term; *Ib.*

549. *Motions in absence of prisoner.* The fact that motions to quash the *venire facias* and for an *alias venire facias* were made after arraignment, and before trial, in the absence of the prisoner, and overruled, is no ground for exception to the verdict. The motions may have been overruled because of the prisoner's absence; *Kelly & Little's Case*, 3 S. & M. 518.

550. *Absence of prisoner when sentence pronounced.* But the presence of the prisoner is essential when sentence is pronounced, and the record must show affirmatively his presence; if it do not, the High Court will set aside the judgment and remand the cause that judgment may be properly pronounced; *Ib.*

551. *Same.* In a trial for murder, the record must show affirmatively the presence of the prisoner during the whole trial; and the fact that the record shows he propounded a question to a witness on the trial, will not show his presence, since he may have propounded the question in writing; *Scragg's Case*, 8 S. & M. 722.

552. *Same: How waived.* Defendant's right to be present when the verdict is returned in a felony case, is waived by his voluntary escape or withdrawal from the court room during the trial; *Price's Case*, 7 G. 531.

553. *Lesser offence in greater.* Where the prisoner, indicted for an assault and battery with intent to kill and murder, is convicted of an assault with intent to commit manslaughter, he is entitled to be discharged; the verdict being a good acquittal of the offence charged, and insufficient to convict of the offence it finds, since that is different from, and not an inferior degree of the charge in the indictment; *Morman's Case*, 2 C. 54.

554. *Prisoner must plead before trial.* It will be error to try a prisoner until he has first pleaded to the indictment; *Sortorius' Case*, 2 C. 602. See *ante*, 25, 462.

555. *Verdict set aside does not open counts on which prisoner was acquitted.* Where under an indictment for murder, the prisoner is convicted of manslaughter, this is in effect an acquittal of murder; and if the verdict for manslaughter be set aside by the High Court, the verdict of acquittal will, nevertheless, stand, as the writ of error did not extend to the verdict so far as it was an acquittal, but only to so much of it as was against the prisoner; *Hurt's Case*, 3 C. 378. See *ante*, 451.

556. *Right of court to discharge in felony.* The court has the right to discharge a jury

in a felony case, without the prisoner's consent, when the ends of public justice require it, but the right must be exercised with the greatest caution and only under urgent circumstances, and for plain and obvious causes; *Price's Case*, 7 G. 531; S. P., *Josephine's Case*, 10 G. 613.

557. *Same: Action of court below presumed right.* When the record merely shows that the jury were discharged from rendering their verdict, without stating the circumstances under which it was done, the action of the court below will be presumed correct; *Ib.*

559. *Right to compel prosecutor to elect on which count to proceed.* When the indictment contains two counts charging distinct offences, the prisoner has no right to compel the prosecutor to elect on which he will proceed, but the court in its discretion, may do so; *Strawhern & Grizzle's Case*, 8 G. 422; citing, *Sarah's Case*, 6 C. 267.

560. *Offence included within another.* By art. 305, sec. 62, p. 622, of Rev. Code of 1857, § 2809, Code of 1871, the defendant in a criminal case, may be convicted of any offence necessarily included in, and a constituent part of the offence charged in the indictment; and hence, under an indictment for an assault with intent to kill, the defendant may be convicted of a common assault without such intent; *Gipson's Case*, 9 G. 295.

LXXVII. Twice in Jeopardy.

See sub-division Autrefois Acquit and Convict.

561. *Invalid indictment.* A conviction or acquittal on an invalid indictment, is no bar to a second prosecution; and hence, an acquittal on an indictment for stealing a negro man, is no bar to a second prosecution for stealing a negro man slave; *McGraw's Case*, W. 208; S. P., *Kohlheiner's Case*, 10 G. 548.

562. *Right of court in felony to discharge jury without prisoner's consent.* In a felony not capital, if the jury are unable to agree when the term of the court is about to expire, they may be discharged without the consent of the accused, and this may be done even in a capital case when there is a strict necessity for it; *Moore's Case*, W. 134; S. P., *Price's Case*, 7 G. 531; *Josephine's Case*, 10 G. 613. See *ante*, 63, 556.

563. *Plea must allege either conviction or acquittal.* A plea of former jeopardy which does not allege either a conviction or acquittal, is not good; *Hare's Case*, 4 H. 187; S. P., *Price's Case*, 7 G. 531. The constitutional rule which protects from being put twice in jeopardy of life or limb for the same offence, means that no person, after acquittal or conviction, shall be tried again for that offence; it does not prohibit the court from discharging the jury in a criminal case from giving a verdict; *Price's Case*, *supra*; S. P., *Josephine's Case*, 10 G. 613.

LXXVIII. Venue.

564. *When certiorari may be awarded.* A *certiorari* may be awarded by the court to which the venue is changed to complete a defective record, and this, too, after verdict; *Loper's Case*, 3 H. 429. See *ante*, 86, 87.

565. *Clerk's certificate.* A separate certificate of the clerk to each paper in the record on change of venue is sufficient, and if he style them "originals," it is only a clerical error; *Ib.* See *ante*, 477.

566. *Prisoner stopped to say change is not made on sufficient evidence.* The prisoner cannot object that an order for a change of venue, made on his application, is not supported by proper proof. The court had jurisdiction to make the order, and its judgment on the proof is conclusive; *Ib.*

567. *County where indictment was found.* The offence must be proven to have been committed in the county in which the indictment was found, or the court will have no jurisdiction, and if the bill of exceptions certify that it contains all the evidence, and there be no proof of venue in it, the verdict will be set aside, though no objection was made on that point in the court below; *Vaughan's Case*, 3 S. & M. 553 (see *ante*, 80); S. P., *Coon's Case*, 13 S. & M. 246.

568. *Same.* But this may be shown by circumstances, and in this case the prisoner was found in possession of a stolen slave in Mobile, Alabama, ten days after his and the slave's disappearance from Wilkinson county, Mississippi, where they both resided, and the court reviewed all the circumstances, and concluded that proof of the larceny in Wilkinson county was sufficient; *Coon's Case*, 13 S. & M. 246; S. P., *Rigg's Case*, 1 G. 635. Venue may be proved by circumstances, and reference to localities familiar to the jury; *Rigg's Case*, *supra*.

569. *Proof of venue essential.* If a party be convicted of an offence, without proof of the fact that it was committed in the county in which the venue is laid, the verdict and judgment will be void. This proof is essential; *Green's Case*, 1 C. 509.

570. *Certified copies.* On a change of venue, not the original but only certified copies of the papers are transmitted, and in such case the defendant is tried on the copy of the indictment; *Browning's Case*, 1 G. 656; S. P., *Browning's Case*, 4 G. 48.

571. *Record transmitted.* Also in case of change of venue, the record transmitted must appear to be a record of the proceedings upon the indictment on which the prisoner is tried; *Jenkins' Case*, 1 G. 408.

572. *Ex parte affidavits not conclusive of.* On an application for a change of venue, the court may examine witnesses to ascertain if there be good ground for it; *Week's Case*, 2 G. 490; S. P., *Mask's Case*, 3 G. 406.

573. *Exceptions to.* That exceptions to sufficiency of proof of venue must be specific, see *Hamilton's Case*, 6 G. 210. See *ante*, 567.

LXXIX. Verdict.

See sub-divisions. Jury. Indictment.

574. *Sealed verdict.* By assent of parties, or direction of the court, the jury may bring in a sealed verdict, deposit it with the clerk, and then separate before it is opened and read; *Friar's Case*, 3 H. 422. But in such case the jury must be present when it is read, and must then assent to it, and they may then be polled, and if any disagree they are sent out again to deliberate; *Ib.*

575. *Juror cannot impeach.* The affidavit of a juror cannot be heard to impeach his verdict, for instance, that he agreed to the verdict on condition that his fellows would sign a letter to the judge, recommending a new trial; *Ib.* See *ante*, 397.

576. *Degrees of crime.* When there are degrees in the crime, the verdict must show in which of the degrees the defendant is guilty; *Thomas' Case*, 5 H. 20. See *ante*, 489.

577. *General verdicts of guilty: Several counts.* A general verdict of guilty is good, if there be one or more good counts in the indictments, though there be a bad count; *Miller's Case*, 5 H. 250; S. P., *Scott's Case*, 2 G. 473. See *ante*, 314.

578. *Same.* When there are several counts, and the verdict be guilty as to some, and there be no special finding as to the others, the verdict will be good, and will be considered as a verdict of acquittal on the counts on which there was no finding; *Swinney's Case*, 8 S. & M. 576; *Morris' Case*, 8 S. & M. 762.

579. *Same.* If there be a good count in an indictment, and the verdict of conviction be on it; it is no objection that a bad count be joined with it; *Brantley's Case*, 13 S. & M. 468.

580. *Same.* And so if the verdict be general without specifying on which count it is found, it will be good, for it will be referred to the good count, and this is the rule in all classes of offences, including capital felonies. *Wash's Case*, 14 S. & M. 120. See *ante*, 597.

581. *Greater including lesser.* When an accusation includes an offence of an inferior degree, the jury may discharge the prisoner of the higher, and convict of the lesser, and a general verdict of conviction of the lesser is an acquittal of the higher, though there be no express finding as to it; *King's Case*, 5 H. 730; S. P., *Heward's Case*, 13 S. & M. 261; *Hurt's Case*, 3 C. 378.

582. *Verdict: Several counts.* When the indictment is for grand larceny (a felony), in one count and for receiving stolen goods in another count, and the verdict is general on both counts, but finds the value of the property to be of such an amount as makes it *petit larceny*, and, therefore, a misdemeanor as to larceny, but it still is a felony when applied to the count for receiving the goods (as to which the offence is felony whatever be the value of the goods), no judgment can be rendered; for the court cannot know whether

the party is convicted of a felony or a misdemeanor; *Jenkins' Case*, 41 M. 582.

583. *Ambiguous or doubtful verdict may be inquired of by judge.* If there be any doubt or uncertainty in the language employed by a jury in returning their verdict, the judge may make such inquiry of them as will enable him to understand their will and intention, and may then direct the verdict thus ascertained to be recorded; *Gipson's Case*, 9 G. 295; *S. P., Shive's Case*, 42 M. 331.

584. *Descriptive words in a verdict do not vitiate.* Where the verdict convicts the accused of an offence for which he could be properly tried under the indictment, the unnecessary addition of words descriptive of the character of the offence in point of aggravation, will not vitiate it; and hence, under an indictment for an assault with intent to kill and murder, a verdict of "guilty of an assault in the attempt to commit manslaughter" is good, for the verdict is a good finding as to the assault; the descriptive words may be treated as surplusage; *Ib.*

LXXX. Witness.

See sub-division Evidence, 174, 175, 176, 177, 178, 179, 180, 181, 170.

585. *Prosecutor: Competency of.* The prosecutor, though liable for costs, if prosecution be frivolous, is a competent witness for the State; *Blennerhasset's Case*, W. 7.

586. *Co-defendants. competency of.* When several defendants are tried jointly for the same offence, though on separate indictments, one is not a competent witness for the other, unless no proof of guilt is offered against the defendant proposed as a witness; *Ib.*

587. *Voluntary withdrawal of.* The voluntary withdrawal of a witness subpoenaed on behalf of the State, is no ground for a new trial, especially where his testimony is not shown to be material for the defendant; *Ib.* See *ante*, 432.

588. *Statutory capacitation of.* Under the statute of this State, providing that no conviction for any offence, excepting perjury and subornation of perjury, shall disqualify or render such person incompetent to be a witness in any case, civil or criminal, but the conviction should only go to his credibility; it was held that a principal found guilty of murder and condemned to be hanged, was a competent witness against a person indicted as accessory before the fact to the same murder. The statute was designed to remove disability; mere conviction never disqualified; it was the judgment which disqualified; the statute must, therefore, be considered to have reference to the judgment; *Keithler's Case*, 10 S. & M. 192. And since the foregoing statute, a condemned principal is a competent witness against the accessory, and the jury are the judges of his credibility; *Ib.* See *ante*, 7.

589. *Weight and value of testimony of accomplice.* A voluntary confession made by the accused, setting out the circumstances in

detail of the transactions under investigation against him, is entitled to but little weight, as it is but natural that one accused of crime should endeavor to palliate his guilt by excuses; and if a different statement should be afterwards made by the party as a witness under oath; and when he is under sentence of death, it will be for the jury to say whether they will believe him on account of such discrepancies; *Ib.*

590. *Mode of discrediting.* It is not competent, in order to discredit a witness in a criminal case, to introduce the statement of the witness as taken down by the judge who tried the case on *habeas corpus*, unless the statement was read over to him, and signed by the witness, the judge not being required by law to take down the whole evidence, but only its substance when desired by one of the parties; *Nelm's Case*, 13 S. & M. 500.

591. *Cross-examination: Leading questions.* A witness may, on cross-examination, be asked leading questions; *Bole's Case*, 2 C. 445.

592. *Interested witness.* In criminal, as well as civil cases, a person interested in the event of the suit or prosecution, as where he is to receive a part of the penalty or forfeiture, as a general rule is not a competent witness; *Murphy's Case*, 6 C. 637.

593. *Same.* But to this rule there are many recognized exceptions, as old as the rule itself; and one of these is, if the statute creating the offence can receive no execution unless a party interested be allowed as a witness, this will be construed as a legislative capacitation of such party as a witness; so cases of necessity, where no other evidence can reasonably be expected; and so, if a person who is to receive a reward, either from the State or private party, is competent; *Ib.*

593a. *Traffic with slaves.* The illicit traffic with slaves, has always been difficult to suppress, as it was generally done in secret. The Legislature has passed stringent laws to suppress it, and finally gave the prosecutor one-half the fine on conviction. Owing to the difficulty and necessity, it is to be presumed that the Legislature did not intend by that provision, to narrow the means of detecting guilt, but to stimulate and encourage efforts to that end, and hence, that they intended to capacitate the prosecutor as a witness; *Ib.*

LXXXI. Writ of Error.

594. *Clerks of Circuit Court cannot grant in criminal cases.* Clerks of the Circuit Court cannot grant writs of error in criminal cases; the writs in such cases can issue only on the fiat of a judge or court, and of competent jurisdiction; *Rockhold's Case*, 5 H. 291. See *post*, 594a.

594a. *Same: Appeal.* No appeal to the High Court lies in a criminal case; a writ of error is allowed only, after final judgment on verdict; and under the statute H. & H. 538, § 40, it is allowable then, not as a matter of right by the clerk, but only upon the fiat of

a competent officer; *Loftin's Case*, 11 S. & M. 358. Act of December 3d, 1858, provides, "That hereafter writs of error in all criminal cases, should be writs of right in the several counties of this State, subject, however, to the rules and regulations respecting the issuance of such writs, prescribed by art. 308, of chap. 64, of Code of 1857." Session Laws of 1858, p. 178. See Code of 1871, §§ 2841, 2842.

595. *State not entitled to.* The State is not entitled to a writ of error in a criminal case. In this case the court below quashed an indictment, because the person whose name was marked as prosecutor, stated to the court that it was done without his authority or consent, and the district attorney excepted, and sued out the writ, and it was dismissed; *Amler-son's Case*, 3 S. & M. 751.

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I. Accounts and Accounting.

1. *When account decreed.* No account should be decreed unless an indebtedness, on the part of the defendant, appears at the hearing; *Stamps v. Bracey*, 1 H. 312. It should not be ordered, unless the facts in relation to it be put in issue by the pleadings, and there be also some proof tending to show the truth of the facts as alleged by the party seeking the account; *McLoskey v. Gordon*, 4 C. 260.

2. *Interlocutory decree to account.* There is no necessity for an interlocutory decree to account where the parties have agreed on a final settlement, unless there is ground laid for surcharging and falsifying the account stated; and to do this, a general charge of error in the settlement will not do; some particular error must be specified; *Calvit v. Markham*, 3 H. 343. And so, when an agent has been appointed by the parties to settle the accounts between them, and the settlement made by him, though not final, is yet sufficient to show the complainant's right to the sum he sues for, an interlocutory decree to account is unnecessary; *Id.*

3. *The remedy in equity.* In matters of account extending over a variety of transactions, the remedy for an account is deemed more ample and complete in a court of equity than in an action at law; and, besides, it tends to prevent multiplicity of suits, and for this reason the jurisdiction is sustained; *Watt v. Conger*, 13 S. & M. 412. See FRAUDULENT ASSIGNMENT, 93, 94.

4. *Jurisdiction of equity.* A court of equity has jurisdiction to entertain a bill by the widow against the heir for an account of rents and mesne profits accruing from her dower interest, before assignment of her dower; and having jurisdiction for this purpose, the court will proceed to take the account also for the rents and profits accruing after the assignment. The jurisdiction is maintainable in such a case, on these grounds: 1st. Where improvements have been made by the heir, whereby the value of the rent has been increased. 2. Where there are several heirs, and they have not held jointly, but each heir has held for separate and distinct portions of time; *Turner v. Morris*, 5 C. 733. For rule as to retaining bill for full relief, see *post*, 311, *et seq.*

5. *Informal error in decree for an account.* It is no objection to an order in a suit by the husband and wife, directing the taking of an account for rents due the wife, that in it, the wife is stated to be the complainant; the error is merely in matter of form, and does not vitiate the decree; *Turner v. Morris*, 5 C. 733.

6. *Rule of damages in account where there has been fraud.* In taking an account where complainant and defendant were jointly interested in a lot of cotton, and the contract of joint ownership was rescinded on account of the fraud of the defendant; the cotton which the defendant thus got by fraud and applied to his own use, will be charged to

him at the highest market price, between the time he took the cotton and the stating of the account; *Fulton v. Woodman*, 49 M. 593.

7. *The notice of taking an account.* Except in cases where the account is taken on the facts as they appear in the pleadings of the parties, or where there is merely a calculation of interest to be made, the commissioner taking the account should give notice to the parties interested, of the time and place of taking the same; and if he fail to do so, it will be error to confirm his report; *Felder v. Wall*, 4 C. 595. No notice is necessary where the taking of the account is a mere matter of computation; if there be errors in the computation, they can be corrected on the motion to confirm the report; *Knox v. Bank of United States* 4 C. 655. Notice is unnecessary where the account is taken on the facts appearing in the pleadings; *Cobb v. Duke*, 7 G. 60. Notice is unnecessary to take an account on a decree foreclosing a mortgage, or enforcing a vendor's lien (see Rev. Code of 1857, p. 547, art. 48); *Kilcrease v. Lum*, 7 G. 569. See *post*, 97, 105.

7a. *Stating account.* A bill was filed for an account, and with it was filed a bill of items, and the bill was proven in the course of the proceedings by a competent witness, of the taking of whose deposition the defendant had notice; a *pro confesso* was also entered for want of answer. The matter of the account was then referred to a master to ascertain the amount due, who took the account without notice to the defendant and reported a sum due to complainant, whereupon the bill was set down for hearing on bill *pro confesso*, proof, and report of the master, and a final decree was rendered: *Held*, that the proceedings were regular (citing *Knox v. Bank of United States*; *Felder v. Wall*, *supra*); *Chapman v. Evans*, 44 M. 113.

7b. *Same: Where notice held necessary.* The complainant represented to the defendant that he only sought by his bill a rescission of the contract, and a recovery of the land, and thereupon the defendant under the advice of counsel, declined to defend, and a *pro confesso* was entered, and thereupon the matter was referred to a master, who reported an amount due from the defendant to complainant for mesne profits, which report was confirmed without notice to defendant: *Held*, on these grounds, that the defendant was entitled to have the decree set aside; *Williams v. Duncan*, 44 M. 375.

8. *How objections made to the account.* When the decree is correct, as to the principles upon which an account is ordered to be stated, objections to the account will not be noticed in the High Court, unless exceptions were filed in the court below; *Williamson v. Downs*, 5 G. 402. See *post*, 107.

9. *Stating account on bill to redeem.* Where a mortgage is made to secure an unfixed and unsettled indebtedness, from the mortgagor to the mortgagee, it is proper, on

a bill by the former to redeem, to examine all the matters of dealing between the parties previous to the mortgage, except such as appear to have been settled; *Ib.*

10. *Practice where there are three auditors.* Where an account is referred to three auditors, it is not a valid objection to the report, that one of the auditors was not notified to attend; and if the objection were good, it should have been made before the auditors; *Davis v. Foley*, W. 43.

10a. *Account necessary on pro confesso.* A final decree on *pro confesso* on a bill to enforce a vendor's lien, without first an order of reference to a master to state an account, showing the amount due, is erroneous; *Freeman v. Ledbetter*, 43 M. 165; *Beville v. McIntosh*, 41 M. 516.

II. Amendment.

See sub-division Supplemental Bill.

11. *Discretionary: Not assignable for error.* The allowance of amendments is in the discretion of the court below, and cannot be assigned for error in the High Court. In this case, after a demurrer was put in, the court allowed the complainant to amend by inserting the name of another as co-complainant; *Tanner v. Hicks*, 4 S. & M. 294; *S. P., Truly v. Lane*, 7 S. & M. 325. But the chancellor, in the allowance or refusal of amendments to the pleadings, must exercise a sound discretion, taking into consideration the *laches* of the applicant, the delay arising from the amendment, and the costs; and his refusal to allow an amendment, may be assigned as error. In this case his refusal to allow an amendment, which was necessary to bring the merits of the case before the court, was held erroneous; *Parker v. Bacon*, 4 C. 425. The allowance of the amendment must, however, be excepted to, or it will not be noticed; *Pass v. McRea*, 7 G. 143.

12. *Principles of allowing amendments.* Amendments should be liberally allowed up to the time of trial; *Moss v. Davidson*, 1 S. & M. 112; except when the bill is under oath, amendments are, as a general rule, allowed until the proofs are closed; *Hunt v. Walker*, 40 M. 590. Where, however, an injunction has been granted and dissolved, it is doubtful whether a new injunction ought to be granted on an amended bill, then filed, except upon newly discovered evidence, or on facts not known when the original bill was filed; *Moss v. Davidson*, *supra*.

13. *Time of application to amend the bill.* After the decision of the court sustaining a demurrer for want of equity on the face of the bill, it is too late to apply for leave to amend; *McComas v. Minor*, W. 513. But this is not the rule now; in this case, the High Court, on reversing a decree in favor of complainant, and sustaining a demurrer to the bill, remanded the cause, with directions to allow the complainant to amend if he saw proper; *Eckford v. Halbert*, 1 G. 273. It is too late, two years after the answer has been filed, and after the cause has been set

down for hearing, for a motion to amend the bill, by inserting a new charge in it; *Vertner v. Griffith*, W. 414.

14. *Time of amending answer.* It is too late to apply for leave to amend the answer, when the chancellor is about signing the final decree; *Burnham v. Huffman*, W. 381.

15. *Nature of the amendment.* In a bill filed to set aside a sale of slaves, made under a mortgage, the names of the slaves were omitted, and it was held proper to allow the complainant to amend, by inserting their names; *Trotter v. White*, 4 C. 58.

16. *Same.* After a cause was tried on bill, answer and proof, and a decree rendered, dismissing the bill, an appeal was taken, and the decree reversed, and an opinion delivered by the High Court, settling the principles of the case, and the cause remanded to the Chancery Court, to be proceeded in, according to the principles so settled. After this, the complainant applied to the Chancery Court for leave to file an amendment to his bill, by which, he merely varied the phasis of the facts stated in the original bill, and not introducing anything which was discovered since the original bill was filed; *Held*, that the amendment would not be allowed; *Hannum v. Cameron*, 12 S. & M. 509. Nor will an amendment to the bill be allowed, in which no material fact is charged, not contained in the original; *Richardson v. Wolfe*, 2 G. 616.

17. *Leave to amend must be asked.* It is not the duty of the chancellor, upon sustaining a demurrer to a bill, upon the ground, that the facts upon which complainant seeks relief, are not formally and sufficiently pleaded, to allow of his own motion, the complainant to amend. If liberty to amend be desired, it should be applied for. In such a case, if no leave to amend be applied for, the bill should be dismissed without prejudice; *Alexander v. Moye*, 9 G. 640.

18. *Necessity for amendment.* Where a foreign guardian has instituted a suit in chancery, without first giving bond, as required by the Act of 1854, ch. 2. § 4, he may afterwards perfect his right, by complying with the act; and if he do so, he must show it, by an amended bill; the mere filing with the record, the evidence of his compliance will not do; *Grist v. Forehand*, 7 G. 69.

19. *Leave to amend must appear in the record.* No alteration or amendment can be allowed in any pleading, or other matter that has become a part of the record, unless upon the previous sanction of the court, or by rule of court authorizing the amendment, without special leave. But where an amended bill was filed without leave of the court, and a bill of revivor was afterwards filed, which set out the substance of the original and amended bills, notice whereof was duly served, it was held that the defendant could not object on final hearing, for the first time, that the amended bill had not been duly allowed. The failure to object is a waiver of objections in such a case; *Hunt v. Walker*, 40 M. 590.

20. *How application to amend is made.*

When an amendment is applied for, it should accompany the application, so that the court may judge of its propriety; *Ib.*

20a. *Amended bill, notice.* When a *pro confesso* has been entered against one of the defendants, and an amended bill filed afterwards, without notice given to him, as required by the 74th rule of the Chancery Court, a final decree thereon will be error, if the amended bill contain matter affecting his interests and requiring an answer from him, or the decree as to him be founded on it; but if the amended bill contain matter only affecting the other defendants, and be in nowise prejudicial to his interests, the failure to give him notice will be an irregularity, which will be no ground for reversal. For if the decree were reversed, his answer to the amended bill could not put in issue the things admitted by the *pro confesso*, and as that covered the whole case as to time, his answer to the amended bill would be unnecessary, and of no benefit; *Reno's Adm'r v. Harper*, 1 C. 154.

20b. *Same.* By the English chancery practice, if the amendment of the bill be before answer, no additional subpoena need be served on the defendant. But he is entitled to the full time for answering, to be computed from the date of serving him with notice of the amendment. If the amendment be after answer, and a further answer is required, a subpoena must be served, but the service may be on the defendant's solicitor. A rule of chancery practice in this State, requires that whenever an amended or supplemental bill is filed, notice in writing of the same shall be served on the opposite party or his solicitor within twenty days after the same shall be filed, and no *pro confesso* on such amended or supplemental bill shall be taken without proof of such notice, unless process shall have been served on such amended or supplemental bill; *Mezeix v. McGraw*, 44 M. 100.

III. Answer.

1. Answer Denying Fraud, Moral Turpitude.

21. *Denial of fraud by the answer.* A charge of fraud contained in the bill must always be answered. A demurrer to the bill, charging fraud, will be overruled, unless accompanied by an answer denying the fraud; *Niles v. Anderson*, 5 H. 365; *Hurd v. Smith*, Id. 562; *S'ovall v. Northern Bank*, 5 S. & M. 17; *Rollins v. Thompson*, 13 S. & M. 522; *Hamilton v. Lockhart*, 41 M. 467; *Hanson v. Field*, 41 M. 712.

But if the facts charged, as constituting the fraud, do not amount to fraud, the charge need not be answered; *Bell v. Henderson*, 6 H. 311; *Santacruz v. Santacruz*, 44 M. 714.

Nor need the fraud be answered in cases where, if it were confessed, it would be no ground for relief to the complainant. Thus, to a bill seeking the specific performance of a parol contract for the sale of land, a demurrer will be sustained, notwithstanding a charge in the bill that the defendant fraudulently prevented the agreement from being

reduced to writing; *Boz v. Stanford*, 13 S. & M. 93; *S. P., Walker v. Gilbert*, 7 S. & M. 456; *Hamilton v. Lockhart*, *supra*; *Hanson v. Field*, *supra*. And a demurrer will be sustained to a bill, notwithstanding the charge of fraud, unless the charge show the elements of the fraud, and bring it within the law of the court for relief; a mere naked charge of fraud will not do, and requires no answer; *Santacruz v. Santacruz*, 44 M. 714. See *post*, 158 to 326.

22. *Form of charge of fraud requiring answer: Case in judgment.* A bill was filed against the sheriff and his vendees, in which the sheriff was charged with fraudulent conduct in making a sale of property, in which complainant was interested, by procuring the complainant to be absent from the sale; and the bill without specifically charging notice of this conduct on the vendees, in the stating part of it, yet alleged, that said conduct "was a fraud on complainant's rights;" *Held*, that the charge of fraud was sufficiently made as to the vendees, so as to require them to answer it (citing *Niles v. Anderson*, *ante*, 21); *Rollins v. Thompson*, 13 S. & M. 522.

23. *How the charge of fraud is to be answered.* Where fraud is sufficiently charged in the bill, an answer, denying the fraud generally, is not sufficient, unless it specifically answer every allegation in the bill, from which fraud may be inferred; *Gray v. Regan*, 1 C. 304.

24. *Answer to charge of moral turpitude.* The defendant is bound to answer a charge in a bill involving his moral turpitude, if it does not amount to an indictable offence, or an indictable crime; *Watts v. Smith*, 2 C. 77.

2. Answer as Evidence.

25. *Answer as evidence.* Where facts in avoidance, and not in response to the bill, are set up in the answer, they must be proven; the answer is evidence only when it is responsive to the bill; *Brooks v. Gillis*, 12 S. & M. 438; *Miller v. Lamar*, 43 M. 383. Thus, if the bill charge that the defendant executed a bond, and the answer set up payment, that allegation must be proven; *Nichols v. Daniels*, W. 224. So of the bill seeking a rescission of a contract charge as the ground of the relief, want of title in the vendor, and the fraudulent concealment thereof, the answer of the vendor that he had procured the title before he sold, but had lost the memoranda of his purchase, and had neglected to take a conveyance, is not responsive to the bill, and is no evidence; *Liddell v. Sims*, 9 S. & M. 596. And so when the bill charged that the transfer was made unconditionally, but did not call for any discovery as to its terms, and the answer denied this charge, and then set out the terms and conditions of the transfer; it was held that the statement as to the terms, &c., were not responsive to the bill and not evidence; *Dease v. Moody*, 2 G. 617. But if the bill charge that no notice was given of a meeting of the Board of Police, and the answer state it was

given, it will be responsive; and so if the bill state that a certain number is a majority of the voters in a county, and the answer state that it is less, the answer is responsive; *Williams v. Cammack*, 5 C. 209.

26. *Evidence where interrogatories are propounded.* Where a complainant propounds special interrogatories to the defendant, the direct answers of the defendant thereto will be evidence, as well for as against him, and will be conclusive unless shown to be false. Nor will any presumption be indulged against such evidence, because it comes from an interested party; *Petrie v. Wright*, 6 S. & M. 647.

27. *Answer without replication.* If the cause be set down for hearing on bill and answer without replication, the answer is not to be taken as true as to matters in avoidance, if it do not appear that the case was set for hearing by the complainant; *Carman v. Watson*, 1 H. 333. But now, by statute, no replication is necessary.

27a. *Setting for hearing: Omitting answer.* An answer which confesses the equity of the bill, and sets up matter in avoidance, after the lapse of five months, which is allowed the defendant to take testimony to sustain his answer, whether the cause be set down for hearing by the complainant or defendant, is of no value as evidence. And whilst it is irregular for the complainant in such a case to set down the cause for hearing on bill, exhibits, &c., omitting the answer, yet as the answer, without proof of its affirmative matter, is but a confession of the bill, if the defendant make no objection to this course in the court below, and does not appear to have been injured thereby, the decree will not be reversed; *Miller v. Lamar*, 43 M. 383.

See *post*, 29, 548; *et seq.*

3. Sufficiency of the Answer.

27b. *Sufficiency of answer.* The answer, however brief and informal, if it distinctly answer all the essential facts constituting the foundation of the complainant's claim, will be sufficient; *Miller v. McDougall*, 44 M. 682.

See *ante*, 23; *post*, 174a.

4. Rules as to two Witnesses, and Setting Cause for Hearing.

28. *The rule requiring two witnesses to overturn the answer.* If the answer be responsive to the bill, it cannot be overturned except by the evidence of two witnesses, or of one with corroborating circumstances; *Nichols v. Daniels*, W. 224; *Parkhurst v. McGraw*, 2 C. 134. And this rule applies where the denial in the answer is positive, although it appears that the respondent had no personal knowledge of the matter; *McGee v. White*, 2 G. 42. By statute this rule is not applicable, where the bill is sworn to; See *post*, 252 to 254.

29. *Answer as affected by setting the cause for hearing.* Under the Act of 1828, either party may set a cause for hearing; and if it be set for hearing by the complainant at the term succeeding the one at which the answer was filed, it is no reason for admitting the

whole answer to be true; *Carman v. Watson*, 1 H. 333. See *post*, 548, 549.

5. Answer Containing a Plea.

30. *Answer setting up a plea in bar.* Where an answer sets up facts as a plea in bar, it should distinctly admit or deny the allegations of the bill; *Carmichael v. Hunter*, 4 H. 308.

31. *Same: Refusal of leave to plead.* Where an answer is rejected, and leave given to answer further (though it be declined), it will not be error to refuse the defendant leave to plead. For having leave to answer, he is at liberty, in his answer, to set up in it, the facts he relies on in a plea; *Id.*

6. Miscellaneous.

32. *Answer a part of the record, though ordered to be taken from the file.* An answer which the chancellor, on setting aside a *pro confesso*, has allowed to be filed, becomes thereby a part of the record, and still so remains, notwithstanding the chancellor on a rehearing, amends the order allowing it to be filed, and directs it to be taken from the file; *McGowan v. James*, 12 S. & M. 445.

33. *Filing of answer.* If the record state that the answer was filed on a certain day, this will be considered the true date of the filing, notwithstanding the *jurat* to the answer bears a subsequent date, for the answer may have been sworn to after it was filed; *Reynolds v. Nelson*, 41 M. 83. If the complainant go to trial on a motion to dissolve an injunction on bill and answer, without objection to the answer, it is a waiver of objection that the answer was not filed in time, or that it was not properly sworn to, and the proper mode to make the objection is by motion to take it from the file; *Yeizer v. Burk*, 3 S. & M. 439.

34. *Effect of a blank in an answer.* See *SALE*, 7b. *Post*, 491.

34a. *Affidavit to answer.* The affidavit to the answer, if there be no rule of the Chancery Court to the contrary, need not be signed by the defendant; a certificate of the proper officer that the defendant made the proper oath is sufficient; *Yeizer v. Burk*, 3 S. & M. 439.

35. *Allegations of bill not denied in the answer.* By the English practice an allegation of the bill not denied by the answer, nor admitted to be true, could not be put in issue, and no proof could be offered to sustain it. But this court adopts the rule of the Supreme Court of the United States, which allows such allegations to be put in issue, and proof to be taken in respect to them; *Gartman v. Jones*, 2 C. 24. But now by statute, such allegations are considered as admitted; See *post*, 173.

36. *Inconsistent defences.* To a bill to enforce a vendor's lien, filed against the widow and heirs of a deceased vendee, the widow set up these defences: 1. That the vendor has no title, and the vendee, in consequence thereof, abandoned the land. 2. That the vendee had paid the purchase money. 3. That

she had since his death acquired a title under a deed in trust executed by her deceased husband: *Held*, that the defences were inconsistent and formed no obstacle to the bill; *Glasscock v. Robinson*, 13 S. & M. 85.

36a. *Filing answer: Laches in.* A demurrer was disallowed, and a reasonable time given to the defendant to answer; no answer was filed for ten months, and then complainant proposed to take a *pro confesso*, and the defendant asked leave to file his answer: *Held*, that the court, before admitting the answer to be filed, should demand the most conclusive showing of the causes for the delay, accompanied by a meritorious answer. The answer must accompany the application in such a case; *Fultison v. Josselyn*, 43 M. 373.

36b. *Prayer of answer* It is settled, that the defendant cannot pray anything in his answer, except to be dismissed with his costs. If he seek to obtain a discovery of facts necessary for his defence, or to obtain any relief, he must resort to a cross-bill; *Millsaps v. Pfeiffer*, 44 M. 805. See *post*, 135a, 156b.

36c. *Granting leave to file answer on condition.* When the defendant has not filed his answer in time, and asks for additional time in which to file it, the court in granting leave, may impose as a condition, that the answer when filed shall be considered as filed of the term at which the leave was granted, so as to enable the complainant to set the cause for hearing, after the expiration of five months from the date of the order, without being compelled to admit that the answer is true; *Reynolds v. Nelson*, 41 M. 83.

IV. Appeal.

See APPEAL. WRIT OF ERROR. HIGH COURT.

37. *From what decree it may be taken: Overruling demurrer.* An appeal may be taken from the chancellor's decision, overruling a demurrer; and the defendant, taking an appeal, is not bound to answer till the appeal is decided; *Montgomery v. Norris*, 1 H. 499; *Brown v. Troup*, 4 G. 35. Such an appeal is a matter of right; the chancellor has no discretion in the matter; *Nesbit v. Rodewald*, 43 M. 304. An appeal will lie from an order overruling a demurrer, when in the same order, leave is granted to the complainant to amend his bill; *Santacruz v. Santacruz*, 44 M. 714. Appeals from other interlocutory orders are in the discretion of the chancellor.

38. *Same: Appointing receiver.* Under the statute (H. & H. 513), an appeal will lie from an order of the chancellor appointing a receiver *Wade v. Amer. Colonization Society*, 4 S. & M. 670.

39. *Same: Setting aside verdict on issue tried by jury.* An order of the Chancery Court, refusing to confirm a verdict, and setting it aside, and granting a new trial at the bar of the court, cannot be appealed from. In such case, the remedy is, as at law, to appeal

after the final decree; *Moody v. State*, 13 S. & M. 642. And an appeal in such a case, will not authorize the High Court to revise the action of the chancellor, in setting aside another verdict in the same case, which had been rendered on an issue sent to a court of law; *Ib.*

39a. *Appeal in divorce cases.* An appeal lies from all final decrees, within three years from their rendition; and there is no exception in this respect, in reference to decrees dissolving the bonds of matrimony; *Fulton v. Fulton*, 7 G. 517.

39b. *Appeal from order granting supplemental bill.* No appeal will lie from an order allowing a supplemental bill to be filed. If there be such error in the order as can be reviewed, it will be noticed only when the cause is brought to the Supreme Court after final decree; *Nesbit v. Rodewald*, 43 M. 304.

40. *Same: Order refusing to dissolve injunction.* An appeal does not lie from a mere refusal to dissolve an injunction on motion, when there is neither an answer nor a demurrer. Such refusal is not an order of court, but a refusal to make one; *Lewis v. Miller*, 13 S. & M. 110. See *post*, 46.

41. *The appeal bond.* It is sufficient, if the condition of the appeal bond be a substantial compliance with the statute,—literal compliance is unnecessary. Thus the statute prescribes as a condition of the appeal bond, that the appellant shall "pay, satisfy and perform the decree or final order of the Chancery Court, and all costs, in case the same be affirmed;" and upon an appeal from an order dissolving an injunction of a judgment at law, the condition of the bond was "to pay and satisfy the judgment at law against appellant;" *Held*, that the bond was good; *Coleman v. Rowe*, 4 S. & M. 747. And so an appeal conditioned as follows, is a substantial compliance with the statute, and good, viz.: "Now if the said J. B. C., in case he shall fail to prosecute said appeal with effect, shall, within thirty days thereafter, well and truly perform the decree of said Superior Court of Chancery, and also abide by the decision of said High Court of Errors and Appeals in the premises, then this obligation to be void, otherwise to remain in full force and virtue;" *Conger v. Robinson*, 4 S. & M. 210.

See APPEAL, 3 *et seq.*

42. *Executor, &c., may appeal without bond.* An executor is entitled to appeal without bond, when the decree appealed from affects only the assets of the decedent in his hands; *Aliter*, when the decree is against him personally; *Wade v. Am. Col. Society*, 4 S. & M. 670; *Hunter v. Thurman*, 3 C. 463.

See EXECUTOR AND ADMINISTRATOR, 300, 301.

43. *Chancellor must approve the bond.* The approval of the appeal bond, by the chancellor, is necessary to give the appeal the effect of suspending the decree; *Wade v. Am. Col. Society*, *supra*; *S. P., Pickett v. Pickett*, 1 H. 267; *Parker v. Willis*, 5 C. 766, digested in APPEAL, 2. See *post*, 47.

44. *Effect of appeal in suspending decree*

The statute requiring bond on appeals, applies only where the appeal is taken from a final decree. The chancellor *may* allow an appeal without bond, from an interlocutory decree; *Gay v. Edwards*, 1 G. 218; *Phillips v. Hines*, 4 G. 163.

45. *Same*. When the requirements of the statute which provides for the granting of appeals have been complied with, an appeal, of its own force, suspends the operation of the decree appealed from; *Wade v. Am. Col. Society*, 4 S. & M. 670.

46. *Appeal from order dissolving injunction*. An appeal from an order dissolving an injunction, if allowed, necessarily suspends its operation, and it will be error, therefore, for the chancellor, pending the appeal, to make an order allowing the defendant to do the thing restrained by the injunction; *Penrice v. Wallis*, 8 G. 172.

47. *Appeal from order appointing a receiver: Instance*. An appeal was taken by an executor, from an order appointing a receiver, and requiring the executor to deliver the property into the receiver's possession. The penalty of the receiver's bond was \$100,000, and the penalty of the appeal bond was \$200, and the bond was not approved by the chancellor. Pending the appeal, the chancellor ordered the receiver to take possession of the property, and the appellant moved in the High Court for a *supersedeas*; *Held*, that under these circumstances the High Court would not interfere, and the *supersedeas* was refused; *Wade v. Am. Col. Society*, 4 S. & M. 670. See *ante*, 43.

48. *Appeal suspends only from time it is taken*. An appeal, if not prosecuted at the same term of the court at which the judgment appealed from was rendered, is inoperative to affect rights acquired and acts done under the judgment, before the appeal is taken, and it does not, it seems, create a *lis pendens* for the period intervening the appeal and the rendition of the judgment. Hence, if a bill enjoining a sale under execution, be dismissed, and an appeal be afterwards taken, a sale made before the appeal, will not be set aside, though the High Court may adjudge that the bill was improperly dismissed; *Baine v. Williams*, 10 S. & M. 113.

See TRUSTS AND TRUSTEES, 17a..

49. *Appeal from order appointing a receiver: Supersedeas by judge of High Court*. An appeal was taken to operate as a *supersedeas* from an order of the Chancery Court appointing a receiver, but after the property had gone into the receiver's hands, the receiver refused to deliver up the property to the appellant, and thereupon the latter procured an order from a judge of the High Court, directed to the clerk of the Chancery Court, directing him to issue a writ commanding the sheriff to seize the property and restore it to the appellant; *Held*, that this order was not made by the judge in the exercise of his appellate jurisdiction, but in the exercise of a special power conferred by the statute; and the writ so ordered, when it is issued, is a writ of the Chancery Court,

and subject to the orders of the chancellor, who may restrain its execution; *Hill v. Robertson*, 1 C. 306.

50. *Appeal from interlocutory order: What revisable on it*. On an appeal from an interlocutory order, the Appellate Court will not look beyond the special matter embraced in the action of the court in making the order. Hence, where the appeal is taken from an order overruling an exception to a commissioner's report of a sale, upon the ground that the bond for the purchase money was not taken payable to the proper party, if the bond be in fact taken in accordance with the decree of the court, the action of the court in overruling the exception, must be sustained, since the decree directing the taking of the bond in that way, though wrong, is not subject to revision on that appeal; *Nebbett v. Cunningham*, 5 C. 292.

51. *Same: What revisable on appeal from final decree*. The rule is different where a writ of error or appeal is taken from a final decree. In such a case the High Court will notice and correct all errors committed in the course of the proceedings to the prejudice of appellant or plaintiff in error, and will render judgment accordingly; *Ib*.

52. *Decree in High Court on appeal*. On affirmance of an order of the chancellor dismissing a *supersedeas* which had been obtained by the purchaser at a commissioner's sale, by which was suspended the completion of the execution on the bond given for the purchase money, the decree in the High Court will be entered against the principal and sureties in the appeal bond, for the debt superseded, damages and costs; *Conger v. Robinson*, 4 S. & M. 210. See HIGH COURT, 130, *et seq*.

V. Assistance, Writ of.

53. *How obtained*. A purchaser at a sale made by a commissioner of the Chancery Court, cannot apply, in his own name, for a writ of assistance to get possession of the land. He can get the writ only by procuring the party at whose instance the sale was made, to make the application; *Wilson v. Polk*, 13 S. & M. 131.

54. *Obtainable without notice*. The writ of assistance is, in equity, as between the parties and those claiming under them, tantamount to the writ of *habere facias possessionem* at law, and the defendant is not entitled to notice of the complainant's application to obtain it; *Harney v. Morton*, 10 G. 508.

55. *High Court will not grant the writ*. This court will not grant a writ of assistance to execute a decree entered in it on appeal from the Chancery Court; the latter court is the proper one to issue it; *Ib*.

VI. Attachments, Foreign.

56. *Jurisdiction of Chancery*. The constitution of the State adopted in 1832, which confers on the Chancery Court "full jurisdiction in all matters of equity," had reference

to the system of equity jurisprudence as it then existed in this State, as derived from the English jurisprudence and modified by the legislation of the State at that time (*S. P., Servis v. Beatty*, 3 G. 52, digested in 6, Probate Court). Hence, the Act of 1822 (enacted under the constitution of 1871), conferring jurisdiction on chancery courts in cases of foreign attachments, even when the demand sought to be enforced is purely legal and the complainant a resident of this State, is not void by being in conflict with the constitution of 1832; and the Chancery Court, under the constitution of 1832, may still exercise the jurisdiction so granted; *Freeman v. Guion*, 11 S. & M. 58; *S. P., Freeman v. Malcom*, 11 S. & M. 53; *Comstock v. Rayford*, 1 S. & M. 423; *contra, Echols v. Hammond*, 1 G. 177; for which see next section. The jurisdiction of the court in foreign attachment bills does not depend on the attachment, but on the statute, where the facts exist as required in the statute; *Freeman v. Guion*, *supra*.

57. *Same*. In this case the complainant, who was a resident, filed a bill on a purely legal demand against a non-resident debtor (who had been a resident), and also against a defendant resident in this State, having effects of the non-resident in his hands. The court, without noticing the decisions in *ante*, 56, held that the complainant had ample remedy at law, under the ordinary attachment laws, and dismissed the bill for want of jurisdiction. The court also make no reference to the principle settled in *Freeman v. Guion*, and subsequently to this case, recognized in *Servis v. Beatty*, 3 G. 52, that the statutes conferring jurisdiction, passed prior to 1832, were to be considered in determining questions in respect to the jurisdiction of the several courts created by the constitution of 1832; *Echols v. Hammond*, 1 G. 177.

58. *In what cases the jurisdiction is granted*. Under the statute (H. & H. 520, § 63), a creditor, with or without a judgment, in this State, may maintain a bill against his non-resident debtor, and subject to the payment of his debt property fraudulently held for him by a defendant, resident in this State; *Comstock v. Rayford*, 1 S. & M. 423.

But in *Berryman v. Sullivan*, 13 S. & M. 65, it was held that a deed in trust made in another State, which conveys a debt due by a citizen of this State, cannot be impeached for fraud against creditors, in a foreign attachment bill, unless the impeaching creditor has a judgment in this State (citing *Zecharie v. Bowers*, 3 S. & M. 641); *sed contra, Trotter v. White*, 10 S. & M. 607.

59. *Jurisdiction: Where complainant is a resident: or affected by the residence of the parties*. Whether all the complainants and all the defendants be non-residents, the court has jurisdiction; *Quære? Comstock v. Rayford*, 1 S. & M. 423. It has, where the debtor has lands here. And a bill may be filed by a non-resident creditor against a non-resident debtor, to subject lands of the latter situated here, though complainant has

no judgment; *Kerr v. Bowers*, 1 S. & M. 584.

60. *Same*. In *Freeman v. Malcom*, 11 S. & M. 53, it was held that equity had jurisdiction of a foreign attachment bill, for the enforcement of a purely legal demand, where there was a resident defendant having effects of the non-resident debtor in his hands, where the complainant was a non-resident (citing *Comstock v. Rayford*, 1 S. & M. 423). And in *Freeman v. Guion*, 11 S. & M. 58, it was held that the same jurisdiction existed where the complainant is a resident (*Sharkey, C. J.*, dissented). See *post*, 321.

61. *Pleadings: Practice: Effect of answer*. The bill in a foreign attachment case, alleged that a debt which the complainant sought to subject to the payment of his demand, was claimed by a third party under an assignment, which was a mere cloak to hide the real ownership, which still remained in the assignor, who was complainant's debtor. The assignee denied the fraud, and asserted that the assignment was *bona fide* to secure him as endorser for the assignor, and also to secure other debts: *Held*, that the answer being responsive to the bill, and the proof not sufficient to overthrow it, the bill must be dismissed; *Berryman v. Sullivan*, 13 S. & M. 65.

62. *Same*. And in such a case it is not incumbent on the assignee to set forth the particulars of his liability as endorser, as the bill was not filed for an account, and to get the balance after he was paid, but only to assail the assignment for fraud; *Id.*

63. *Practice: Sequestration: Injunction*. When a bill is filed under the foreign attachment law, the court cannot at the filing of the bill, order an attachment to issue against the property of the non-resident debtor, in the hands of the resident defendant. That order can only be made at the return term after the resident defendant has been served with process, and on affidavit made as to the non-residence of the other defendant. But in such cases, an endorsement on the subpoena for the resident defendant, "that it is to stop the debts and effects of the absent defendant in his hands to satisfy a debt due from the absentee to the complainant," operates when served, as a garnishment. It was not decided, however, that upon a proper showing, the complainant could not get an injunction to prevent the removal or transfer of the property in the hands of the resident defendant.

Such order will be granted at the filing of the bill upon a sufficient showing; *Trotter v. White*, 10 S. & M. 607, digested in next section.

64. *Same*. Under the foreign attachment law (H. & H. 520, § 63), where there is a bill pending in equity against a non-resident debtor of complainant, and against a resident defendant who has effects of the non-resident in his hands, upon affidavit of the indebtedness and non-residence, the court may make an order requiring the resident defendant to give security to have the effects in his hands forthcoming, to abide the ultimate decree of

the court, or in default thereof, that the property shall be delivered to complainant upon his giving like security. And the complainant may at the time of filing the bill, upon a sufficient showing of the necessity for it, obtain an injunction against the transfer or removal of the effects in the hands of the resident defendant.

And if the effects in the resident defendant's hands are claimed by him as his own, yet if the bill allege them to be the property of the non-resident debtor, and claimed by the resident defendant under a fraudulent sale, the attachment bill will be sustained, and the same relief granted, if the claim be shown to be fraudulent, as if the resident defendant had set up no claim to the effects; *Trotter v. White*, 10 S. & M. 607.

65. *Instance of attempt to secure an assigned debt.* A foreign attachment bill was filed to subject to the complainant's demand, a debt due by a citizen of this State to one of complainant's joint debtors, alleging that it had been fraudulently assigned. The assignee showed that the assignment of the debt, and also of other property, was for value and to secure debts due by the assignor, including also a debt he owed to his co-debtor, on the demand due to the complainant, and who was also a co-defendant in the bill, and that by a sale of the other property embraced in the assignment, nearly all the debts secured by the assignment had been paid. Complainant then asked to have the debt due by the defendant in this State subjected to his claim, upon the ground that under the assignment, it was to go to pay a debt due by one of his debtors to the other; but it was held, that this could not be done, unless it was also shown that the debt due by one debtor to the other was still a subsisting debt, and had not been paid by the proceeds of the sale of the assigned property; *Berryman v. Sullivan*, 13 S. & M. 65.

66. *Practice when foreign debtor has land here: Pro confesso.* In a foreign attachment bill, in which land in this State, and belonging to the non-resident debtor, was sought to be subjected to the payment of complainant's demand, the complainant proceeded to trial on *pro confesso*, without posting notice at the court house, as well as publishing it in a newspaper, the chancellor dismissed the bill without prejudice, and the decree was affirmed; *Kerr v. Boners*, 1 S. & M. 584, *Zecharie v. Bowers*, 3 S. & M. 641. The notice must be posted, as well as published in a newspaper, and the resident defendant may object to want of regularity in the notice; *McKey v. Cobb*, 4 G. 533.

67. *Proof of the debt.* In a foreign attachment bill, if a *pro confesso* be entered against the non-resident debtor, the production of a bill of exchange accepted by him, is sufficient proof of his indebtedness to the amount thereof; *Freeman v. Malcolm*, 11 S. & M. 53.

68. *Decree: Provision for protection of defendant.* In the decree on such a bill, the complainant should be required to give bond and security to abide by any future decree

which may be made, ordering a restoration of the effects of the non-resident, upon his appearing and answering the bill, and successfully controverting the justice of the complainant's demand; or the decree should make the alternative order for a receiver, as provided for in the statute. A failure in this respect will be error, notwithstanding the complainant may have given bond and security on obtaining the injunction, allowed when the bill was filed, on which bond he was bound to pay all damages the defendant might sustain, as well as to abide by the orders of the court made in the cause; *Ib.*

69. *Limitation of jurisdiction where foreign judgment is sought to be condemned.* The statute authorizing foreign attachments does not confer jurisdiction on the chancery courts of this State, as an incident to such a bill, to subject to complainant's demand, a judgment which has been rendered against a resident of this State, in a foreign State, and in favor of a non-resident plaintiff, upon the ground that the judgment itself belongs to the non-resident debtor of complainant, and that the foreign plaintiff's title is fraudulent as to creditors, unless the non-resident plaintiff in that judgment will appear and submit to the jurisdiction of the court; for if such decree were rendered, it would be no protection to the judgment debtor, who would nevertheless be liable in the foreign State to pay the judgment; *Sims v. Talbert*, 5 C. 487. See JUDGMENT OF SISTER STATES, 8.

VII. Betterments.

See BETTERMENTS. EJECTMENT, 41 to 45.

70. *When defendant entitled to.* Where a decree is entered in favor of a tenant in common against his co-tenants, for the recovery of his undivided interest in land, and also for the rents and profits during the time he was kept out of possession, the defendants should be allowed credit for the value of the permanent and valuable improvements made by them; *Nelson v. Leake*, 3 C. 199. But whether a court of equity would give relief upon a bill filed for that purpose, to a party who entered *bona fide*, and, under color of title upon the land, and made valuable improvements thereon; *Quere?* *Moody v. Harper*, 9 G. 599. See post, 323a.

VIII. Bill of Review.

See PROBATE COURT, sub-division Bill of Review.

71. *When allowable.* A bill of review will lie only after enrolment of the original decree, for error on the face of the decree, or for some new matter proved to have been since discovered, and which could not have been discovered by reasonable diligence in time to be used at the hearing, or on a petition for a re-hearing; *Iler v. Routh*, 3 H. 276; *Starke v. Miner*, 3 H. 377; *Foy v. Foy*, 3 C. 207; or for new matter which has arisen since the decree; *Handy v. Cobb*, 44 M. 699. A bill of review is in the nature of a writ of error, and can only be brought upon

a final decree, signed and enrolled; or if it is not enrolled, it must be complete and final; *Handy v. Cobb, supra.*

72. *Rule as to the newly discovered matter.* The new matter must not be relevant only, but distinct; and it must not be merely new cumulative evidence of witnesses to a fact litigated in the original bill; nor will it be allowed merely to enable a party to strengthen his evidence by the addition of new witnesses to a fact which was in issue on the trial; *Iler v. Routh, supra.*

73. *Same: Instance.* The cause was tried on its merits on bill, answer, and proof taken by complainant, and the decree was for the complainant. The defendant then filed a bill to have the decree re-opened, upon the ground that he had no personal notice of the taking of the depositions of complainant's witnesses; that they had sworn falsely; that he had no knowledge that such proof had been taken; that he lived twelve miles from any post office, and his solicitor on inquiry could not ascertain his post office, so as to communicate with him; that for six months preceding the trial he had been in bad health, and unable to go and see his counsel; and that he could show by testimony that the decree was unjust, and complainant's evidence was false: *Held*, on demurrer to the bill, that complainant was entitled to no relief; *Foy v. Foy, 3 C. 207.*

74. *Same: Another instance.* Farr had sold land to Shields by title bond. Moody, under a judgment against Shields, had bought the land. Moody filed a bill against Farr, asserting that the purchase money due by Shields had all been paid to Farr at the date of Moody's purchase at sheriff's sale. Farr answered, denying that the purchase money had been paid, and setting up that the contract of sale between him and Shields had been rescinded before Moody's purchase; and that Shields had, in pursuance of the rescission, redelivered the title bond to him, which, however, he had mislaid. A decree was rendered for Farr. Afterwards, Moody filed another bill against Farr, charging that he had since discovered that on the title bond from Farr to Shields, was endorsed evidence of the payment by Shields of the purchase money for the land, and that Farr had suppressed it, falsely stating in his answer that he had lost the title bond. On a review of the evidence, the court concluded that it was not shown that payment for the land by Shields was endorsed on the bond. And it was held, that upon the point of newly discovered evidence apart from the bond, the bill presented no ground for relief; that it was neither a bill of review, but a bill in the nature of a bill of review, to avoid the previous decree for fraud in suppressing the title bond. And if considered as a bill for a new trial, the new evidence was merely cumulative, and, therefore, insufficient; *Moody v. Farr, 5 C. 788.* See *post, 457, et seq.*

75. *Instances of error on face of the decree.* A bill of review will lie to correct a decree of foreclosure of a mortgage which erroneously

directs a sale of the whole mortgage property to pay instalments not due, when the decree is rendered, where it appears that the property is capable of subdivision; *James v. Fisk, 9 S. & M. 144.* And so it will lie to correct such a decree, which is erroneous in awarding execution against the mortgagor generally, for any unsatisfied balance which may remain after a sale of the mortgaged property; *Stark v. Mercer, 3 H. 377.*

76. *When decree is void.* A decree against a dead person may be reversed by bill of review, or writ of error *coram nobis*; *Neilson v. Holmes, W. 261.*

But if the decree be void for want of jurisdiction over the subject matter, a bill of review cannot be maintained to reverse it; for if there was no jurisdiction to render the decree, there can be none to review and reverse it; *Friley v. Hendricks, 5 C. 412.* See *PROBATE COURT, 178.*

77. *Who are proper parties.* All the parties to the original decree should be parties to the bill of review, and if any be dead, their representatives should be made parties, as in other proceedings in error; *Friley v. Hendricks, supra.*

78. *Parties: Bill against purchaser at commissioner's sale: Void decree.* If a bill, framed so as to be a bill of review, be filed only against the purchaser under the original decree, without joining as parties those who were parties to the original decree, it cannot be sustained as an original bill against the purchaser seeking to set aside the sale for defects in the original decree; for, viewed in that aspect, the reversal of the decree would not divest the rights of the purchaser, who was neither a party nor a privy to the decree. Nor can such a bill be maintained against the purchaser, upon the ground that the original decree is void, for in that event the sale under it is no obstacle to complainant's success at law; *Ib.*

79. *Setting aside decree for fraud.* At the request of the defendant, and to enable him to negotiate, the complainant's solicitor took no steps in the prosecution of the cause for two terms; at the next term, after complainant's solicitor had left the court and returned home, the suit, upon the motion of the defendant, was dismissed, on account of such omission to prosecute, the defendant failing on the trial of the motion to state to the court the circumstances which occasioned the failure to prosecute: *Held*, that the decree of dismissal was procured by the fraudulent concealment by defendant of facts which it was his duty to have communicated to the court, and that therefore it should be annulled, and the cause reinstated; *Person v. Nevitt, 3 G. 180.* See *post, 179, 145.*

80. *Bill of review is independent.* A bill of review is an independent proceeding, and does not constitute a part of the original cause; *Cole v. Miller, 3 G. 89.*

81. *Jurisdiction of Superior and District Chancery Courts.* The Superior and District Courts of Chancery, since the date of the constitutional amendment abolishing them, have

no power to entertain bills of review as to decrees rendered in them before such abolition; a bill of review does not come within the powers granted to these courts to proceed for a limited time to dispose of the business pending in them at the date of said amendment; *Ib.* See *post*, 642, 650.

IX. Bill to Remove Clouds from Title.

See *post*, 412.

82. *Jurisdiction as to.* A court of chancery has jurisdiction of a bill brought by a complainant in possession, to cause a deed to be cancelled, which he alleges constitutes a cloud on his title. Thus, where two persons have purchased the same land under different executions against the same defendant, the purchaser in possession may file a bill against the other to cancel his deed, upon the ground that the complainant has the better title; *Banks v. Evans*, 10 S. & M. 35. And under the statute, Rev. Code of 1857, p. 541, a complainant out of possession may file such a bill against the possessor; *Ezelle v. Parker*, 41 M. 520. But the jurisdiction does not extend so as to embrace a case already in a court of law, if the parties can there present their rights fairly, and there is no special reason for withdrawing the cause, and for equitable interference; *Huntington v. Allen*, 44 M. 654.

83. *The jurisdiction is limited.* The jurisdiction conferred by the statute on the Chancery Court, to remove clouds from complainant's title, is special and limited, and when a bill is filed under it, it does not follow, as in ordinary cases, that the court having jurisdiction for one purpose, will retain the bill and give full relief; but the jurisdiction is ended when the decree is made removing the clouds on the title. And the court will not go farther and decree an account for the rents, and direct a surrender of possession; *Ib.* See *post*, 311, and *ante*, 4.

84. *Complainant must show a clear title.* The court will not give relief in a doubtful case; the complainant must show a clear title; *Banks v. Evans*, 10 S. & M. 35. He must also show the entire fairness of his title. If suspicions of fraud be thrown around it, and not removed, the bill will be dismissed, and the complainant left to his remedy at law. The statute allowing the bill, it is true, is very broad, but it does not repeal the established rule that he who comes into equity must come uncontaminated with fraud, and with clean hands (citing *Banks v. Evans*, *supra*); *Boyd v. Thornton*, 13 S. & M. 338. The complainant must also have a perfect legal or equitable title; *Toulmin v. Heidelberg*, 3 G. 268; *Kerr v. Freeman*, 4 G. 292; *Huntington v. Allen*, 44 M. 654. Where the evidence left it doubtful whether complainant's title was not procured by a fraud on the creditors of grantor, both parties claiming under him by sales under execution, the bill was dismissed without prejudice; *Boyd v. Thornton*, 13 S. & M. 338. The jurisdiction will only be exercised in favor of the true owner of the land; *Huntington v. Allen*, 44 M. 654.

85. *Same: Modification of the rule.* But the complainant, though out of possession, will not be compelled to show a perfect title against the defendant in possession, who claims under complainant, though under a void deed. The defendant in such a case is tenant at will to complainant, and cannot dispute his title; *Ezelle v. Parker*, 41 M. 520. Nor can the defendant set up an outstanding title in a stranger, which is invalid, or barred by the statute of limitations; *Harney v. Morton*, 7 G. 411.

86. *The onus of proof of interest is on complainant.* Where land is devised to be sold by the executors, for the payment of debts, with directions that the surplus proceeds not needed for that purpose, should be paid to the heirs, they cannot maintain a bill in equity, to remove clouds from the title, unless they show that the land will not be needed for the payment of the testator's debts; *Blalock v. Hardy*, 8 G. 615.

87. *Quit claim deed not a clear title.* A quit claim deed implies a doubtful title in the person who executed it, and it will be treated as passing only a doubtful title to the releasee; and hence, such a deed is not a sufficient foundation for the complainant's title, to enable him to maintain a bill to remove clouds; *Kerr v. Freeman*, 4 G. 292. See QUIT CLAIM.

88. *Complainant must prove a negative.* When the complainant in a bill to remove clouds from his title, grounds his right to relief upon a negative allegation, he must prove it; and hence, where such a bill is filed to cancel a deed, upon the ground that it was never executed, and which deed it is alleged, casts no cloud on complainant's title, it is incumbent on him to show its non-execution, or his bill will be dismissed; *Ib.*

89. *Gross inadequacy of price.* Gross inadequacy of price paid for the land by the complainant, though not amounting to fraud, yet is a good ground for a court of equity refusing relief, and leaving the complainant to his remedy at law; *Huntington v. Allen*, 44 M. 654.

X. Bona Fide Purchaser.

See VENDOR AND VENDEE, 45 to 65, for cases relating to purchasers of realty. SHERIFF AND SHERIFF'S SALE, 123.

90. *No relief against.* Equity will not grant relief against a bona fide purchaser of the legal title, without notice and for a valuable consideration; *Harper v. Bibb*, 5 G. 472. He must be a purchaser of the legal title; see VENDOR AND VENDEE, 48, 49. He must also be a purchaser for value; see VENDOR AND VENDEE 45, 46, 46a, 47; and must have no notice; see VENDOR AND VENDEE, 50 to 56. He must get the legal title before notice; see VENDOR AND VENDEE, 48. As to partial payment before notice, see VENDOR AND VENDEE, 51.

91. *Same: Purchaser from trustee.* A bona fide purchaser for value, who has acquired the legal title from the trustee, will

be protected in equity against the *cestui que trust*; *Wyse v. Dandridge*, 6 G. 673.

92. *Protection extended to purchasers of personally.* The rule protecting *bona fide* purchasers for value, extends to purchasers of personally, as well as to purchasers of realty; *Ib.* See SALES, 17 to 21.

93. *Foreign registration no notice.* And such a purchaser (when the purchase was made in the State) will not be affected by the registration of the trust deed in the State in which it was executed, if he had no actual notice; *Ib.*

XI. Chancery Side of Circuit Court.

See CIRCUIT COURT, 13, 14.

94. *Practice.* The statutes passed for the regulation of proceedings in chancery, are to be applied to suits on the chancery side of the Circuit Court. A final decree may, therefore, be entered by the Circuit Court at the same term a bill is taken for confessed, such course being authorized by the statute in regard to the practice in the Superior Court of Chancery; *Sanders v. Dowell*, 7 S. & M. 206

95. *Force of rules in chancery.* Whether the rules adopted by the chancellor are applicable to equity cases on the chancery side of the Circuit Court; *Quære? Ib.*

96. *Taking account: Notice: Recommitment.* There is no rule of the Circuit Court requiring a commissioner to state an account on a bill to foreclose a mortgage, to give notice of the taking of the same, yet, if no such notice be given, and the defendant object to the confirmation of the report on that ground, and at the same time show any good cause for the recommitment of the report, it should be done. But if the defendant permit the report to be confirmed without objection, he will be held to have waived all objections thereto, as he is bound to take notice of the action of the court in that matter; *Ib.* See *ante*, 7.

97. *Jurisdiction as to mortgages.* The Circuit Court, on its chancery side, has power to foreclose a mortgage, and to settle all questions incident thereto; *Bibb v. Martin*, 14 S. & M. 87. But after it has confirmed a sale of the mortgaged property, and the term has expired, it has no power to entertain a bill to set aside the sale, if the property exceed \$500 in value; *Henderson v. Herrod*, 1 C. 434.

97a. *Proceedings in.* Proceedings on the chancery side of the Circuit Court must conform to the regular chancery practice; *Mobley v. Buchanan*, 1 H. 174.

XII Charities.

98. *Jurisdiction.* The Chancery Court of England has jurisdiction over charities independent of the statute of 43 Elizabeth, c. 4. And the Chancery Court of this State has such jurisdiction, whether that statute has been re-enacted or not; *Wade v. Am. Col. Society*, 7 S. & M. 663.

99. *When the doctrine as to charities may be invoked.* If the trusts created by a will be valid as such, there is no room for the application of the doctrine of charities. It is

only where the bequest or devise is too vague or indefinite to enable those intended to be benefited by it to claim an interest under the will, that the doctrine of charities can be applied; *Ib.*

XIII. Commissioner and Commissioner's Sale.

1. Commissioners to take Evidence, to make Deed, and to State Accounts.

100. *Power of commissioner to take evidence.* A commissioner in chancery can exercise no power except such as is given him by statute, and hence he cannot imprison a witness who refuses to testify before him, and if he do, he and all those urging and assisting the imprisonment, are trespassers; *Marsh v. Williams*, 1 H. 132.

101. *Power to make deed.* Whether a commissioner in chancery, who was appointed to make a conveyance, can, after having made a conveyance, which is lost by the grantee, make a new deed, without first getting a new appointment; *Quære? Stillman v. Hamer*, 7 H. 421.

102. *Effect of deed by commissioner: Relation.* A deed by a commissioner in chancery, conveying land out of the defendant and vesting it in the complainant, will relate back to the commencement of the suit in which the decree ordering the conveyance was ordered, so far as the rights of the defendant and those claiming under him are concerned; *Shotwell v. Lawson*, 1 G. 27.

103. *Necessity for a commissioner to convey.* A decree of the Chancery Court, directing that the legal title to land be divested out of the defendant and vested in the complainant, is not, of itself, sufficient to vest the legal title in the complainant. The court must appoint a commissioner to convey, on failure of the defendant to do so; *Walker v. Williams*, 1 G. 165; *Wallis' Heirs v. Wilson's Heirs*, 5 G. 357.

104. *Commissioners to state accounts.* See *ante* 7, 10, 96.

105. *Notice to take account.* Under the 38th chancery rule, parties are entitled to notice from a commissioner appointed to state an account, of the time and place of stating it; *Poindexter v. La Roche*, 7 S. & M. 699. See *ante*, 7, 10, 96.

106. *Reference to two commissioners and recommitment.* Where a cause was referred to two commissioners, or either of them, to state an account, and the duty is performed by one alone, and upon exceptions to the account being sustained, the cause is recommitment "to the commissioner," without naming him, it is to be understood as recommitment to the commissioner who originally stated the account; *Ib.*

107. *Exceptions to report.* If exceptions to a commissioner's report be referred to a master, to whose report no exceptions are filed, objection can, nevertheless, be made thereto, based on the exceptions made to the first report; *Ib.* See *ante*, 8.

2. Commissioners to Sell, and Sales made by them.

A. THE COMMISSIONER'S REPORT, AND BILL OF SALE AND CONVEYANCE.

108. *Identifying the property sold.* When a sale is made by a commissioner under a decree foreclosing a mortgage, the decree, report of sale, and mortgage are to be taken as parts of an entire thing. If, therefore, the property be described in the decree, and the report state that the commissioners sold the property mentioned in the decree, the report is sufficient to identify the property sold, though no other description of it be given in the report; *Conger v. Robinson*, 4 S. & M. 210.

See GUARDIAN AND WARD, 58.

109. *Omission in report to state name of purchaser.* If the report omit to state the name of the purchaser or the amount of the bid, it will be irregular; but the defect will not justify a suspension of an execution issued on the bond, returned with the report, as given by the purchaser for the purchase money; *Ib.*

110. *Bill of sale by commissioner.* In judicial sales of personalty, as in all other sales of such property, the right passes by delivery, and the purchase and ownership under such sales, may be established by parol proof. The want of a perfect bill of sale made by the commissioner to the purchaser, will not, therefore, be sufficient ground for suspending the execution on the bond given for the purchase money, nor to rescind the sale; *Conger v. Robinson*, *supra*. And so, if the purchaser of slaves get the slaves actually ordered to be sold, it is immaterial what name is given them in the bill of sale made by the commissioner; *Ib.*

110a. *Conveyance by* In an interlocutory decree ordering a sale, the commissioner shall not be ordered to make a conveyance to the purchaser; this should be done in the final decree; *Coulter v. Herrod*, 5 C. 685.

B. THE CONFIRMATION AND DISAFFIRMANCE OF THE SALE.

111. *Confirmation necessary: Effect before confirmation.* Until confirmation, the sale is *in fieri* and may be set aside; and so, after confirmation, at the same term at which the confirmation is made, the order to that effect may be set aside and the sale disaffirmed, just as if no order of confirmation had been made; *Henderson v. Herrod*, 1 C. 434. Confirmation of sale necessary to its validity; *Sanders v. Dowell*, 7 S. & M. 206; *Tooty v. Grilley*, 3 S. & M. 493; *Gowan v. Jones*, 10 S. & M. 164; *S. P.*, *Mitchell v. Harris*, 43 M. 314.

112. *How confirmation may be made.* But the confirmation may be by act of the parties, or even by the lapse of a great length of time, during which both parties acquiesced in the sale; but ordinarily, if there be no confirmation by the court, no title passes, and the purchaser cannot recover the property by suit; *Gowan v. Jones*, *supra*. The title in either

real or personal property may be effectually vested in the purchaser at such sale, by confirmation *in pais*, arising from the acts of parties in interest. Where there has been a substantial execution of the decree, by an open and fair sale, a deed and possession given, and the purchaser has remained in possession for several years, such acts are held to be a confirmation *in pais*, so far as the parties in interest are concerned, and the mere fact that the price was inadequate or excessive will not authorize such sale being set aside; *Redus v. Hayden*, 43 M. 614. See *post*, 115, 117.

And if the complainant in a decree to foreclose a mortgage ordering a sale to be made on a credit of six months, after the sale is made, accept the bond and order execution on it, and cause the same to be levied, and contest in the Chancery Court the appropriation of money made under the execution, he will be held to have confirmed the sale made by the commissioners, though it were irregularly made, and he will be bound by it as fully as if the confirmation were made by the court; *Tooty v. Grilley*, 3 S. & M. 493. See *post*, 119a.

113. *When confirmation may be set aside.* It may be set aside at the same term (see *ante*, 111). But after that term the court cannot set it aside except for the same reasons, and upon the same principles which would authorize a court of chancery to set aside the decree of any other court; and the setting of the decree of confirmation aside then becomes a matter of original chancery jurisdiction; *Henderson v. Herrod*, 1 C. 434.

114. *Practice and proceedings in setting it aside after the term.* Where the suit in which the sale was made is still pending, and the purchaser is a party to it, an application to set aside a sale after the term at which it was confirmed, may be made by petition; but if the suit has been determined, or the purchaser is not a party, or being a party has resold to another, the application must be by bill; *Ib.* See *post*, 539, *et seq.*

115. *Objections by purchaser to confirmation.* Before the confirmation of the commissioners' report of a sale, it is competent for the purchaser to move to reject the report; and an application by petition for a supersedeas of the execution, which issued on the bond given for the purchase money, will be regarded as equivalent to such motion, and the decree of the chancellor dismissing the supersedeas in effect, amounts to a confirmation of the report; *Conger v. Robinson*, 4 S. & M. 210.

115a. *Exceptions to report of sale: How made.* Where the report of sale by a commissioner has been made, and exceptions filed thereto, which were sustained, and the sale confirmed, if the purchaser should execute bond for the purchase money within thirty days, according to the order of the court otherwise the sale to be set aside; and the commissioner made another report, showing the execution of the bond according to the order of the court, it will be incompetent for

the party excepting to file to the second report any exceptions which might have been filed to the first report, and which go to the irregularity of the sale, unless the irregularity be so gross as to cause a manifest injury, or show a strong probability of it. His exceptions will be confined to the matter arising upon the second report, as to the taking of the bond from the purchaser; *Nebbitt v. Cunningham*, 5 C. 292.

116. *Rule as to confirming.* Sales made by commissioners in chancery, should be regulated very much by the same rules which apply to sales made by sheriffs, under execution. The object in each is the same—the execution of the judgment or decree of the court—and the interest of suitors, as well as public policy, demands that the sales in both instances should be alike, certain and obligatory; *Henderson v. Herrod*, 1 C. 434.

117. *Same: Discretion as to: Causes for disaffirmance: Reopening bidding.* It is true a commissioner's sale is not final and valid until confirmed by the court; but the chancellor in refusing to confirm should exercise a judicial, not an arbitrary discretion. Fraud, accident, mistake, or surprise in relation to the time of the sale or title to the property, or the failure of the purchaser to comply with the conditions of the sale, are among the causes which are sufficient to cause a disaffirmance. The English rule, allowing the bidding to be reopened, has never been adopted in this State; *Ib.* See *post*, 128.

The English rule of conducting sales by a permanent master in chancery, and keeping them under the continual direction and control of the chancellor, and of reopening the biddings upon advances of the property in price, and thus making the court the vendor, does not prevail in all its extent in this country. With us, such sales are more like sheriff's sales, under execution; the most important difference being, that the commissioners making such sales must report them to the court for confirmation. But confirmation by the court is not essential to complete the sale—if the acts of the parties amount to a confirmation; *Redus v. Hayden*, 43 M. 614. See *ante*, 112.

117a. *Reopening bids.* Sales by commissioners in chancery will not be reopened, either before or after confirmation, except for special cause; and not then, unless the purchaser, being free from fault, shall be fully indemnified, by the repayment of the purchase money, costs, and expenses. After confirmation of the sale, a mere increase of the price, however large, will not induce a court of equity to reopen the biddings, though such increase is a strong auxiliary where there are other grounds. Nor is inadequacy of price sufficient, unless it be so great as to create an inference of fraud. There must be some such ground as fraud, accident, or surprise, preventing a fair sale, and working injustice to some party interested. Thus, where the sale, under a decree to foreclose a mortgage, took place without notice to complainant or

defendant, or to the solicitor of either, and property shown to be worth \$5000 was sold for \$100, in the absence of all the parties, it was held that the sale was properly set aside; *Mitchell v. Harris*, 43 M. 314.

118. *Same: Causes for setting aside sale adjudged bad.* It is not a good cause for setting aside an order confirming a sale, made under a decree to foreclose a mortgage, that the decree is erroneous in giving a priority in the proceeds of the sale to an assignee of a part of the mortgage debt, and that afterwards the other assignee, whose rights were postponed, appealed, and caused the decree giving the priority to be reversed, he now alleging as the reason for setting aside the sale, that it took place before the appeal, and that he was unable to bid, owing to the decree postponing him, and that the sale was for an inadequate price; he should have appealed before the sale was made; *Ib.*

118a. *Set aside for fraud.* Where the facts are such as to compel the conviction that there has been a collusion between a defendant in the decree and the purchaser at the commissioner's sale, to bring on the sale without the complainant's knowledge, whereby the property was sold at a greatly inadequate price, it is no abuse of the chancellor's discretion to set aside the sale, and refuse to confirm it; *Pattison v. Josselyn*, 43 M. 373.

C. SALES MADE ON A CREDIT.

119. *The statute: Decree for a note instead of bond.* The statute (H. & H. 525, §76), directs that where the sale is on a credit, that a bond shall be taken from the purchaser, which, if not paid at maturity, shall have the force and effect of a judgment against the obligors therein. If the decree directing the sale order a note to be taken from the purchaser, it will be erroneous, and will be reversed if no sale has been made under it; *Cook v. Fultz* 10 S. & M. 369.

119a. *Constitutionality of the statute.* The court were inclined, under the authority of *Bronson v. Kenzie*, 1 H. S. C. R., to hold that the law of the State providing that sales, made under decrees to foreclose mortgages, should be on a credit of six months, was unconstitutional; but it was also held that if the complainant do not object to the decree, but acquiesces in it, and seeks to enforce the purchaser's bond, he would thereby be estopped to raise that objection; *Tooley v. Gridley*, 3 S. & M. 493. See *ante*, 112.

120. *Same: Effect of private agreement on the bond.* Where the sale is made on a credit, the bond of the purchaser for the purchase money, if not paid at maturity, will have the force and effect of a judgment; and it will have this effect, notwithstanding a private valid agreement between the purchaser and the complainant, that the former should have a longer time for payment than the maturity of the bond, and should also pay the bond by instalments. The bond will be good as a judgment, though the purchaser may restrain collection, except in accordance with the

terms of the private agreement; *Shotwell v. Webb*, 1 C. 375.

121. *Obligee in the bond.* The court, in ordering a sale of mortgaged property on a credit, has power to order the bond of the purchaser to be made payable to the mortgagee, notwithstanding the debt has been assigned to another party; for the court has power to enforce the bond for the use of the party really interested; *Nebbett v. Cunningham*, 5 C. 592.

122. *Interest on the bond.* The statute requires the bond of the purchaser to bear interest at eight per cent. from its date. The bond will be considered as given with reference to this statute; and if nothing be said in it about interest, it will bear interest, according to the statute, at eight per cent. from its date, the statute entering into and becoming a part of the contract; *Ib.*

123. *Bond by agent.* Where such a bond appears on its face to be executed by one of the sureties, through his agent, the authority of the agent will be presumed; and it will also be presumed that the commissioner required the production of the agent's authority when he took the bond; *Ib.*

See ATTACHMENT, 44. HIGH COURT. 20. WRIT OF ERROR.

124. *Power of complainant to receive money on the bond.* Where the sale is on a credit, and the bond of the purchaser is payable to the complainant, this does not authorize the complainant to receive the money when it is due, unless he have a previous order of the court to that effect; and if he do receive it, he may be ordered by the court to bring it into court. *A fortiori*, he is not entitled to receive the money, when there has been a writ of error and *supersedeas*, before payment, even though he has no notion of such proceedings, for he and his solicitor are bound to take notice of all proceedings in the cause, affecting his right to receive the money; *Coulter v. Herrod*, 5 C. 685.

125. *Return of the bond into court: Confirmation.* It is no objection to the confirmation of a sale, that the commissioner does not return the purchaser's bond into court, within the time prescribed by the order of the court, if it were in fact returned in time to enable the complainant to have an effective execution on it, returnable to the same term at which the execution would have been returnable, in case the bond had been returned in the time prescribed in the order; *Nebbett v. Cunningham*, 5 C. 292.

126. *Same.* Yet on such failure to return the bond, the court has power to set the sale aside, unless the purchaser will produce the money in court, but such production will not be ordered until the return day for the execution, which would have been issued in case the bond had been returned in due time; *Ib.*

126a. *Lien on such sale.* Whether in a sale made by a commissioner on a credit, a lien similar to the vendor's lien, exists without an express reservation of it in the decree; *Quære?* But if the lien exists, the original mortgagor is not a necessary party to a bill

to enforce it, and the bill might also be brought in a different chancery court from the one which entered the decree of foreclosure; *Tooly v. Gridley*, 3 S. & M. 493.

126b. *Ordering sale for cash.* The ordering of a sale for cash by the Chancery Court (under the statutes as they existed before 1857), is an extraordinary power conferred by statute on the court, and the circumstances justifying it should appear affirmatively in the decree; and hence, the decree will be reversed if it order a sale for cash, unless the consent of the parties thereto required by the statutes, appear in the record; *Knox v. Bank of United States*, 4 C. 655; *Dean v. Lezardi*, 2 id. 424.

3. Miscellaneous.

127. *Jurisdiction of court over the purchaser.* The purchaser under a decree in chancery by the act of the purchase, submits himself to the jurisdiction of the court, as to all matters connected with the sale or relating to himself in his character as purchaser, and he stands before payment of his bid, in the relation of a trustee having possession of a trust fund. Hence, when the sale is on a credit, he is subject to the jurisdiction of the court, to be ordered to bring the money into court; *Coulter v. Herrod*, 5 C. 685.

128. *When bidding reopened.* By the English rule, the Chancery Court would not reopen the bidding in a sale regularly made by a commissioner, and ready for confirmation, at the instance of a third party who proposes to advance on the price for which the estate sold, unless such third party state the amount he is willing to advance, and offer to pay the expenses already incurred in the sale, and also to pay the purchaser for his expenses and loss of time. Would the bidding be reopened in such a case on any terms in this State; *Quære?* *Wright v. Cantzon*, 2 G. 514. See *ante*, 117, 117a.

129. *Irregular sale.* Where there is an irregularity in the proceedings by complainants, and a sale is made in execution of their decree thus irregularly obtained, and a purchase made by a trustee for their benefit, no title will be acquired; *Goff v. Robbins*, 4 G. 153.

129a. *Substituted bidder.* Property sold by a commissioner, was knocked off to C., but A., who was not present at the sale, afterwards took the property and gave his own bond for the price, in which it was recited that A. was the purchaser: *Held*, that A. was estopped to deny that he was purchaser, and was bound to pay the purchase money; *Redus v. Hayden*, 43 M. 614.

XIV. Contribution.

129b. *For contribution among sureties*, see PRINCIPAL AND SURETIES, 70, 71, 72. CONTRIBUTION, 4.

129c. *Contribution among co-legatees.* The doctrine of contribution does not apply to a case between specific legatees, under a will where all the property bequeathed to

them is subject to an encumbrance paramount to the title of the testator, and the property of one of the legatees alone has been seized to satisfy it; *Peebles v. Horton*, 10 G. 406.

129d. *Same: Case in judgment.* A. died, giving all his estate to B., who afterwards died, leaving specific legacies to several legatees, of the property so bequeathed to him. Afterwards a judgment was rendered against the executor of A. (the first testator), which was wholly satisfied out of the property bequeathed to one of the specific legatees of B.: *Held*, that such legatee was not entitled to contribution from his co-legatees whose legacies were equally with his liable, to the satisfaction of the judgment. In such a case, the creditor has the right to levy his execution on any part of the property, and if he levy solely on the legacy of one, it is a misfortune for which that one has no remedy against his co-legatees; *Ib.*

129e. *Same: Contribution where an estate is not solvent.* Where one of several specific legatees has been compelled to pay the whole of a debt due by the testator, he will not be entitled to contribution against his co-legatees who have received their legacies, if the estate be solvent, independent of the legacies, nor in case it becomes insolvent by *devastavit* of the executor; *Ib.*

XV. Creditor's Bill.

See FRAUDULENT ASSIGNMENT.

See sub-division Equitable Assets. See post, 479.

130. *Who may file: The lien necessary, and proceedings generally.* See FRAUDULENT ASSIGNMENT, 87 to 102. Post, 132a.

131. *Right of assignee in fraudulent assignment.* Where, in a creditor's bill filed to set aside a fraudulent conveyance, it appears that the conveyance was made with a fraudulent intent by the grantor to secure the vendee and another, they will be entitled to have their claim first paid, if they were innocent of any fraud; otherwise, they would be postponed to the judgment creditors; *Shotwell v. Taliaferro*, 3 C. 105. See FRAUDULENT ASSIGNMENT, 80 to 84.

132. *Case held not to be a creditor's bill.* M. recovered a judgment against P., and had execution returned *nulla bona*. P. was administrator of an estate, and he made settlements with the Probate Court, which showed that he was in advance to the estate to the amount of \$17,000. On this state of case, M. filed his bill against P., to subject the indebtedness which the estate owed P. to the payment of M.'s judgment against P.: *Held*, that the object of the bill was nothing more than to compel P. to pay a judgment against himself out of a particular fund, and it could not be maintained; *Helm v. Philbrick*, 6 C. 210.

132a. *The judgment and lien necessary.* A bill to subject the equitable assets of a debtor to the payment of his debts, cannot be maintained unless there be first rendered against him a judgment at law, on which there is a return of *nulla bona*; *Mizell v.*

Herbert, 12 S. & M. 547; *Flurned v. Harris*, 11 S. & M. 366; *Brown v. Bank of Miss.*, 2 G. 454; *Vasser v. Henderson*, 40 M. 519; *Hülzheim v. Drane*, 10 S. & M. 556. See further on this subject, FRAUDULENT ASSIGNMENT, 98 to 100; and for a modification of the rule, see same title, 101. See ante, 64; post 132f, 641.

132b. *Rule for allowance of creditor's bill.* Equity will not lend its aid to enforce a judgment at law, except where the assets sought to be subjected are in their nature equitable, or where the complainant's remedy at law has been obstructed by fraud. And in such a case complainant must show that he could not obtain relief at law. Hence, where the complainant had judgment at law against the maker and first and second endorsers of a note, he cannot maintain a bill to subject the equitable assets of the second endorser to the payment of the judgment, unless he show the insolvency of the maker and first endorser; for the second endorser's property, under our statute, cannot be taken to satisfy the judgment until those liable before him are exhausted; *Coleman v. Rives*, 2 C. 634. See PRINCIPAL AND SURETY, 41, et seq. BILLS OF EXCHANGE, &c., 164a, et seq.

132c. *Jurisdiction where there is a lien appearing of record: Obstructions to execution.* A court of equity has jurisdiction of a bill by a judgment creditor, to subject to his judgment property on which another has a lien to indemnify him as surety for the debtor, where the lien, though paid off and satisfied in fact, appears of record to be still subsisting. In such a case, the appearance on the record of an unsatisfied lien, is an impediment in the way of the execution, which the court will remove; *Folkes v. Hayden*, 7 C. 123.

132d. *Same: Case in which jurisdiction is denied.* But equity has no jurisdiction of a bill seeking a discovery from the defendant as to his indebtedness to the judgment debtor, and to have it applied to the payment of the complainant's judgment, when there is no allegation that such indebtedness grows out of or is in any way connected with an attempt to defeat the creditors of the debtor. In such a case, the remedy is ample at law by garnishment; *Ib.*; contra, *Payne v. Bullard*, post, 320.

132e. *Same: Obstructions to execution: Fraudulent sale: Parties.* A court of equity has jurisdiction to entertain a bill by a judgment creditor, whose judgment was rendered whilst the debtor had a legal title to land, to set aside a sale made by the debtor of the land, and to subject it to the judgment, upon the ground that the sale was fraudulent, where under the statute the lien of the judgment would have been divested by the sale, if it had been fair and *bona fide*. In such a case notwithstanding the creditor might have a remedy at law, the Chancery Court has jurisdiction to set aside the sale and remove obstructions to a fair sale at law. And such a bill may be maintained against the heir of the debtor and the fraudulent grantee without

revivor of the judgment at law: all the parties interested being before the court, they can make any defence to the bill which they could have made against a *scire facias*; *Fowler v. McCartney*, 5 C. 509; S. P., as to parties, *post*. 188.

132f. *Jurisdiction as to fraudulent assignments: Ground of: Lien.* Where property legally liable to an execution has been fraudulently conveyed or encumbered, and the application to chancery is to remove an obstruction which prevents a legal lien from operating on the property; in such case the better opinion seems to be that the creditor need only proceed at law to the extent necessary to give him a complete title, and that a judgment which operates as a lien upon the property sought to be charged, is all that is necessary; and hence, it is not essential to justify a levy on such property, and a bill to remove the obstruction, that the party making the conveyance, and his co-debtors, should be without other property to satisfy the judgment. And, notwithstanding property fraudulently conveyed may be levied on and sold under execution without first setting aside the fraudulent conveyance, yet equity will not require the creditor to sell a disputed title, but will set aside the conveyance and remove the obstructions to a fair sale (citing *Hilzheim v. Drane*, 10 S. M. 556; *Berryman v. Sullivan*, 13 id. 65; *Fowler v. McCartney*, 5 C. 509; *Snodgrass v. Andrews*, 1 G. 472); *Vasser v. Henderson*, 40 M. 519. See *post*, 132a.

XVI. Cross-bill.

133. *No new parties in.* By the general rules of chancery practice, a defendant has no right to make new parties to the suit by his cross-bill. And the statute (H. C. 770, art. 12, § 1), which enables a defendant to a bill in chancery to make his answer a cross-bill, without service of process on the defendants to the cross bill, "unless new parties be introduced," does not authorize the making of persons parties to the cross-bill, who were not parties to the original bill. The parties therein referred to as "new," and upon whom service of process is not dispensed with, are those of the defendants to the original bill, who are made parties to the cross-bill; *Ladner v. Ogden*, 2 G. 332.

134. *Effect of dismissal of original bill, on cross bill.* Where a cross-bill is filed for relief separate and independent of the original bill, and involving the rights of the co-defendants in the original bill, although touching the same property, and growing out of the same subject matter litigated in the original bill, the dismissal of the latter would not necessarily dismiss the former; but where the cross-bill has direct reference to, and involves only some collateral right affected by the relief sought in the original bill, it must be considered as in the nature of a defence to the original bill, and would necessarily fall by an abandonment or dismissal of that bill; *Id.*

135. *Cross-bill by complainant.* Because the defendant makes his answer to the original bill a cross-bill, this does not give to the complainant the right to make his answer thereto a cross-bill; but if he wishes to introduce new matter not embraced in his original bill, he must file an amended or supplemental bill; *Brown v. Troup*, 4 G. 35.

135a. *Necessity for cross-bill.* A decree granting relief in favor of a defendant against the complainant, cannot be granted except upon a cross-bill filed by the defendant; *Arnold v. Miller*, 4 C. 152. See *ante*, 36b; *post*. 156b.

135b. *Cross-bill for discovery.* Although by statute of 1861, the defendant is entitled to take the testimony of the complainant in the original bill, yet it does not oust the Chancery Court of its original jurisdiction to allow cross-bills for relief merely. The defendant has his election to take the testimony of the complainant under the statute, or resort to his cross bill for discovery and relief; *Millsaps v. Pfeiffer*, 44 M. 805. See *ante*, 36b.

XVII. Decrees.

136. *What is a final decree: Rule.* A final decree is one which makes an end of the case, and decides the whole matter in controversy, and determines the costs, and leaves nothing further for the court to act on; *Cook's Heirs v. Bay*, 4 H. 485.

137. *Same: Illustrations.* A bill was filed to set aside certain sales and for an account, and on it a decree was entered vacating the sales, and settling the principles on which the chancellor thought the final decree ought to be rendered, and also ordering an account and an issue *quantum damnificatus* to be sent to a jury for trial, but reserving the question of costs and all other questions: *Held*, that it was merely interlocutory and within the power of the chancellor to amend at any time before final decree; *Id.*

138. *Same: Another illustration.* A decree granting a divorce *a mensa et thoro*, and appointing a commissioner to ascertain and report the pecuniary condition of the husband, with the view of awarding permanent alimony, and directing that until the further order of the court, the wife be allowed eight dollars per month, and reserving the question of permanent alimony until the coming in of the report, is only interlocutory, and not final. And the allowance therein made ceases when the commissioner makes his report, if no further order be made to continue it. And if nothing more be done in the cause for eighteen years, it is not competent for the wife to file an original bill to enforce her right under the decree; but the cause is still depending, and she must apply to the court where it was instituted; *Bankston v. Bankston*, 5 C. 692.

139. *Same: Another illustration.* The object of the bill was to enforce specific performance of a contract, by which complainant claimed a lien on land for the payment of expenses incurred and advances made in con-

summing the purchase of the land. The fund had been placed in the hands of a receiver, by order of the court, and an account taken, and confirmed, and a decree entered, ordering the receiver to pay the money in his hands to complainant and appoint a commissioner to sell the land and settling the payment of the costs, leaving nothing but to distribute the proceeds of the sale: *Held*, that the decree was final, and a writ of error would lie from it; *Stebbins v. Niles*, 13 S. & M. 307.

140. *Same*. A decree to account is interlocutory until the report of the master has been confirmed; *Hunter v. Carmichael*, 12 S. & M. 726.

141. *Effect of final decree: Power of court over it*. After the expiration of the term of the court, at which a final decree is rendered, the cause cannot be considered as depending, and all jurisdiction of the court over it is ended, except in cases where infants are parties defendants, and when there is an express reservation to them by the decree of the time in which to contest it; also, except when the defendants are non-residents, who have time allowed by statute in which to contest it; *Cole v. Miller*, 3 G. 89.

142. *Same*. The Chancery Court has no power after the term at which it is rendered has expired, to entertain a petition to set aside a final decree duly enrolled. And it is enrolled when entered on the minutes of the court. After that time the decree is only examinable on appeal or writ of error, or by bill of review; *Sagory v. Bayless*, 13 S. & M. 153; or by bill in the nature of a bill of review for fraud in obtaining it; *Person v. Nevitt*, 3 G. 180. See *ante*, 79.

And an order, setting aside a final decree made after the expiration of the term, is void; and, if such order be made, and thereupon the defendant file a cross bill, and without objection from either side, proof is taken, and the whole matter relitigated, still the objection to the order of reinstatement is so conclusive and fatal that the court will be bound to notice it, and to dismiss the cross bill (citing *Sagory v. Bayless*, *supra*); *Commercial Bank of Manchester v. Lewis*, 13 S. & M. 226. A final decree may, for good cause, be set aside or modified at the term at which it is enrolled; *Pattison v. Josselyn*, 43 M. 373.

142a. *Power of court after final decree*. The jurisdiction of the court ceases after final decree, if there be nothing to be done in execution of the decree; but when in order to give the successful party the benefit of the decree, it is essential that it be executed, jurisdiction does not cease till such execution be had; *Goff v. Robbins*, 4 G. 153. See *post*, 655.

143. *Interlocutory decree may be set aside*. An interlocutory decree may be set aside after the term; but this action is not arbitrary; it must be regulated by the sound legal discretion of the court; and it will be error to set aside a decree to account without any petition or other showing setting

out the grounds therefor; *Hunter v. Carmichael*, 12 S. & M. 726; S. P., *Pattison v. Josselyn*, 43 M. 373.

144. *Decree against a dead person*. May be reversed by bill of review, or writ of error *coram nobis*: *Neilson v. Holmes*, W. 261.

145. *Disregarding decree void for fraud*. A decree obtained by fraud is void, both at law and equity, and may be so treated in any collateral proceeding in either forum; and hence, the husband may, in a suit to recover property in possession of the wife's vendee, show that a decree obtained by the wife against him for a divorce *a vinculo*, and adjudging the property to be her's, was obtained by fraud; and upon establishing his title and the fraud in the decree, he will be entitled to recover, without proceeding directly to annul the decree; *Plummer v. Plummer* 8 G. 185. See *ante*, 79.

146. *Form and contents of decrees: Instances*. A decree directing a sale of land to pay a judgment, should state the amount of the judgment to be paid; *Cohen v. Carroll*, 5 S. & M. 545. Where a decree decides that a defendant, claiming in his own right, holds the legal title for complainant, it should direct a conveyance by the former to the latter; *James v. Fisk*, 9 S. & M. 144. The decree cannot operate to convey the title *per se*; see *ante*, 103. *Post*, 496a.

In a decree of foreclosure, where some of the instalments are not yet due, the whole mortgaged estate should not be ordered to be sold, if less be sufficient to pay the instalments due, and the property be capable of division; *James v. Fisk*, 9 S. & M. 144. And where there is a decree to sell several distinct species of property, to pay one debt, it should order a sale of only so much as is necessary to pay what is due; *Morse v. Clayton*, 13 S. & M. 373.

See sub-division Infants. See *post*, 406.

147. *Time of entering decree: Haste*. A final decree to foreclose a mortgage signed on the same day the bill is taken for confessed, the case referred to a master, and his report confirmed, is, to say the least, a very hasty one. Whether it would be erroneous; *Quære?* *McGowan v. James*, 1 S. & M. 445. See *post*, 561.

148. *Decree on irregular service*. If the return of service be defective, and there be no appearance, the decree will not therefore be void, but only erroneous; *Smith v. Bradley*, 6 S. & M. 485. See *Process*, 17.

149. *Setting aside a decree on constructive service*. A final decree entered on *pro confesso*, where the service was by copy left at defendant's residence, should be set aside if defendant was absent from the State at the time, and in fact had no notice of the suit until after the decree was entered, if he shows that he had a good defence; *McGowan v. James*, 12 S. & M. 445; S. P., as to new trials at law, on same ground, see *Jones v. Commercial Bank of Columbus*, 5 H. 43; *Joslin v. Coffin*, Id. 539; *Lapiece v. Hughes*, 2 C. 69; digested in sub-division New Trial; *post*, 447, 564.

150. *Recital in decree as to appearance.* A recital in a final decree that the hearing was in the presence of the counsel of all the parties, would not include a party against whom a *pro confesso* had been entered, where it does not otherwise appear that he ever had counsel in the cause, or had entered his appearance (citing *Edwards v. Toomer*, 14 S. & M. 75); *Reno's Adm'r v. Harper*, 1 C. 154. See *APPEARANCE*, 1. *ATTACHMENT*, 72. *PROBATE COURT*, 47; *JUDGMENT*, 8.

151. *Erroneous decree: How attacked.* A decree which is merely erroneous, and is not void, cannot be attacked collaterally; *Smith v. Bradley*, 6 S. & M. 485.

See *JUDGMENT*, 22 to 28.

152. *Who bound by decree.* A decree only binds parties to the bill, and their privies; *Pouns v. Gartman*, 7 C. 133.

See *JUDGMENT*, 33 to 40. *EVIDENCE*, 119, *et seq.*

153. *No reversal for erroneous interlocutory order.* It is no ground for reversing a final decree which is right, that a previous interlocutory order was erroneous; *Topp v. Polard*, 2 C. 682.

154. *Reinstatement of dismissed bill.* If a suit in chancery, which has been once dismissed for want of prosecution, be afterwards reinstated by the court, this will be a judicial determination that there has been an unreasonable delay in the prosecution of it; *Tarpley v. Wilson*, 4 G. 467. See *post*, 602.

155. *Decree barred by statute of limitations.* A motion to appoint a new commissioner to execute a decree foreclosing a mortgage, is but a proceeding to revive the original decree, and have execution of it; and if it be not made till after the lapse of seven years from the rendition of the decree, it comes fully within the spirit and reason of the statute prohibiting the revival of any judgment by *scire facias*, after the expiration of seven years from its date, and will, therefore, be barred; *Goff v. Robins*, 4 G. 153.

156. *Decree making new parties.* A decree making new parties will be presumed correct, unless the record show affirmatively to the contrary; *Pass v. McRea*, 7 G. 143. See *post*, 490.

156a. *Decree on overruling demurrer.* Where a demurrer is overruled to an amended bill, leave should be granted to file an answer. The rule is different where a demurrer to a bill of revivor is overruled. In this last case, the court should proceed at once to enter a decree of revivor, unless the defendant make a showing of merits in support of his application for leave to answer; *Nye v. Slaughter*, 5 C. 638.

156b. *Decree in favor of a co-defendant.* A court of chancery may make a decree between co-defendants, or in favor of one and against another co-defendant, founded on facts stated in the complainant's bill, which are admitted by the defendant sought to be charged. But this can be done only where the bill is maintained, and the relief sought in it, granted against one or more of the defendants between whom there may be adverse

equities, growing out of the complainant's right, and not inconsistent with it; and these equities growing out of the relief decreed to the complainant, are proper to be adjusted between all the parties to the suit. But a decree granting relief against the complainant can only be granted on cross-bill; *Arnold v. Miller*, 4 C. 152. See *ante*, 135a.

XVIII. Demurrer.

157. *That fraud charged in the bill must be answered, with demurrer,* see *ante*, 21, 22, 23.

158. *Effect of answer on demurrer.* If an answer be filed before a demurrer is disposed of, it overrules the demurrer; *Baines v. McGee*, 1 S. & M. 208.

And the rule is the same where the demurrer is contained in the answer, and is a part of the bill, if the answer extend to that part of the bill to which the demurrer is applied, the rule being, that if the answer go farther than to deny the combination usually charged, it overrules the demurrer; *Bond v. Jones*, 8 S. & M. 368. And so if the demurrer be to the whole bill, and the answer be to a part, it overrules the demurrer; *Gray v. Regan*, 1 C. 304; *Fall v. Hafter*, 40 M. 606. And this rule applies where there is a demurrer to the bill and an answer filed, denying the fraud in a case where the fraud is the *gravamen* of the bill. But where the answer and the demurrer apply to separate and distinct parts of the bill, the answer will not overrule the demurrer; *Fall v. Hafter*, *supra*.

159. *How framed, when to a part of the bill only.* Where a demurrer is intended to reach only a part of the bill, it should definitely state the part demurred to; *Ib.*

160. *Demurrer when part of the bill is good.* A demurrer cannot be good in part, and bad in part; and hence, if the demurrer be taken to the whole bill, and a part of the bill be good, the demurrer will be overruled; *Graves v. Hull*, 5 C. 419. The rule is the same at law. See *PLEADINGS*, 73, *et seq.*; and in the Probate Court; see *PROBATE COURT*, 140. And if a particular ground of demurrer be assigned to the whole bill, it will be overruled, unless the bill in that respect be wholly insufficient for the relief sought; *Anding v. Davis*, 9 G. 574. And so if a ground of demurrer be assigned as against all of the complainants, and it be insufficient as to one of them, it will be overruled as to all; *Gibson v. Jayne*, 8 G. 164.

161. *When bill good as to one defendant and bad as to another.* When a bill is good as to one of several defendants, it will not be dismissed on his demurrer, because it may be insufficient as to another defendant, who has not appeared and defended the suit; *Garner v. Lyles*, 6 G. 176.

162. *Bill dismissed as to all on demurrer by one defendant.* Where the demurrer of one party brings up the equity of the whole bill as to the others, as well as to himself, and it appears that there is no equity as to any of the defendants, the bill should be dis-

missed as to all; *Patterson v. Edwards*, 7 C. 67; but this rule would not apply where the ground of defence is such that it may be waived, as the statute of limitations. See *post*, 164.

163. *Demurrer admits the truth of the bill.* A demurrer is by law an admission of the truth of the bill, or, of so much of it as it applies to. The demurrant cannot give it a different effect by denying in the demurrer any part of the bill; *Gray v. Regan*, 1 C. 304.

164. *Difference between admission by demurrer and by pro confesso.* Notwithstanding a demurrer confesses the allegations of the bill, it still is but a confession accompanied by an assertion of all the legal rights of the demurrant as they would exist supposing the bill to be true, and growing out of the facts as therein stated. It is, therefore, something more than a *pro confesso*, which is, in effect, equivalent to an answer confessing the bill and asserting no legal right in the defendant. Hence, because the statute of limitations can be set up by demurrer as a defence to the bill, it does not follow that the court should refuse relief on a *pro confesso* decree, merely because it appears that the statute of limitations, if relied on, would be a bar. The failure to set up the statute is a waiver of it; *Patterson v. Ingraham*, 1 C. 87; S. P., *Spears v. Cheatham*, *ante*, 164.

165. *Form of demurrer setting up the statute of limitations.* The statute of limitations may be set up in equity by demurrer; but when this is done, that particular cause must be assigned in the demurrer; *Archer v. Jones*, 4 C. 583.

166. *When demurrer proper to set up the statute.* The defence of the statute of limitations can be set up by demurrer only when, from the face of the bill, it appears that the bar has attached. When it does not so appear, the defence must be set up by plea or answer; *Dickson v. Miller*, 11 S. & M. 594; *Nevitt v. Bacon*, 3 G. 212; and it makes no difference, in such a case, that the bill avers that the debt is due and unpaid; *Nevitt v. Bacon*, *supra*.

167. *Demurrer for want of equity on the face of the bill.* A demurrer to a bill for want of equity on its face, will not be sustained, unless the court be satisfied that no discovery or proof called for properly by the bill, can make the subject matter of the suit a proper case for equity cognizance; *Morton v. Grenada Female Academy*, 8 S. & M. 773.

168. *When special demurrer necessary.* Defects or omissions arising from obscurity or unskillfulness in drawing the bill, should be distinctly and specifically pointed out in the demurrer, so that complainant may have an opportunity of amending. And for this reason a general demurrer setting up the statute of limitations ought not to be sustained merely upon the ground that the disability of one of the joint complainants at the time the cause of action accrued, is not distinctly stated, the disability of the others clearly appearing. That particular cause of

demurrer should have been assigned; *Fearne v. Shirley*, 2 G. 301.

See HIGH COURT, 73.

169. *Demurrer to pleas, &c.* A demurrer to a plea or replication in chancery, is not the proper mode of testing its sufficiency. The plea or replication should, in such case, be set down for a hearing, and then its sufficiency will be determined; *Beck v. Beck*, 7 G. 72.

170. *Effect of difference between bill and exhibit on demurrer.* A bill alleged satisfaction of a judgment at law, averring that the proceeds of a sale made under an execution therefrom, had never been appropriated to the payment of any other judgment against the defendant. The record of the judgment, which was made an exhibit to the bill, showed the contrary: *Held*, on demurrer to the bill, that, in the absence of all explanation in the bill of the statement in the record, the court must consider that the appropriation was made as stated in the exhibit; *Harper v. Hill*, 6 G. 63.

See PROBATE COURT, 139.

170a. *Exhibits on demurrer.* An exhibit merely referred to in the bill, and asked to be taken as a part thereof, does not constitute a part of the pleadings in the cause, so as to aid a demurrer to a bill which shows on its face a case for equitable relief. The bill is a part of the pleadings, but the exhibits are evidence; *Terry v. Jones*, 44 M. 540.

171. *Second demurrer.* After a demurrer has been overruled, a second demurrer may be filed, if the bill has been, since that time amended materially and improperly; *Scott v. Colvitt*, 3 H. 148.

171a. *Decree on overruling demurrer.* See *ante*, 156a.

XIX. Discovery.

See *ante*, 24, 26, 135b; *post*, 292.

172. *Disposition of bill for.* A bill for discovery only cannot be set down for final hearing; *Townsend v. Odam*, W. 357.

173. *Proof as to.* When matters in avoidance are stated in answer to a bill of discovery, they are subject to be sustained or disproved by evidence on both sides; *Greenleaf v. Highland*, W. 375.

174. *Who entitled to.* A purchaser of land at sheriff's sale, under a judgment against the original enterer from the United States, has a right to a discovery from the assignee to whom it has been patented, as to the date of the assignment, and the manner in which it was made; *Huntington v. Gran'land*, 4 G. 453.

See LAND LAWS OF UNITED STATES, 30, 35.

174a. *Presumption against a party failing to make discovery.* When the defendant neglects, in his answer, to discover the date of a fact within his knowledge, when required by the bill to make the discovery, and there is no proof on the point, the true date will be considered by the court to be that which is most beneficial to the complainant, and not inconsistent with the other circumstances of the case. Hence, when a defendant, in whose

hands had been placed collateral securities, bearing interest at eight per cent., being required to answer whether he had collected them, and the date of such collection, answered, admitting the collection, but failed to state the date thereof, he will be considered as having made the collection at the date of the filing of the answer, so as to make him chargeable with eight per cent. interest up to that date; *Tarpley v. Wilson*, 4 G. 467.

See ANSWER, 25. *Post*, 505, 508.

174b. *When proper: Affidavit: Practice.* A bill of discovery must be for matters which lie in the knowledge of the defendant only, and should call for something which is not in the complainant's power to set out in his bill, and the bill need not be sworn to; *Buckner v. Ferguson*, 44 M. 677.

And the pendency of an action at law is not always necessary to the maintenance of a bill of discovery. The bill must state that the discovery is asked for the purpose of some suit brought or intended to be brought, and it should set forth, with reasonable certainty, the nature of the suit, or the nature of the claim or right, to support which the action is brought, or intended to be brought, and also the name of the defendant; *Ib.*

XX. Dismissal of Bill.

174c. *When the bill is bad as to demurrant, but good as to another, see ante*, 161.

175. *When bill is dismissed as to all, on demurrer of one, see ante*, 162.

176. *As to effect of reinstatement after dismissal, for want of prosecution, see ante*, 154.

177. *Power of clerk to dismiss in vacation.* The clerk of the Chancery Court has no power, in vacation, to dismiss a bill in chancery, upon the order of the complainants, unless the costs be first paid or secured to his satisfaction; *Ladner v. Ogden*, 2 G. 332.

178. *Effect of order of complainant to dismiss.* The letter of the complainant, or of his solicitor, filed with the clerk in vacation, and directing a dismissal of the bill, will not have that effect, unless the costs be paid or secured; *Ib.*

179. *Dismissal for want of prosecution.* Where no steps in the prosecution have been taken by the complainant for two terms, the bill may be dismissed for want of prosecution, unless the failure was occasioned at the instance of the defendant; *Person v. Nevitt*, 3 G. 180. See *ante*, 79.

180. *When bill dismissed without prejudice.* When the proceedings under which the complainant claims title, as they appear in the record, are invalid, but their validity was not directly attacked in the court below, if there be a probability that the invalidity arises from a defect in the record as made up in this court, and that it can be remedied, this court will dismiss the bill without prejudice; *Bias v. Vance*, 3 G. 198. And so where a demurrer is sustained to a bill, upon the ground that it is not technically and formally

drawn, and the complainant does not apply for leave to amend, the decree should dismiss the bill without prejudice; *Alexander v. Moye*, 9 G. 640. And so where it was adjudged, that the complainant had not framed his bill properly, in order to overturn a defence set up in the answer, it was ordered to be dismissed without prejudice; *Carnes v. Hubbard*, 2 S. & M. 108. See *post*, 391.

181. *Same: Other instances.* In a case where a bill was brought to remove clouds, by a purchaser at sheriff's sale, who bought under a judgment junior to the one under which the defendant bought, the principal question being whether the senior judgment was satisfied at the time of the sale under it; the court reached the conclusion, that the senior judgment was not satisfied at that time; yet, inasmuch as the facts were complicated, and the record not as perspicuous as it might have been, the bill was dismissed without prejudice to the legal rights of the complainant; *Banks v. Evans*, 10 S. & M. 35. And so where a bill was filed to set aside a sheriff's sale, upon the ground that it was fraudulent as to creditors, and the proof, though calculated to excite suspicion, fell short of establishing the fraud; the court dismissed the bill, without prejudice to the complainant's rights at law, saying, that a jury might find differently, and that the question of fraud could be better investigated before them; *Foster v. Pugh*, 12 S. & M. 416.

182. *Same: Another instance.* In this case, the High Court reversed a decree giving a right claimed under a will made in a sister State; and the reversal was on the ground that the copy of the will was not authenticated according to law; the court refused to enter a decree final for the defendant, but stated that they would either dismiss the bill without prejudice, or remand the cause, so that the complainant might get an amended transcript. The bill was remanded, and again it was a second time remanded for the same reason in this case; *Stewart v. Swanzy*, 12 S. & M. 684; S. C., 1 C. 502.

See HIGH COURT, 138.

183. *Same.* Where the complainant fails to take any proof to sustain his cause, the bill was dismissed without prejudice, upon the ground that there had been no trial on the merits; *Wellons v. Newell*, 7 S. & M. 399.

184. *Dismissal for want of prosecution, is without prejudice.* The dismissal of a bill for want of prosecution, is no bar to a subsequent suit for the same matter; *Nevill v. Matthews*, W. 375.

185. *Effect of dismissal without prejudice.* The effect of a decree by the chancellor, dismissing a bill without prejudice, is, that such dismissal shall not operate to bar a new suit, which the complainant might thereafter bring on the same cause of action. It does not deprive the defendant of any defence he may be entitled to make to the new suit, or confer any new right or advantage on the complainant. And hence, it will not have the effect of excepting from the period prescribed by the statute of limitations, the time during

which the first suit was pending; *Nevitt v. Bacon*, 3 G. 212.

186. *Dismissal before answer.* A bill which shows no ground of relief on its face, may be dismissed before the principal defendant has answered; *Semple v. Magatagan*, 10 S. & M. 98.

See sub-division *Res Adjudicata*.

186a. *Effect of dissolving injunction as to dismissal.* See *post*, 261a.

XXI. Election.

187. *Power to compel election of two suits: Case in judgment.* The power of compelling a plaintiff, who has brought suit in two different tribunals against the same defendant, on the same cause of action, to elect in which tribunal he will proceed, is in a chancery court; but it is never exercised, except where the recovery in one, would be a bar to a judgment or decree in the other. It does not apply where a defendant being sued at law, seeks also in a court of chancery to make a defence to the action at law. Hence, where a judgment at law was rendered against a defendant, and he then filed a bill in equity, to make his defence there, and to procure a perpetual injunction against the judgment, and at the same time sued out a writ of error to reverse the judgment at law, it was held that the High Court would not compel him to elect which suit he would prosecute; the writ of error or the bill in equity; *Larauseini v. Carquett*, 2 C. 151.

See *ELECTION*. See *post*, 390.

XXII. Equitable Assets.

See sub-division *Creditor's Bill*.

188. *Proceeding to condemn.* Where the ancestor dies, having only an equitable title to land, which could not be sold under a judgment rendered against him at law, the plaintiff may proceed in equity to condemn the land under the judgment, without revivor by *scire facias* at law; *Ferguson's Heirs v. Crowson*, 3 C. 430; S. P., in *ante*, 132e.

188a. *Complainant must have lien.* A bill to subject equitable assets to the payment of debts, where the complainant's demand is legal, can be maintained only where the complainant has reduced his claim to judgment, and has a return of *nulla bona*; a judgment in a sister State, is not sufficient for this purpose; *Farned v. Harris*, 11 S. & M. 366; *Prewett v. Land*, 7 G. 495; *Brown v. Bank of Mississippi*, 2 G. 454; *Hilzheim v. Drane*, 10 S. & M. 356. *Aliter*, where the demand is equitable, and he must therefore come into equity in the first instance; *Prewett v. Land*, *supra*. Thus, a court of equity will entertain a bill against a trustee, and the beneficiaries, to compel the trustee, according to the terms of the trust, to apply the assets to the payment of a debt due by his beneficiaries to the complainant; *Prewett v. Land*, *supra*.

188b. *Where the lien and nulla bona may be dispensed with.* See *FRAUDULENT ASSIGNMENTS*, 101.

188c. *Judgment in Federal Court a good lien.* A judgment in the Federal Court held in this State, and a return of *nulla bona* on it, is sufficient; *Bullitt v. Taylor*, 5 G. 708.

188d. *Reversal of the judgment.* If the judgment be reversed *pendente lite*, the bill will be dismissed; *Brown v. Troup*, 4 G. 35.

188e. *A sale of the property will be decreed.* See *Hunt v. Knox*, digested *post*, 311.

188f. *Bill against fraudulent assignee as executor de son tort.* After the death of the fraudulent assignor, proceedings to annul the assignment may be instituted against the assignee as executor *de son tort* of the assignor, where there is no legal representative of the assignor who can be made a party to the bill; *Garner v. Lyles*, 6 G. 176. See *post*, 352.

188g. *Bill by administrator de bonis non.* Equity will entertain a bill by the administrator *de bonis non* of an insolvent estate, to set aside a previous fraudulent and illegal sale made by the administrator in chief. And in such a case, if the sale be annulled, possession of the property will be decreed to the complainant, also an account for rents and profits; *Forniquet v. Forestall*, 5 G. 87.

XXIII. Exhibits.

See sub-division *Demurrer*, *ante*, 170, 170a.

189. *Admission in exhibit.* An admission by the defendant of an item of indebtedness against him, contained in an account filed as an exhibit to his answer, is sufficient evidence to prove it; and such item should be allowed in an account stated between the parties under the order of the court, unless otherwise shown to be improper; *Williamson v. Downs*, 5 G. 402.

190. *How proven.* An *ex parte* affidavit is not admissible to prove an exhibit; *Carman v. Watson*, 1 H. 333.

191. *Same.* It seems questionable whether exhibits may be proven in open court, or whether they should be proven before an examiner; *Id.*

192. *How pleaded.* It is admissible, to a certain extent, in pleading in chancery, to refer to written evidence as exhibits, and as parts of the bill and answer; but good pleading requires that what is material in the exhibits should be set out by proper averments in the pleadings themselves. The pleadings ought to contain the substance of the case, and so much of the exhibits as is material to it; *Harvey v. Kelly*, 41 M. 490.

XXIV. Evidence.

See *EVIDENCE*.

1. Witness.

193. *Witness: What parties competent.* A defendant may be examined as a witness by the complainant; and where he has no interest in the matter, upon which it is proposed to examine him, he may be examined for his co-defendant; but in no case can a complainant be examined as a witness, either

for a co-complainant or a co-defendant. And this rule applies, also, to a complainant in a cross-bill, who is proposed to be examined in reference to facts therein alleged, and concerning which a discovery was sought; *Servis v. Beatty*, 3 G. 52.

194. *Rule where complainant examines defendant as a witness.* It is a rule of chancery practice, that if the complainant examines as a witness a material defendant in the cause, no decree can be rendered against that defendant, nor against his co-defendants, whose interests are so involved with his, that a decree against them would affect his rights, unless the bill be admitted by the answer, or be taken for confessed. The reason of this rule is, "that there cannot be a decree for or against a man on his own evidence," and "the complainant cannot compel the defendant to assist in the same cause, and also, to act adversely to him;" but this rule, though well settled, is extremely technical, and is not to be extended beyond the strict reason on which it is founded; and hence, where the deposition of such a defendant has been taken, if the complainant is entitled to relief upon the pleadings and other evidence in the cause, the deposition will be suppressed, and a decree rendered in favor of the complainant; *Stanton v. Green*, 5 G. 576.

195. *Same: Instance.* A fraudulent conveyance, to defeat or hinder creditors, though void as to them, is good as between the parties, and the fraudulent grantee is still liable for the purchase money, though the conveyance be set aside at the instance of a creditor. Hence, he is a material defendant, whose rights would be affected by a decree annulling the conveyance, and if examined by the complainant in relation to the fraud, a decree cannot be rendered for the complainant, unless his answer confess the complainant's case, or the bill be taken for confessed, or there be other proof in the record, sufficient to entitle complainant to relief, without reading the deposition of such defendant; *Ib.*

196. *Same: The rule abolished by Rev. Code of 1857.* The foregoing rule stated in *ante*, 194, is not founded on very satisfactory reasoning, and is abolished by the Rev. Code of 1857, allowing parties to the record to be examined as witnesses; *Burk v. Loggins*, 10 G. 462.

2. Pleadings as Evidence.

197. *Pleading as evidence: Answer of one defendant against another.* In general, the answer of one defendant is not evidence against his co-defendant; but it is an exception thereto, that where one succeeds to the right of another, so that right devolves on such successor, they then become privies, and the answer of the party from whom the right devolved, will be evidence against the other succeeding to it; and hence, it was held, that where one had purchased a judgment from another, the answer of the latter, acknowledging the reception of a valuable

consideration, for a prior assignment of the same judgment, should be admitted against the successor, to prove the valuable consideration; they both being defendants to a bill by the first assignee, to enforce the prior assignment. But this exception, which allows the admissions of one in privity with another to bind the latter, does not apply where one of the parties is complainant, and one is defendant; for in this case, the first owner and assignor of the judgment stated, that the consideration for the first assignment had failed; and it was held, that it was not evidence against the first assignee, who was the complainant against the last assignee, who was a co-defendant with the assignor making the answer; *Fitch v. Stamps*, 6 H. 487. See *post*, 209.

198. *Same: Pro confesso as evidence.* As a general rule, the answer of one defendant is no evidence against his co-defendant; and a *fortiori* a *pro confesso* against one is no evidence against the other; *Carnes v. Hubbard*, 2 S. & M. 108. See *post*, 559.

3. Miscellaneous.

199. *The rule about two witnesses to overturn the answer, see ante*, 28.

200. *When answer is not evidence, see ante*, 25, 26.

201. *Admission in exhibit as evidence, see ante*, 189.

202. *Proof of negative allegation, see EVIDENCE*, 341.

203. *Allegata and probata must correspond.* Evidence which does not correspond with the pleadings, is irrelevant; *Cole v. Hundley*, 8 S. & M. 473.

204. *Same.* The *allegata* and *probata* must correspond; the complainant can have no relief, except upon his case as made by the bill, and the defendant is not compelled to meet a case made by the proof, but not stated in the bill; *Pinson v. Williams*, 1 C. 64; *S. P.*, *Carnes v. Hubbard*, 2 S. & M. 108; *Kidd v. Manley*, 6 C. 156; *Bowman v. O'Reilly*, 2 G. 261; *Faherree v. Fletcher*, 2 G. 265; *Shaw v. Brown*, 6 G. 246; *Parkhurst v. McGraw*, 2 C. 134. And so a defence not set up in the answer, cannot be relied on at the hearing; *Bacon v. Ventress*, 3 G. 158; *Prewett v. Coopwood*, 1 G. 369; *Harney v. Morton*, 7 G. 411. But a party may prove less than he claims in his pleading, if it be a part of the charge or defence set up, and of the same nature, and conduce to establish the same right; hence, the complainant may, where the bill alleges full payment, prove partial payment; *Keaton v. Miller*, 9 G. 630. See further on this subject, *post*, 510.

205. *Sufficiency of proof.* A complainant who asks a decree against the plain and unequivocal denials of the answer, must satisfy the court by clear proof, that the answer is untrue; doubtful evidence will not do; *Moody v. Farr*, 6 S. & M. 100.

But no more evidence is necessary to establish a fact in chancery, than at law, in a similar case; *Gray v. Roden*, 2 C. 667; except that in certain cases it requires two

witnesses to overturn the answer; See *ante*, 28.

206. *Same: Instance.* Property was sold under several executions, and the sheriff's deed to the purchaser recited a particular execution as one under which the sale was made; a purchaser of the same property, at a sale made by the United States marshal attacked the validity of the sheriff's sale, and alleged in his bill, that the particular execution, so specified in the sheriff's deed, was not in his hands when the sale was made by him; the defendant answered by averring his belief that it was in the sheriff's hands; there was no other proof on either side than the recital in the sheriff's deed, and it was held that the complainant had failed to make out his claim to relief on that issue; *Banks v. Evans*, 10 S. & M. 35.

207. *Same: Case of conflicting evidence considered.* In this case the complainant, who was a married woman, claimed title to a slave, under a deed alleged to have been made by her father in the year 1818; and in support of her case, read in evidence the deposition of the trustee in the deed, which stated clearly and positively the execution of the deed, and the delivery of the slave under it. The defendant, though having no personal knowledge of the matter, denied the execution of the deed and the delivery of the slave under it, and asserted, that before its date the slave had been given by the complainant's father to her husband, under whom defendants claimed title, and had held possession for many years. The court reviewed the defendant's evidence, which consisted of a great many circumstances tending to support it, and reached the conclusion that it was sufficient to overturn the positive testimony of the complainant's witness; *Woods v. Sturdevant*, 9 G. 68.

208. *Bill must be proven: Instance.* A bill was filed for relief against a judgment at law, upon the ground that it was void for want of notice to complainant, the bill alleging that the writ was returned executed as to complainant by mistake; the want of notice was denied by the answer and no evidence taken either way; *Held*, that the complainant was not entitled to relief without proof of his bill; *Cole v. Hundley*, 8 S. & M. 473.

209. *Admissions in pleading as evidence.* Evidence cannot be introduced by a party to contradict facts admitted by his pleadings; *Parkhurst v. McGraw*, 2 G. 134. Thus, if complainant in his bill to enforce a contract, made by one assuming to act as his agent, state that it was made by his agent, this is a conclusive admission of the agency, and he will not be permitted to deny it; *Kountz v. Price*, 40 M. 341.

210. *Proof of character in which complainant sues.* Complainant is not bound to prove that he is entitled to the character in which he sues, unless it be denied under oath; *Keaton v. Miller*, 9 G. 630.

211. *Proof against infants.* A joint decree against a mother and her minor children, can-

not be rendered without other proof against the children, than the admissions of the mother; *Prewett v. Land*, 7 G. 495. See INFANTS; and *post*, sub-division Infants.

4. Parol Proof to Vary, &c., Writings.

212. *Parol evidence to vary, &c., Writing.* The general rule is recognized in chancery, that parol evidence will not be admitted to vary a written instrument, but where from mistake or fraud, the writing does not truly express the intention of the parties, the evidence is admissible to carry out their true meaning and intention. This principle was extended so as to allow an administrator, seeking to enforce a statutory lien on land sold by him, to show that a note given to him as the guardian of the minor heirs of the intestate, and expressing on its face to be for loaned money, was in renewal of a note given for the balance of the purchase money due for the land; the court saying that the heirs of the intestate were to be regarded as the real parties complaining, and that any change in the contract affecting their rights, would be a fraud on them; *Elliott v. Connell*, 5 S. & M. 91.

See EVIDENCE, 155, *et seq.* *Post*. 330, *et seq.*; 584 *et seq.*

XXV. Guardian ad litem.

212a. See INFANTS, sub-division Infants.

XXIV. Infants.

See INFANTS. See *ante*, 211.

213. *No pro confesso against infants.* A *pro confesso* cannot be taken against an infant; and if there be a *pro confesso* against an adult defendant, this does not entitle the complainant to a decree against the infant co-defendant. No decree can be rendered against an infant, except on proof, and if it be done, the error will not be cured by reserving in the decree time to the infant after his arrival at full age, to impeach the decree; for the right of impeachment seems to be limited to reversal for errors on the face of the decree itself; see *post*, 216; and it also seems to be lost, where the decree is for a sale of property; see *post*, 215; but if such a decree be reversed, the *pro confesso*, as to the adult defendant, will not thereby be set aside; *Hargrove, v. Martin, Pleasants & Co.*, 6 S. & M. 61.

214. *Decree against.* A decree against an infant, without the appointment of a *guardian ad litem* is not void, but only erroneous; *Smith v. Brady*, 6 S. & M. 485; and so, if the decree omit to appoint a day, after his coming of age, to show cause against it; *Ib.*

215. *Entitled to no day, where there is a sale.* Where the decree is for a sale of the mortgaged premises, instead of a technical foreclosure, an infant defendant is not entitled to have a day appointed after his majority, to show cause against it; *Smith v. Brady, supra*. See *ante*, 213. But a decree generally in relation to the realty of an infant,

which does not reserve to him a day after his majority to show cause against it, is erroneous; *Williams v. Stratton*, 10 S. & M. 418.

216. *Power to impeach decree.* Where an infant is entitled to show cause against a decree after his majority, he can only show errors on the face of the decree; he cannot reinvestigate the matters of the suit; *Ib.* See *ante*, 213.

217. *Appointment of guardian ad litem.* Both by the rules of the Chancery Court, and the general principles of equity jurisprudence, a guardian *ad litem* cannot be appointed for an infant defendant until the court has acquired jurisdiction over the infant by personal service of process, if he be within the State, or by publication, if he be a non-resident; and an appointment made without such service or publication, will be erroneous, and a decree rendered against the infant will be reversed; *Stanton v. Pollard*, 2 C. 154; *S. P., Prewett v. Land*, 7 G. 495. The decree will be void; see INFANTS.

218. *Same: Agreement of counsel.* And an agreement of counsel made on the filing of a bill of revivor, against an infant heir, that a certain person shall be appointed a guardian *ad litem*, will not make such appointment good; *Stanton v. Pollard*, *supra*.

219. *Form of appointment.* If an answer be put in by one as guardian *ad litem* for an infant, and it be received as such, it will be sufficient, though the record do not show any formal appointment of such guardian *ad litem*; *Ib.*

220. *Infant's deed cancelled.* A court of equity has jurisdiction of a bill to cancel a deed made by the complainant where he was an infant, and to recover possession of the land thereby conveyed; *Cook v. Tounbs*, 7 G. 685.

221. *Infant's deed: No estoppel: Offer to refund.* An infant is not bound by his deed, nor estopped by any recital in it; and hence, it is unnecessary, in a bill to cancel a deed on the ground of the infancy of the grantor, for the complainant to offer to refund the purchase money stated in the deed to have been paid to the infant, if he aver that the deed was made without consideration; *Ib.*

222. *Suit by infants to recover land.* Where land has been sold by a guardian, and he has died, the wards who are infants, may maintain a bill to enforce the lien for the purchase money, or in case the sale is invalid, to recover the land and the mesne profits. If there were no other reason for the courts entertaining jurisdiction, the infancy of the complainants brings the case within the jurisdiction of a court of equity, for all the purposes of the bill, including the claim for use and occupation (citing *Carmichael v. Hunter*, 4 H. 308); *Williams v. Duncan*, 44 M. 375.

223. *Sale of infant's land for partition.* The Chancery Court has jurisdiction "to order the sale of any real estate held in joint tenancy, or tenancy in common, when a sale will better promote the interest of the parties than a partition," and this jurisdiction exists

where the complainant is a minor, and the defendants his guardian and co-heirs; *Wilson v. Duncan*, 44 M. 642.

A court of equity will entertain a bill against a disseisor, to recover rents and profits, if a part of the complainants be infants; for as to them the defendant will be considered as guardian or bailiff; *Carmichael v. Hunter*, *supra*. See *post*, 497.

223a. *Protection to infants.* It is the duty of the chancellor to protect the interests of infants, whether the proper defence be made or not; and for this purpose he should look to the record in all its parts, and, of his own motion, give to the infant the benefit of all objections, as fully as if specially pleaded. An infant can waive none of his rights; *Price v. Crone*, 44 M. 571. See *post*, 323b.

223b. *Defence of infancy available at law.* See *post*, 308a.

XXVII. Injunction.

1. The granting of Injunctions, and the Bond

224. *When not refused in the first instance.* An injunction requested upon principles apparently of justice and equity, should not be refused in the first instance; *Lee v. Montgomery*, W. 109.

225. *Granting discretionary.* An application for an injunction is addressed to the sound discretion of the court, or chancellor in vacation; and he may wholly refuse it, or grant it on such terms as he may see proper to prescribe; *Brown v. Speight*, 1 G. 45.

226. *Same: Administrator required to give bond.* And in the exercise of this discretion, the court, or chancellor, may require of the administrator, as a condition to the grant of an injunction applied for by him, that he execute an injunction bond; and if the administrator accept the injunction by giving the bond, it will be binding on him and his sureties thereon, in their individual capacity. And it is right and proper that the court or chancellor should require such bond, when an injunction is granted at the instance of an administrator, to restrain proceedings at law before judgment; *Ib.*

227. *The bond required.* Upon issuing an injunction against proceedings at law, the clerk must endorse on the writ, "that its operation is to be suspended, until bond is given;" and unless bond is given by all the parties applying for it, the injunction will be inoperative (see *Poindexter's Code*, p. 95, § 44); *Davis v. Dixon*, 1 H. 64. By the Code of 1857, no injunction is to issue, until bond and security be given, conditioned as the statute directs. Two sureties are required where the injunction is to stay proceedings at law, but if one only be taken, it will be error to dismiss the injunction on that ground, without giving the complainant an opportunity under an order of court, to amend his bond; *Miller v. McDougall*, 44 M. 682. And so if the sureties be insufficient, the complainant shall have time to give new security; *New v. Wright*, 44 M. 202. If the bond be defective, it is good ground for dissolving the injun-

tion, but it is no cause for dismissal of the bill; *Boswell v. Wheat*, 8 G. 610.

2. The Effect of Granting an Injunction.

228. *As a release of errors.* Under the statute (H. C. p. 760, § 4), which provides "that no injunction shall be granted to stay the execution of a judgment at law, unless the party to be benefited thereby shall first sign and seal a release of errors in such judgment at law, and file the same in the office of the clerk of the court in which the judgment shall have been obtained," an injunction is not *per se*, a release of error; but the chancellor would dissolve an injunction issued without such release being filed, unless the complainant would execute it, as the statute directs; *Moody v. Harper*, 6 C. 615.

The issuance of an injunction under the Code of 1857, is, *per se*, a release of errors; *Thompson v. Munson*, 43 M. 176.

See HIGH COURT, 194.

229. *Its effect on statute of limitations.* See LIMITATION OF ACTIONS, 135c, *et seq*

3. In what Cases Granted, Rule and Instances.

A. AGAINST JUDGMENT AT LAW.

230. *What matter may be set up: Diligence.* An injunction will not be granted against the collection of a judgment at law, for any matter which the complainant might have used as a defence at law, if it were known to him at the trial, or might have been known by the use of reasonable diligence; *Montgomery v. Griffin*, W. 453; *Puckett v. McDonald*, 6 H. 269; S. P., *Nevitt v. Gillespie*, 1 H. 108; *Green v. Robinson*, 5 H. 80; *McRaven v. Forbes*, 6 H. 569; *Yeizer v. Burk*, 3 S. & M. 439; *Nevitt v. Hamer*, 5 S. & M. 145. See *post*, sub-division Jurisdiction, 293 *et seq*.

231. *Same: Instance.* An injunction was granted against a judgment at law, rendered for the purchase money of land sold by an administrator. The bill set up the invalidity of the sale, on the ground of the illegality of the decree of the court, the complainants averring that they did not know of such illegality of the decree, at the time of the trial, but they did not show that they had used any diligence to discover it. But no objection was made in the argument on that account, the contest being alone on the legality of the sale, and on the effect of the complainants being in possession, under a deed, with covenants of warranty; *Ib*.

For further examples, see *post*, sub-division Jurisdiction, 293 *et seq*.

232. *Against void judgment.* It is no ground for retaining an injunction against a judgment at law, that the execution enjoined, emanated from a void judgment, affirming the judgment sought to be restrained, for if the execution issued irregularly on the wrong or void judgment, the remedy was ample in a court of law. And, if equity would grant relief at all in such a case, it would be only against the damages on the affirmed judgment; and then only on the condition

that the judgment, interest and costs, are paid; *Boone v. Poindexter*, 12 S. & M. 640.

B. AGAINST TRESPASS, AND WASTE, AND NUISANCE.

233. *When granted to stay waste.* An injunction will not be granted to stay waste, except where irreparable injury will be sustained, and there is no adequate remedy at law; *Poindexter v. Henderson*, W. 176; confirmed in *Nevitt v. Gillespie*, 1 H. 108.

Nor will it be granted against a party in adverse possession of the land; *Poindexter v. Henderson*, *supra*. Nor against a mere trespasser, unless the complainant produce the most unquestioned evidence of title; *Nevitt v. Gillespie*, *supra*. It will not be granted where complainant has only a doubtful title; *Skipwith v. Dodd*, 2 C. 487.

An injunction will not be granted to restrain a party from going on the complainant's land, cutting his timber and erecting a free bridge, in opposition to complainant's toll bridge, without any legal right to do so. This is a mere trespass, for which there is ample remedy at law; *Blewitt v. Vaughan*, 5 H. 418.

234. *Trespass: Nuisance.* Every common trespass, where it is only contingent and temporary, is not a foundation for an injunction; but if it continues so long, or from its nature will continue so long, as to become a nuisance, the court will interfere by injunction. The rule is also stated thus: To justify the injunction, there must be such an injury as from its nature is not susceptible of any adequate compensation by damages at law; or such as from its continuance and permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented than by injunction; *Whitfield v. Rogers*, 4 C. 84.

For injunction against railway company using right of way without consent of owner, see RAILWAYS, 17.

235. *Same: Instances: Destruction of timber.* If a mill dam is proposed to be erected which will subject complainant's land to overflow, and thereby destroy his timber, the case is within the rule, and an injunction will be granted; *Ib*.

236. *Same: Public nuisance: Injury to health.* A complainant is entitled to an injunction against a public nuisance, if he show he would be injuriously affected by it, in common with others, without showing any special damage to himself over what others will sustain. Thus, a private individual owning land, and residing within the limits in which the public health will be affected by the erection of a mill dam, is entitled to have an injunction against its erection. And in such case, the court will apply the remedy by injunction against the erection of the dam, and will not refer the parties injured to the remedy by indictment; *Ib*.

C. AGAINST SALES UNDER DEEDS IN TRUST AND EXECUTION.

237. *Under deed in trust: Usury.* An in-

junction will be granted to restrain a trustee from selling property conveyed to secure a debt due to the defendant, where the debt bears usurious interest, and it will be retained until an account is taken of the principal and legal interest, notwithstanding the defendant may disclaim in his answer all intention to collect any more than legal interest; *Hooker v. Austin*, 41 M. 717. See fully on this subject, INTEREST AND USURY, 28, *et seq.*

238. *Against sales under execution: Personality.* A court of chancery will not, at the instance of the owner, interpose to prevent a sale of personality, under execution against another, except it be of some peculiar value, whereby damages would not be an adequate compensation for the loss; the remedy is at law, by a claim under the statute, replevin, or trespass; *Beatty v. Smith*, 2 S. & M. 567. See *post*, 242, 361. 389.

239. *Same: Sale of land.* Equity has jurisdiction of a bill by a party holding a prior equitable lien on land, to enjoin a sale of it about to be made under an execution, against the holder of the legal title, junior to the lien; and in such case will administer full relief by ordering a sale of the land, first to pay the equitable lien, and then to satisfy the judgment; *Parker v. Kelly*, 10 S. & M. 184. See *post*, 389.

D. MISCELLANEOUS.

240. *Injunction against turnpike company.* It is no ground for restraining a company from using their franchises under a charter authorizing them to build a turnpike and establish a ferry, that they have located their road so near the road of another company, which had been previously built under a charter granted for that purpose, that persons travelling the former might commit a trespass on the latter, by travelling on it without paying toll; *Collins v. Sherman*, 2 G. 679.

241. *Against trustee of femme covert.* A purchaser from husband and wife of a slave held by a trustee, and which by the terms of the trust was to remain under his control for the benefit of the wife, is not entitled to an injunction against the execution of a judgment in detinue, in favor of the trustee, for the recovery of the slave from him; *Jordan v. Thomas*, 5 G. 72.

242. *Defendant in replevin entitled to.* The defendant in an action of replevin, who has executed a bond to have the property forthcoming to abide the judgment of the court in that action, is entitled to an injunction, restraining, during the pendency of the replevin suit, the sale of property under an execution against the plaintiff in replevin, although he does not allege in the bill that the property is his; *Cooper v. Newell*, 7 G. 316. See *ante*, 238. *Post*, 361.

243. *Injunction against taking property for public use.* The owner is entitled to an injunction against persons charged with the construction of a public improvement, restraining them from using his property for that purpose, until compensation has been

only made therefor; *Penrice v. Wallis*, 8 G. 172.

244. *Garnishee entitled to.* A person who has been summoned as a garnishee, may maintain a bill of interpleader against a plaintiff, and the person suing out the garnishment; and he is entitled to an injunction against the collection of the debt he owes, until the rights of the parties are adjusted and settled; *Henderson v. Garrett*, 6 G. 554.

See further as to right of garnishee to injunction, GARNISHMENT, 30, *et seq.* See also, ATTORNEY AT LAW, 32, 34.

245. *Against judgment in ejectment inter alios.* A court of equity will not, at the instance of the holder of the paramount legal title, restrain the execution of a writ of *habere facias possessionem*, emanating from a judgment in ejectment between other parties; in such a case, the complainant, not being at all affected by the proceedings in ejectment, to which he was no party, may recover possession in another action of ejectment, against whoever may be in possession. Nor can the defendant, in such a judgment, restrain the execution of it by attorning to the holder of the paramount legal title, and receiving possession from him; *Harper v. Hilt*, 6 G. 63.

246. *Injunction against proceedings for dower.* A court of equity will, at the instance of a purchaser from the husband, enjoin the widow from proceeding in the Probate Court to procure an allotment of dower, where her right has been barred by the statute of limitations; *Moody v. Harper*, 9 G. 599.

247. *Injunction by purchaser against decree of Probate Court ordering sale of the land.* A party in possession of land, and claiming it by purchase at a sheriff's sale, made under a judgment rendered against a decedent, is not a proper party defendant to a proceeding in the Probate Court to condemn the land for sale, for the payment of debts; and hence, has no opportunity to contest it in that court; but if a sale of the land is ordered in the Probate Court to pay a debt barred by the statutes of limitations, he may enjoin it in equity; *Ib.*

See PROBATE COURT, 58, *et seq.*

248. *Injunction by surety of insolvent administrator.* See EXECUTOR AND ADMINISTRATOR, 390.

249. *Injunction against a removed administrator.* An injunction will not be granted at the instance of an administrator *de bonis non*, against his predecessor, restraining him from collecting debts due the estate, unless the bill show some specific act of collection, or attempt to collect such assets; *Stubblefield v. McRaven*, 5 S. & M. 130.

See EXECUTOR AND ADMINISTRATOR, 188.

250. *Injunction for deficiency in quantity of land sold.* Where there is a deficit in the quantity of good land sold, an injunction will be granted to restrain the collection of so much of the purchase money as is an equivalent for the deficit; *Simmons v. Lard*, W. 159.

250a. *Injunction against collecting taxes.* It is no ground for an injunction that the

tax collector is about collecting more money for taxes than has been assessed, or is about to collect illegal taxes; because should he do so, the tax payer is not without remedy. He may recover it back by action of assumption. If the tax collector be insolvent, the rule would probably be different; *Coulson v. Harris*, 43 M. 728.

250b. *Injunction against taxes: Parties.* Several distinct tax payers, having no united or common interest in the same property, which is threatened with an illegal distraint for taxes, will not be allowed to join in legal proceedings to prevent the collection of the tax. In such case, the different tax payers have no such community of interest in the subject matter of the suit as would authorize them to sue together, or as authorizes a few to sue for all. But each must sue separately for himself; *Ib.*

250c. *Injunction between partners.* Complainant and defendant formed a partnership for the purpose of sawing lumber from timber to be taken from the land of complainant, it being the object of complainant to convert his timber into lumber. The defendant, who, by the agreement, was the managing partner, ceased to procure timber from the complainant's land, but obtained it elsewhere, from others: *Held*, this was using the mill in a manner not authorized by the contract of partnership, and that an injunction would be granted to restrain the defendant from such proceeding; *New v. Wright*, 44 M. 202.

4. Dissolving and Modifying Injunction.

251. *Time for dissolution.* An injunction may be dissolved before or after the filing of an answer or demurrer; *Jones v. Com'l Bank of Columbus*, 5 H. 43.

252. *Motion to dissolve: Effect of bill and answer.* On a motion to dissolve an injunction, the bill is to be taken as true, except when overturned by the answer, or proof, and the answer will not have this effect, on that motion, unless it deny positively the equity of the bill. A denial of the equity of the bill, accompanied by a statement that the defendant has no personal knowledge of the matter, will not do, unless the bill charges that the defendant has a personal knowledge of it. And so, the denial, by an administrator, of the equity of the bill—he having no personal knowledge of it—is insufficient. And when matter is set up in the answer in avoidance of the bill, the injunction will not be dissolved on that, unless it be proven; and such matter, if not proven, will have no effect in procuring a dissolution on bill and answer. Hence, when a sale is threatened, under a deed in trust, to secure an usurious debt, and it is enjoined, the answer of the defendant, that he will not collect usury, can have no effect to procure a dissolution of the injunction; *Hooker v. Austin*, 41 M. 717; S. P., *Miller v. McDougall*, 44 M. 682.

253. *Same: Nature of the answer.* To warrant the dissolution of an injunction, on bill and answer, the answer must deny every material allegation of the bill, with the same

clearness and certainty with which the charges were made. An inferential denial will not do. Hence, when a complainant charges he had, as surety on a note made by one partner, paid money thereon, and that the note was made and discounted for the benefit of the firm, and the other partner answered, denying that charge, and averring that his said partner, (who made the note), had no authority to raise funds for the firm in that way, and never did raise them. *with the knowledge or consent of respondent.* It was held that the answer was insufficient to warrant a dissolution of the injunction; *Buckner v. Bierne*, 9 S. & M. 304; S. P., *Miller v. McDougall*, 44 M. 682.

254. *Same.* But when the answer denies positively the equity of the bill, and there is no proof, the injunction should be dissolved. And so, if there be several equities in respect to several sums, or definite parts of the same sum, and the answer deny some of them but not all, the injunction should be dissolved *pro tanto* in respect to the equities thus denied; *Pass v. Dykes*, 8 S. & M. 92.

255. *New bill by defendant to dissolve an injunction.* The defendant to an injunction bill cannot procure a dissolution of the injunction by filing a new bill against the complainant, and if such bill be filed it will be irregular and should be dismissed; *Martin v. O'Brien*, 5 G. 21.

256. *Power to dissolve in vacation.* After an injunction has been granted, and the bill filed, the judge of another district than the one in which the bill is pending, cannot make an order modifying or dissolving the injunction; *Martin v. O'Brien*, 5 G. 21.

257. *Dissolution a matter of discretion.* The dissolution of an injunction on bill and answer, rests very much in the discretion of the chancellor; but this is a judicial discretion which is subject to review on appeal; *Miller v. McDougall*, 44 M. 682.

258. *Order nisi to dissolve.* When an order is made that an injunction shall be dissolved and the bill dismissed, unless complainant will file the exhibits to his bill by a specified day, there is no actual dissolution upon the mere failure to comply, until the rule is made absolute. And if a trustee in whose hands money is enjoined, pay it over upon the mere failure of the complainant to comply with such order, and the rule *nisi* is afterwards set aside, and the complainant finally succeeds in establishing his right to the money, the trustee will be liable, as for having paid the money in violation of the injunction; *Roberts v. Bea*, 5 S. & M. 590.

259. *Dismissal of bill.* The dismissal of the bill is a dissolution of the injunction; *Rubon v. Stephen*, 3 C. 253. See *post*, 261a.

260. *Damages on dissolution.* Under the statute (H. & H. 514, §§ 40 and 41), damages on the dissolution of an injunction do not follow as a matter of course, but are allowed only where the injunction appears to have been sued out for delay; *Tyler v. McCordle*, 9 S. & M. 230. See DAMAGES, 29. BOND, 13.

261. *Remedy on bond after dissolution.* When an injunction restraining the collection

of a judgment at law is dissolved, the obligee may institute instant proceedings on the bond against all the obligors, principal and sureties, without first issuing an execution on the judgment at law. The condition of the bond is forfeited on the dissolution of the injunction. And after the commencement of an action on the bond given to procure an injunction against a judgment at law, the issuance of an execution and the forfeiture of a forthcoming bond on the enjoined judgment, will be no bar to further proceedings on the injunction bond; *Harrison v. Balfour*, 5 S. & M. 301.

261a. *Effect of dissolving injunction as a dismissal of the bill.* An injunction may be dissolved for want of equity on the face of the bill without answer, or upon answer denying the equity. In either case the bill cannot be dismissed until the last day of the next succeeding term, as the result of dissolving the injunction. The complainant is entitled to that time to take testimony to sustain his bill, and to make application to reinstate his injunction. And if he fail to show cause to the contrary, by the last day of the next succeeding term, his bill then stands dismissed as a matter of course, and it is the duty of the clerk so to enter it; *Drane v. Winter*, 41 M. 517. And where a bill was filed by husband and wife, to restrain a sale of the wife's property, under an execution against the husband, and at the same time the bill set up an independent equity in favor of the husband, the court, on dissolving the injunction as to the wife, will allow the bill to be retained to enable the husband to prosecute his equity in it; *Beatty v. Smith*, 2 S. & M. 567.

5. Violating Injunctions.

262. *Sale made in violation of an injunction.* If a sale be made in violation of an injunction of which the purchaser had notice, it will be set aside, though the injunction were groundless, and in case of sale of taxes, the payment of the taxes will be required as a condition of setting aside the sale where the injunction is groundless; *Williams v. Cammack*, 5 C. 209.

263. *Issuance of execution.* The issuance of an execution without a levy or sale, is a violation of an injunction against the collection of a judgment; *Sugg v. Thrasher*, 1 G. 135.

264. *Taking judgment.* If the defendant at law obtain an injunction against the prosecutor of a suit against him, the plaintiff cannot proceed to take judgment without first getting the injunction modified so as to allow him to do so; *Wildy v. Bonny's Lessee*, 6 G. 77.

265. *Same: Case in judgment.* The plaintiff's lessor brought ejectment against the husband to recover possession of the premises in controversy. The wife and another—the husband joining as a mere formal party—filed a bill in equity, setting up title in the wife and her co-complainant, and alleging that certain deeds held by plaintiff's lessor, con-

stituted a cloud on their title and praying that he might be enjoined from setting up any claim of title or possession under them, but making no reference to the ejectment suit. Thereupon, the Circuit Court, on motion of the plaintiff, rendered judgment in his favor, in an action of ejectment, without a trial by jury: *Held*, that the judgment was erroneous: 1. Because the injunction did not affect the ejectment suit, nor enjoin the plaintiff from proceeding therein as against the rights of the husband. 2. Conceding that the injunction did operate on the action of ejectment, then the rendition of the judgment was an improper violation of it, and that the proper course to pursue was to apply to the chancellor to modify the injunction, so as to permit the plaintiff's lessor to establish his title at law; *Id.*

266. *Remedy for violation of injunction.* The supersedeas of an execution issued in violation of an injunction, is not the proper remedy. It should be corrected by an attachment against the plaintiff or his attorney for contempt; *Com'l Bk of Manchester v. Waters*, 10 S. & M. 559. And so, if a suit be brought in violation of an injunction, the remedy is not to dismiss the suit, but to punish for a contempt; *Robertson v. Hoy*, 12 S. & M. 566. See LIMITATION OF ACTIONS, 135c.

6. Miscellaneous.

267. *Appeal from order dissolving an injunction.* Pending an appeal from an order dissolving an injunction, it remains in full force, and cannot be violated even by order of the chancellor; *Penrice v. Wallis*, 8 G. 172.

268. *What party getting an injunction consents to.* Equity will regard a party applying for an injunction to restrain the execution of legal process, as proposing or consenting, that if such injunction be improvidently obtained or the relief asked shall be refused, the party so applying, will put his adversary in the same condition he was in at the time the injunction was granted; *Marshall v. Minter*, 43 M. 666.

269. *Same.* Thus, where a judgment creditor is restrained by the interposition of a court of equity, it is inequitable that such injunction should be the means of depriving the creditor of a legal right, by its mere wrongful continuance, until the bar of the statute of limitations has attached, and equity will enjoin the debtor from setting up the statute of limitations in such a case; *Id.*

See LIMITATION OF ACTIONS, 136.

270. *Same: Remedy when interest exceeds penalty of injunction bond.* Where on the dissolution of an injunction restraining execution of a judgment at law, it is found that the interest accrued on the judgment, renders the amount due on the judgment greater than the penalty of the bond, though at law, the responsibility of the obligors would be limited to the amount of the penalty, a court of equity will substitute a remedy of its own, and allow interest on the penalty of

the injunction bond, to an amount not exceeding the principal and interest of the judgment; *Ib.*

271. *Responsibility of party holding property under an injunction.* Where a party without just cause or interest, wrongfully detains the property of another, after due demand, he is responsible for the loss of the property, if it should be afterwards lost or destroyed by casualty; but this rule does not apply where the party detaining the property has an interest in it equal in right to that of the party demanding it. Hence, where a bill was brought by a creditor to set aside a sale of slaves, on the ground of fraud, and the sale was set aside for constructive fraud, and the fraudulent purchaser adjudged to be entitled to be first satisfied out of the property, for payments he had made on the same, and pending the litigation part of the slaves died without his fault—he being in possession under an injunction bond, which bound him to have the slaves forthcoming to abide the decree of the court—it was held, he was not bound for the loss. In such case, he is bound only to use the same care and diligence as are required of sheriffs, when property is in their custody, under legal process; *Trotter v. White*, 4 C. 88.

272. *Three injunctions in same case: Practice.* An injunction was granted on an original bill, and dissolved by the High Court, and afterwards, another was granted on a supplemental bill, and it was also dissolved by the High Court, and afterwards, a third injunction was granted on a second supplemental bill. The court said that in deciding on complainant's right to this last injunction, it would regard the case as settled, so far as it was developed by the first two bills, and would look alone to the matter stated in the last bill, and upon that, determine whether the facts of the case as thus charged and shown, would authorize the injunction. The law of the case as settled in the first two decisions, would not be varied from; *Green v. McDonald*, 13 S. & M. 445.

See *post*, 592.

XXVIII. Interpleader.

273. *Interpleader by attorney at law.* See ATTORNEY AT LAW, 34.

274. *When proper remedy: Rule.* A bill of interpleader is a proper remedy when suits are either threatened or actually pending, by two different parties claiming the same debt or duty, by separate or different interests, the complainant not knowing which has the superior right; *Yarborough v. Thompson*, 3 S. & M. 291. A bill of interpleader is the proper remedy where the complainant has a fund in possession in which he claims no interest, but the fund is claimed by two or more parties adversely to each other. The complainant, after he has filed his bill, cannot set up a claim in himself; *Anderson v. Wilkerson*, 10 S. & M. 601.

275. *Same: Rule further explained: Parties.* A bill of interpleader cannot be maintained unless the complainant admits a right

in one of two claimants, and unless, also, he show two claimants in existence capable of interpleading. If one of the parties defendant be such that he cannot assert the right claimed for him, as a distributee, where the administrator would be the proper party, the bill must be dismissed. For a party cannot be admitted to interplead where the decree would not finally settle the right. Hence, where the contest is about the right to collect a debt, which is alleged to have belonged to one now dead, if his heirs be made parties to represent his rights, instead of his administrator, the bill cannot be maintained; *Browning v. Watkins*, 10 S. & M. 482.

276. *The right and duty of garnishee to interplead.* See *ante*, 244. GARNISHMENT, 30, *et seq.*

277. *Same: Instance.* A drawer of a bill, pending suit thereon, was summoned as garnishee by a creditor of the plaintiff. He answered, denying indebtedness on the ground of a want of notice of the dishonor of the bill. Both issues were found against him, and he then brought the money into court, and filed his bill of interpleader against both parties: *Held*, that it was a good bill, and complainant was entitled to relief; *Warren v. Robbins*, 1 C. 309.

278. *Same: Another instance.* The maker of a promissory note was summoned as garnishee for the payee. Before he answered, but after he was summoned as garnishee, he had notice of the assignment, but, under the advice of counsel, he answered that he was indebted to the payee, and a judgment was accordingly rendered against him. He was afterward sued by the person of whose right by assignment he had notice, as before stated, and judgment was rendered against him in that action. He then filed his bill of interpleader against both judgment creditors: *Held*, on demurrer to the bill, that it could not be maintained (the case of *Oldham v. Ledbetter*, 1 H. 47, digested in GARNISHMENT, 30, so far as it relates to interpleader by a garnishee, criticized); *Yarborough v. Thompson*, 3 S. & M. 291.

279. *By purchaser at sheriff's sale.* A purchaser of property under a junior judgment takes it under the enrolment law of 1844, exempt from prior liens; and if, on such purchase, by agreement his notes are taken for his bid by the judgment creditor, and he is threatened with a levy under an older judgment, he may interplead the two judgment creditors, have the levy enjoined, and the money due on the notes appropriated to the older judgment; *Brown v. Bacon*, 5 C. 589.

See SHERIFF AND SHERIFF'S SALE, 84.

280. *Admission of indebtedness.* The filing of a bill of interpleader necessarily admits an indebtedness on the part of the complainant; *Knight v. Yarborough*, 7 S. & M. 179; S. P., *Browning v. Watkins*, *ante*, 275. He cannot claim the fund after filing the bill; *Anderson v. Wilkerson*, *ante*, 274.

281. *Complainant claiming as creditor of one of the defendants.* Where the complainant, in a bill of interpleader, pays the money

into court, and afterwards sets up a right to it, as creditor of one of the defendants, and the fund is adjudged to the other, he will not, on that account, be chargeable with interest from the term he brought the fund into court; *Anderson v. Wilkinson*, 10 S. & M. 601.

282. *Withdrawal of claim by one defendant.* Where one of the two defendants to a bill of interpleader withdraws his claim, a decree in favor of the other will be entered as a matter of course; *Knight v. Farborough*, 7 S. & M. 179.

XXIX. Issue to a Jury.

283. *Rule as to.* The chancellor has the right, with certain exceptions, to decide every issue of fact in a cause; but he has a discretion also to send an issue to the country, whenever his mind is in doubt as to the preponderance of evidence; and from the exercise of this discretion in granting the issue, though the preponderance is clearly on one side, error will not lie; *Iler v. Routh*, 3 H. 276. See *post*, 363.

284. *Issue as to whether a note has been lost or not.* In a suit to recover on a note alleged to be lost, the chancellor may refer an issue to a jury to determine whether the note has been lost or not; *Truly v. Lane*, 7 S. & M. 325.

285. *Withdrawal of issue.* The chancellor may withdraw an issue sent to a jury, and determine the whole case himself; *Cook's Heirs v. Bay*, 4 H. 485.

286. *Verdict: New trial: Exceptions.* The verdict upon an issue sent to a jury is, by statute, placed on the same footing with verdicts rendered in courts of law, and if a motion for a new trial be made, there must be a bill of exceptions embodying the evidence, to enable the High Court to determine as to the propriety of the action of the Chancery Court on that motion; *State v. Farish*, 1 C. 483.

287. *Verdict on: Case in judgment.* The issues submitted were: 1st. Whether the contract was made with the agent of the State, as stated in the bill. 2d. If so, was the complainant hindered or prevented from performing his contract by the acts of the agent of the State? 3d. And if both these are so, then the jury shall assess the damages (if any) that may be due and owing the complainant. The verdict was: "We, the jury find for the complainant, and assess his damages at \$11,200." *Held*, that this was a substantial finding on all the issues, as the jury were not authorized to find damages, unless they found the other issues for the complainant; *Id.*

XXX. Jurisdiction and General Principles of Equity Jurisprudence.

For jurisdiction in particular cases, see BILL OF REVIEW, INJUNCTION, &c., see also those sub-divisions.

1. Jurisdiction as Affected by Remedy at Law.

288. *No jurisdiction if complainant's remedy at law is clear.* A court of equity

will not interfere where the complainant's remedy is clear and unembarrassed at law; *Shotwell v. Lawson*, 1 G. 27; *Haynes v. Thompson*, 5 G. 17; *Echols v. Hammond*, 1 G. 177; *Boyd v. Swing*, 9 G. 182. And if complainant show a legal instead of an equitable title, he cannot have relief; *McAfee v. Lynch*, 4 C. 257. Nor will equity take jurisdiction where complainant has the legal title, unless, perhaps, when the defendant has something in form a legal title, which he might interpose as a defence at law. The bill will not be entertained merely because complainant's recovery at law has been defeated by defendant's proving that the patent under which the complainant claimed was obtained by fraud. This defence can as well be overturned at law as in equity; *Williams v. Rhodes*, 4 G. 137.

289. *Same: Examples.* A court of equity will not entertain a bill to enforce a legal demand in favor of a resident creditor against a debtor who has removed from the State, or who is an inhabitant of another State, never having resided here, the complainant having a complete remedy by attachment at law; *Echols v. Hammond*, 1 G. 177; *sed vide ante*, 60.

And so a court of equity will not entertain a suit by the equitable assignee to collect a bond, the remedy being complete at law by an action in the name of the obligee for the assignee's use; *Haynes v. Thompson*, 5 G. 17; S. P., as to an equitable assignee of an open account; *Garland v. Hull*, 13 S. & M. 76. *Sed vide* BILLS OF EXCHANGE, &c., 169, and *post*, 289a, where the contrary doctrine is established. See *post*, 387.

And so a suit to recover for a breach of a collector's bond, being a purely legal demand, for which an adequate remedy exists at law, is not within the jurisdiction of a court of equity where it can be made available without a discovery from the defendant; *Boyd v. Swing*, 9 G. 182.

289a. *Jurisdiction where there is a remedy at law in the name of a nominal plaintiff.* If a party goes into a court of chancery to seek redress, founded on a purely equitable title, or growing out of equitable interests, he is in the proper court with full original jurisdiction; and because a court of law would give him relief through the instrumentality of the holder of the legal title, is no sufficient reason for turning him out. And hence, the equitable assignee of a note may bring in a bill in equity to collect it, notwithstanding he has a remedy at law by bringing an action in the name of the payee for his use; *Taylor v. Reese*, 44 M. 89.

And before this case it was held, that the Chancery Court had jurisdiction to enforce collection of a promissory note, where the complainant had only an equitable title to it, and there was no being in esse or in posse, in whom the legal title could vest or was vested, as where the note is payable to a dissolved corporation or order, and was transferred by delivery before the dissolution;

Bacon v. Cohea, 12 S. & M. 516; *Marsh v. Mandeville*, 6 C. 122; see *ante*, 289.

290. *Jurisdiction where the remedy in equity is more full and complete.* But where the remedy is more full and complete in equity than at law, a court of equity will entertain jurisdiction; *Barnes v. Lloyd*, 1 H. 584; and so where the complainant's remedy at law has become embarrassed and doubtful by the fraud of the defendant; *City of Natchez v. Vandervelde*, 2 G. 706. But because the complainant's proof is doubtful, this is no ground for the interposition of a court of equity; *Gee v. Gee*, 3 G. 153. See *post*, 323b.

291. *Where several are interested separately as complainants or defendants.* A court of equity will entertain jurisdiction for the recovery of a fund, in which the several complainants are interested, the separate share of each being unascertained, and depending upon a *pro rata* distribution of the fund upon an account taken. And so equity will give relief where there are several defendants, who together are responsible for the entire fund sought to be recovered, where such liability is separate and not joint, and the amount of the liability of each can be ascertained only by a discovery from them; *Gay v. Edmonds*, 1 G. 218. And so equity will take jurisdiction when complainant and defendant have an undivided interest in the subject matter of the suit, the extent of the interest of each being unascertained, and the court being called upon to protect the rights of each; *Cable v. Martin*, 1 H. 558. And so where two of several remaindermen jointly interested in a chattel, the interest to vest after the termination of a life estate, joined with the life tenant in making an absolute sale, chancery will be the proper forum for the other remaindermen (who did not join in the sale), to recover their interest in the property, as well because of the sale by the two affecting the remedy at law, as also because there is a necessity for an account to adjust the fractional interests of complainants; *Stewart v. Swanzy*, 12 S. & M. 684.

292. *Discovery as a ground of jurisdiction.* Where the jurisdiction of a court of equity, to give relief on a purely legal demand, is sought to be maintained, upon the ground that a discovery from the defendant is necessary, it must appear that material facts, indispensable as proof, lie exclusively within the knowledge of the defendant, and cannot, therefore, be established by other witnesses; *Boyd v. Swing*, 9 G. 182. See *post*, 296.

2. Where Complainant has Failed to Assert his Remedy in an Action at Law.

See sub-division Injunction, *ante*, 230, *et seq.*

293. *Where remedy lost by laches, or omitted to be set up.* A party cannot invoke the aid of a court of equity, where he has lost his remedy at law by his own *laches*; and on this ground, the sureties on a forthcoming bond, who had signed the same in blank, were refused relief—the court holding they should

have made the objections at the return term of the bond; *Finney v. Harris*, 1 G. 36. And so if the defendant in an action of ejectment, or in an action for *mesne profits*, fail without sufficient excuse, to set up his claim for valuable improvements, he cannot afterwards have relief in equity; *Moody v. Harper*, 9 G. 599.

3. Relief against Judgment at law.

294. *Complainant must have used diligence to be relieved of judgment at law.* Where a party has been impleaded in any jurisdiction having cognizance of the subject matter, he must use diligence to avail himself of every defence proper to his case, and admissible in that forum, or else he cannot be relieved in equity; *Nevitt v. Gillespie*, 1 H. 108; *Green v. Robinson*, 5 H. 80; *Glidewell v. Hile*, *ib.* 110; *McRaven v. Forbes*, 6 H. 569; *Yeizer v. Burke*, 3 S. & M. 439; *Nevitt v. Hamer*, 5 S. & M. 145; *Smith v. Walker*, 8 S. & M. 131.

295. *Same: Instances: Surety's defence.* A surety applied to the complainant to sign a new note, by which an extension of time on the debt would be procured, but the note presented for complainant's signature, was drawn payable to the surety making the application. The complainant signed as joint maker, whereby the old surety was only secondarily liable on the note, as endorser. The old surety having taken up the note as endorser, sued the principal and the complainant on it; *Held*, that the surety's (the complainant's) defence could be made at law, and he was entitled to no relief, after judgment there; *Wellons v. Newell*, 7 S. & M. 399.

296. *Same: Another Instance: Usury.* The defence of usury can be made at law, and must be made there; and if a discovery be needed to make the defence available at law, this is no excuse for not making it; the defendant at law should have applied for a discovery before trial and judgment; *Smith v. Walker*, 8 S. & M. 131; *S. P.*, *Robb v. Halsey*, 11 S. & M. 140. And if usury be embraced in an execution, the remedy is not in chancery, but in the court from which the execution emanated; *Robb v. Halsey*, *supra*; *Yeizer v. Burke*, 3 S. & M. 439. Nor is it any excuse for not making that defence at law, that complainant was absent from the trial, and relied on his attorney, who was prevented by sickness from attending, especially if the pleadings in the court of law are signed by two attorneys for the defendant. It was the duty of the complainant himself to be present at the trial, and see that his defence was made; *Yeizer v. Burke*, *supra*. See *post*, 446.

And the rule that where a court of equity has taken jurisdiction for one purpose, it will exercise it for all purposes, does not apply, where pending a bill for an injunction against a sale under a deed in trust, on the ground that the debt is usurious, the creditor sued and obtained judgment at law, so as to enable the Chancery Court to entertain a supple-

mental bill to attack the judgment at law, without any showing why the defence was not made at law; *McRaven v. Forbes*, 6 H. 569.

And so where a party was sued for an usurious debt, and compromised the suit by giving bond with security, payable at a future day, and afterwards, being sued on the bond, permitted judgment to go against him, and then gave a forthcoming bond, which was forfeited, it was held that after all this, his application to equity for relief was too late; even if he ever had any grounds for such relief; *Yeizer v. Burke*, 3 S. & M. 439. See *post*, 371.

297a. *Same: Terms imposed where relief is granted: Void guardian sale.* A purchaser of land, at a guardian's sale, can set up the illegality of the sale, as a defence to an action at law for the purchase money; and if he fail to do so, without just cause, he cannot afterwards come into equity for relief against the judgment; but if such a bill be maintainable, under any circumstances, it is essential that the complainant offer to restore possession to the guardian, and to account for the rents and profits during his occupation of the land so sold; *Skipp v. Whelers*, 4 G. 646.

See EXECUTOR AND ADMINISTRATOR, 367. PROBATE COURT, 234.

298. *Same: Another instance: Neglect to defend scire facias.* A purchaser of land on which there is a lien, in virtue of a judgment rendered against his vendor in his lifetime, and who suffers *sci. fa.* to revive the judgment against him as terre-tenant, after the death of the vendor, to go undefended, whereby the judgment is revived against him, has no ground to come into equity to enjoin the judgment, upon the allegation that he believes the judgment has been paid, and that he had no notice of the lien; and that all the terre-tenants situated as he was, who had defended the *sci. fa.*, had forced the plaintiff to take a nonsuit; *Nevitt v. Hamer*, 5 S. & M. 145.

299. *Same: Waiver of defence.* And so, if once having a good defence at law, the complainant voluntarily deprives himself of the power of making—as when he voluntarily waives a defence at law, by executing a deed in trust to secure the debt—he cannot come into equity afterwards, to be relieved of the judgment at law; *Fanning v. Farmers' and Merchants' Bk.*, 8 S. & M. 139.

300. *Relief against judgment on contract, against public policy.* Equity will not relieve against a judgment at law, upon the ground that the contract on which it is founded is void, being in violation of public policy, as established by the constitution. Nor will it relieve in such cases, where it has concurrent jurisdiction to grant relief, if the complainant failed and refused to make his defence; *Green v. Robinson*, 5 H. 80; *Glide-well v. Hite*, 1b. 110; S. P., *Thomas v. Phillips*, 4 S. & M. 358 (see *post*, 305). Nor will it grant relief in such cases, where the surety in the judgment is the complainant; *Thomas v. Phillips*, *supra*. The rule is, that any fact which

proves it to be against conscience to execute a judgment, of which the injured party could not avail himself at law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence of himself or agents, will authorize a court of equity to interfere. But courts of equity will not relieve against a judgment at law, where the case in equity proceeds upon a ground equally available at law; but the complainant ought to show some special ground of relief, as that the defence could not at that time, or under the circumstances, be made available at law. And this rule applies equally, where the judgment is on a contract which is in violation of the constitution, as in other cases; *Thomas v. Phillips*, *supra*.

301. *Same: Judgment on a gaming contract.* But if the judgment be on a gaming contract, it is void, and will be relieved against. See GAMING, 2. See *post*, 431.

302. *Same: Where defendant's legal defence was not available.* Equity will give relief to a complainant having the best title in equity, where a judgment has been rendered in favor of the best title at law, even where complainant's title was cognizable at law, but owing to the rules of law, the defendant's title was preferred. Hence, where the prior enterer of public land was defeated in an action of ejectment by his adversary, who had a patent based on a junior entry, relief was granted to the prior enterer; *Hester v. Kembrough*, 12 S. & M. 659.

303. *Where plaintiff at law has been guilty of fraud.* If a wrong doer has obtained an advantage at law, by hiding the real nature of the transaction under a trustee's name, a court of equity will lend its aid to place the party injured by the judgment at law, in the same situation he would have been, if no fraud had been perpetrated; *Stovall v. Northern Bk.*, 5 S. & M. 17.

304. *Same: Case in judgment.* A bank loaned money, and had the note of the borrower taken, payable to another bank, upon the false statement that it was to be transferred to the bank that was payee. After the note became due, the bank making the loan caused suit to be instituted on it, in the name of the bank to whom it was made payable, when in fact the note had never been transferred, and still belonged to the bank making the loan; and judgment was rendered in favor of the payee, without its knowledge—its name being used by the other bank, to defeat the maker in his defence of payment and set-off. The bank making the loan was insolvent, and its notes—which if the suit had been brought in its name, would have been a good set-off—were greatly depreciated. The maker of the note was ignorant, till after judgment, that the bank making the loan was the real owner: *Held*, he was entitled to relief against the judgment, and to pay it in the notes of the bank to whom it really belonged; *1b.* See *post*, 457.

305. *Judgment at law when jurisdiction is concurrent.* When a matter of which equity

and the common law courts have concurrent jurisdiction, has been submitted to and tried by a court of law, it is *res adjudicata*, and cannot be reviewed in equity; *Houston v. Royston*, 1 S. & M. 238; *S. P. McRaven v. Forbes*, *ante*, 296; *Green v. Robinson*; *Glidewell v. Hite*, *ante*, 300. See *post*, 441, 453.

306. *Same: Instance.* A mortgagor who had mortgaged a slave, delivering possession to the mortgagee, upon an agreement that the hire should go for the interest, filed his bill to redeem, alleging that the hire greatly exceeded the interest in value, and praying for an account. It appeared from the answer and proof, that the mortgagee had sued the mortgagor at law, and that the whole matter of the accounts between them had been tried, and settled, and that the mortgagor had paid the judgment thus recovered against him, and had gotten possession of the slave. It was held that though equity might have granted relief originally, yet the whole matter having been settled at law, it was *res adjudicata*, and equity would not interfere; *Houston v. Royston*, 1 S. & M. 238. See *McRaven v. Forbes*, *ante*, 296, for another instance.

307. *When full defence cannot be made at law: Partial failure of consideration.* Where there is a partial failure of consideration in a note given for the purchase money of land, the weight of authority is, that equity will relieve. (See *CONSIDERATION*, 36.) And where the defence cannot be made fully at law, relief will be granted in equity, after judgment at law; *Parham v. Randolph*, 4 H. 435.

308. *When the defence is merely equitable, relief will be granted.* When the defence to an action at law cannot be made in that suit, but only in chancery, equity will relieve against the judgment; *Willis v. Ives*, 1 S. & M. 307.

308a. *No relief against erroneous judgment.* A court of equity has no more power to set aside an erroneous judgment on a forthcoming bond, than to avoid any other erroneous judgment. The defence of infancy can be as well made at law as in equity; and if a judgment be rendered against an infant, his remedy is by writ of error *coram nobis*, and not by bill in equity; *Robb v. Halsey*, 11 S. & M. 140. See *post*, 385.

309. *Decree in Probate and Chancery Courts set aside for fraud.* A decree on a final settlement in the Probate Court can be set aside for fraud; but to entitle the complainant to relief, the charge of fraud must be proven; *Hooker v. Hooker*, 2 G. 448; *Green v. Creighton*, 10 S. & M. 159; *Searles v. Scott*, 14 S. & M. 94. So equity will grant relief against a decree for distribution made in the Probate Court, where it was obtained fraudulently, by some of the distributees using the names of the others in the petition for distribution, without their knowledge or consent; *Fairley v. Thompson*, 5 G. 101. But after setting aside a decree allowing an account, the court cannot restate the account between the parties, but they will be remitted to the Probate Court for that

purpose, which, alone, under the constitution, has jurisdiction over such accounts; *Searles v. Scott*, 14 S. & M. 94; *Neylans v. Burge*, *Ib.* 201.

And if a bill to set aside a decree for fraud, contain other matter, over which the court has no jurisdiction, to a demurrer to it will be overruled as to the fraud in the decree, and sustained as to the matters not within the jurisdiction of the court; *Neylans v. Burge*, *supra*. See *post*, 312, 349b.

And so a decree obtained in chancery by fraud, will be set aside; *Person v. Nevitt*, 3 G. 180, for which see *ante*, 79. See also, *ante*, 7b, 74, 145.

310. *For judgments set aside for fraud*, see *an'e.* 303, 304, and *post*, sub-division New Trial.

4. Retaining Bill for Full Relief.

311. *Rule: Instances: Where bill retained:* A court of equity has jurisdiction of a bill by a party holding a prior equitable lien on land, and to enjoin a sale under a junior execution against the holder of the legal title, and in such case will administer full relief, by ordering a sale of the land, first to pay the equitable lien, and then to satisfy the judgment; *Parker v. Kelly*, 10 S. & M. 184.

And so, a court of equity having taken jurisdiction at the instance of a judgment creditor, to annul a fraudulent conveyance made by the debtor, will grant full relief to the complainant, by decreeing a sale of the property, for the payment of the complainant's debts; and hence, where the complainant's judgment was valid and operative at the time of filing the bill, his right to relief will not be affected by reason of the statute of limitations, subsequently, and pending the litigation, barring the issuance of a new execution on the judgment; *Hunt v. Knox*, 5 G. 655.

And so, where a judgment debtor has a claim against a judgment creditor, which, under the circumstances, is a valid set-off, and it be such that it can be enforced only in equity, as where it is for an unadjusted balance between them as partners, a court of equity having undertaken to settle the partnership balance, will take into consideration all the matters of indebtedness between them, and will allow such balance, thus ascertained, as a credit on, or set-off to, the judgment; *Graves v. Hull*, 5 C. 419. See *ante*, 296, where this doctrine is not allowed to control the rule requiring parties to make their defence at law. See *ante*, 4, 83.

312. *Same: Instances where the bill was not retained.* A court of chancery can set aside a decree in the Probate Court, allowing an administrator's account, where it has been obtained by fraud; but it cannot go farther and require a new account. Where the decree allowing the account is set aside, the whole matter is remitted to the Probate Court to settle a new account; *Green v. Creighton*, 10 S. & M. 159; *Scott v. Searles*, 14 S. & M. 94; *Neylans v. Burge*, *Ib.* 201; *Anderson v. Duke*, 6 C. 87.

The Chancery Court may set aside the decree for fraud, and take steps to preserve the property until the Probate Court can act; but if it undertake to settle the accounts, and render a decree for the balance against the administrator, it will be void, and a sale thereunder will convey no title; *Fonte v. McDonald*, 5 C. 610. See *ante*, 309.

And so if a ward file a bill to foreclose a mortgage given by his guardian, equity has no jurisdiction to allow as a set-off to the mortgage an unascertained balance alleged to be due by the ward to the guardian, on a settlement of the guardian's account. This balance can only be ascertained by accounting in the Probate Court; *Ratliff v. Davis*, 9 G. 107. See *post*, 347, 348.

And this rule does not apply so as to give the Chancery Court jurisdiction where a bill is filed to foreclose a mortgage, or enforce a vendor's lien, to enter a decree against the mortgagor or vendee *in personam*, for any balance of the debt which might remain after the mortgaged property, or the land, is exhausted; *Starke v. Mercer*, 3 H. 371; *Tanner v. Hicks*, 4 S. & M. 294; *Dollahite v. Orne*, 2 S. & M. 590; *Mosby v. Wall*, 1 C. 81; *Cobb v. Duke*, 7 G. 60. See *post*, 379.

312a. *Same: Instance of retaining bill.* Where the Chancery Court can afford full and adequate relief, and by one decree adjudicate the rights of the parties, it may take jurisdiction over the entire subject matter, and if necessary, enjoin a party from proceeding in the Probate Court, when such suit embraces only a part of the subject matter in dispute. Hence, where the widow claims under an ante-nuptial contract, and also under the will of the husband, it is competent for the Chancery Court, in a controversy as to whether the legacy is a satisfaction of the contract, to enjoin a suit in the Probate Court for the legacy, and to draw to itself cognizance over both subjects; *Gilliam v. Chancellor*, 43 M. 437. See *post*, 362.

5. Some General Rules and Maxims in Relation to Jurisdiction and Relief.

A. COMPLAINANT'S TITLE.

312b. *Test of jurisdiction: Title.* The test as to the jurisdiction of a court of equity is, that the complainant must have an equitable title, and if it appear from the face of the bill that he has no title whatever, it seems that the decree of the court in his favor would be void for want of jurisdiction; *Walker v. Williams*, 1 G. 165.

312c. *Complainant recovers on strength of his title.* In equity as well as at law, the complainant must recover on the strength of his own title, and not on the weakness of his adversary's. A perfect equitable title must be shown in equity; possession will prevail against any other; *Grand Gulf R. R. & Banking Co. v. Bryan*, 8 S. & M. 234.

313. *When equitable title complete.* An equitable title is always complete where a court of chancery will compel the holder of the legal title, who in such cases is treated as

a mere trustee, to convey to him who holds the equitable title, or will restrain him from asserting rights under the legal title detrimental to the equitable title; *Healy v. Alston*, 3 C. 190.

B. EQUITIES ARE EQUAL, NO RELIEF.

314. *Rule where equities are equal.* Where the equities of the complainant and defendant are equal, a court of chancery will not interfere; *Lee v. Montgomery*, W. 109; but in such cases will leave the parties to their remedies at law; *McAfee v. Lynch*, 4 C. 257. In such cases, however, if one party have also the legal title, and the circumstances be such that a court of equity may take cognizance of it, then the legal title will prevail; *Coleman v. Rives*, 2 C. 634; *Hogan v. Burnett*, 3 G. 617; *Perkins v. Swank*, 43 M. 349.

315. *He who seeks equity must do equity.* He who seeks equity must do equity; *McRaven v. Forbes*, 6 H. 569; *Kibble v. Butler*, 5 C. 586; *Moody v. Harper*, 9 G. 599.

316. *Same: Application of the maxim.* Hence, a court of equity will not relieve against an usurious contract, unless complainant offer in his bill to pay the principal and legal interest; *McRaven v. Forbes*, 6 H. 569. (*Sed vide* INTEREST AND USURY, 44, *et seq.*) And so equity will not grant relief to a married woman from a judgment rendered against her on her bond given to try the right to property claimed by her, if she do not offer to restore the property delivered to her on the execution of the bond, and place the plaintiff in the position he was in when she got the property; *Kibble v. Butler*, 5 C. 586.

317. *Same: Modification of the rule.* The principle that he who seeks equity must do equity, does not apply to a matter set up as equity against the complainant, which is not a defence to the relief sought by his bill, but is an independent claim for relief on the part of the defendant; and hence, when a complainant has recovered possession of land, and also *mesne* profits in an action at law, and afterwards come into equity to remove clouds upon his title caused by the wrongful acts of the defendant subsequent to the recovery, his bill will not be dismissed because he will not allow the defendant compensation for valuable improvements made on the land; *Moody v. Harper*, 9 G. 599.

C. PRIOR EQUITY WILL PREVAIL.

318. *Prior equity will prevail.* Where a vendee buys only an equitable title he takes it subject to all the equities against his vendor. Hence, where land had been sold at sheriff's sale and the debtor then sold his right of redemption, the vendee gets only an equity, and will not be permitted to redeem, if the purchaser at the sheriff's sale be entitled to hold the land against the claim of the debtor to redeem, owing to his having, as against said debtor, a complete equitable title to the land, independent of the title acquired under the sale; *Healy v. Alston*, 3 C. 190. The rule is *qui prior est in tem-*

pore potior est in jure, when the equities of the parties are otherwise equal; *Perkins v. Swank*, 43 M. 349; S. P., *Bank of England v. Turlton*, 1 C. 173, for which see MORTGAGE, 58; see also, ASSIGNMENT, 17b, 22. See *post*, 386, 334.

319. *Same: Another instance.* A party owning the right of a Choctaw Indian reserve, stated to the defendant in 1832, that he had located it on section 24, and thereby induced the defendant (who had a pre-emption settlement on that section) to remove therefrom and to locate on section 14, which he entered with a Jefferson College fiat; and in 1834, after this entry, the owner of the Indian reservation located it on said section 14. The court held that the owner of the Indian reservation, after making such statement about locating it on section 24, and inducing thereby the defendant to remove therefrom, had no superior equity to the defendant, and dismissed his bill, leaving him to his remedy at law; *McAfee v. Lynch*, 4 C. 257.

See LAND LAWS OF UNITED STATES, 37.

D. ANCIENT JURISDICTION RETAINED.

320. *Same.* Cases of the receipt of money by fraudulent contrivances were originally the especial subjects of equity jurisdiction, upon the ground that there was an implied trust on the part of the receiver to return it. Courts of law now afford a remedy in such cases, by allowing the plaintiff to recover as for money had and received to his use, by the defendant wherever the latter *ex æquo et bono*, is bound to pay it. But this extension of the legal remedy is no objection to the exercise by a court of equity of its former jurisdiction in such cases; *Phillips v. Hines*, 4 G. 153.

And so where the remedy of courts of law has been extended by statute to a case in which chancery originally had jurisdiction, the extension does not oust the jurisdiction of chancery. Thus, the statute which authorizes a judgment creditor to proceed by *scire facias* at law, to procure satisfaction of his judgment out of property which has been fraudulently conveyed by the debtor, does not exclude the old jurisdiction of a court of equity to set aside fraudulent conveyances; *Abbey v. Com'l Bank of N. O.*, 2 G. 434.

And so the remedy by garnishment granted by the Legislature, does not oust the original jurisdiction of equity to subject to the payment of a judgment, the debtor's choses in action; *Payne v. Bullard*, 1 C. 88, *contra*, *Folkes v. Hayden*, digested in 132d, *ante*. And the act giving courts of law jurisdiction over contracts made by married women, does not take away the original jurisdiction of equity to enforce agreements made by married women against their separate estates; *Mitchell v. Oley*, 1 C. 236. See *ante*, 132d, *post*, 327.

321. *Extent of Constitutional jurisdiction: How determined.* The constitution of 1832 confers on the Chancery Court, "full jurisdiction in all matters of equity." This

grant refers not alone to equity jurisdiction as defined in the jurisprudence of England, but to that jurisdiction as modified and enlarged by our own legislation as it then existed; and, hence, embraces the jurisdiction conferred by the Act of 1822, in cases of foreign attachment where the demand sought to be collected is purely legal. Nor is it any argument against the exercise of that jurisdiction where complainant is a resident, that the same act grants an attachment at law to resident complainants, for the maxim that equity has no jurisdiction where there is a remedy at law, does not apply so as to exclude express grants of jurisdiction by the Legislature; *Freeman v. Guion*, 11 S. & M. 58. See *ante*, 56, 57.

For further illustration of this principle, see PROBATE COURT, sub-division Jurisdiction.

E. LEGISLATIVE GRANT OF JURISDICTION.

322. *Act of Legislature conferring jurisdiction.* The Act of the Legislature authorizing suits to be brought against the State in the Chancery Court, does not enlarge the subject matter of equity jurisdiction. An act which would confer on a court of equity jurisdiction over questions purely legal, would be unconstitutional; *Farish v. State*, 2 H. 826. But this is overruled in the same case, 4 H. 170, where it is held that under the provision of the constitution which authorizes the Legislature to provide by law for the bringing of suits against the State, that the Chancery Court may be invested with jurisdiction over all kinds of claims against the State, legal as well as equitable; see *ante*, 320, 321.

F. COMPLAINANT MUST HAVE CLEAN HANDS, PARTICIPES CRIMINIS,

323. *Same.* The complainant, who was a grantor in a deed in trust to secure debts, and was insolvent, in answer to a bill by the *cestui que trust*, who had purchased at the trustee's sale, which bill was filed to compel a conveyance by the trustees, set up that complainant fraudulently pretended at the sale that he was purchasing the property for the purposes of the trust, and that he had discovered since the sale, that complainant was converting it to his own use, without making provisions for the trust debt; and on that ground he had forbidden the trustees to make the conveyance: *Held*, that if there were a combination between them, that the *cestui que trust* should purchase at a reduced price, the creditors, whose debts were secured, (the *cestui que trust* being but an endorser on them), would have cause to complain, but that a party to such a compact could not have the matter investigated in equity; *Wulker v. Brungard*, 13 S. & M. 723.

See FRAUDULENT ASSIGNMENT, 85, 93, 94, 97 *Ante*, 84.

323a. *Right of fraudulent grantee to return of purchase money.* Where an executor's sale, made under a valid order of court, is set aside for fraud in the sale, the fraudulent purchaser will be allowed to retain a lien on the land for the amount he has paid and interest, and he will be charged with reasonable rent, and be allowed for permanent and

valuable improvements, not to exceed the value of the rents, and the land will be sold under the old order, subject to these rights; *Grant v. Lloyd*, 12 S. & M. 190.

323b. *Particeps criminis granted relief: Case in judgment.* A bill was filed by an executor (who was also an heir), and by the other heirs jointly against a purchaser of realty and personalty from the executor at a public sale made by him under an order from the Probate Court. It was charged in the bill that the property had been sold by the executor at the suggestion of the purchaser, for the purpose of defrauding certain banks, who were creditors of the testator; that at the sale the purchaser prevented other persons from bidding; that at the sale he told certain other creditors who were disposed to bid, that he was buying for the benefit of complainants; that he purchased for less than the real value of the property; and that he was now holding the property for his own use, refusing to account with the executor and the heirs for any part of it: *Held*, on demurrer to the bill, that it presented a case for equitable relief, and that it was no objection that the executor was *particeps criminis*, as there were other parties interested, some of whom were infants. Nor was it an objection to the bill, that the Probate Court had jurisdiction, since that was very questionable, and if it were conceded, that court could not give all the relief which the cause demanded; *Grant v. Lloyd*, 12 S. & M. 191.

See FRAUDULENT ASSIGNMENT, 86.

324. *Same: An illustration.* A party endeavoring to perpetrate a fraud, can get no relief in equity against a *particeps criminis*; but a husband making a deed to bar supposed rights of his wife from whom he is separated, is not guilty of such a fraud as will bar him from relief against the grantee perverting the deed to fraudulent purposes; *Dismukes v. Terry*, W. 197.

G. THE PREVENTION OF A MULTIPLICITY OF SUITS.

325. *Same.* Courts of equity will interpose where legal questions only are involved, to prevent a multiplicity of suits; where the subject matter of the contest is held by one individual in opposition to a number of persons, who controvert his right, and who hold separate and distinct interests, depending on a common source. But a court will not entertain a bill of peace, where the right is controverted by two persons only, until that right has been satisfactorily established by a trial at law; *Nevitt v. Gillespie*, 1 H. 108.

See FRAUDULENT ASSIGNMENT, 86.

6. Instances of Jurisdiction, and the Want of it.

A. FRAUD AS A GROUND OF JURISDICTION.

326. *Same.* An allegation of fraud in a bill is usually considered as giving a chancery court jurisdiction, and as a general rule such a charge requires an answer where a demurrer is interposed; but if the subject matter of the bill be such as the court can-

not act on, or where it is palpable that the case made by the bill, aided by the discovery sought, is wholly without the pale of chancery cognizance, then an answer would avail nothing, and is, therefore, unnecessary. If the case, however, is in any degree doubtful, the allegation should be answered; *Morton v. Grenada Academy*, 8 S. & M. 773. See *ante*, 21.

327. *Same: Fraudulent assignment.* The Chancery Court is the proper tribunal in which the creditors of a deceased person shall seek relief against fraudulent conveyances of property made by the decedent in his lifetime; *Snodgrass v. Anderson*, 1 G. 472. And the remedy by *scire facias* granted in such cases does not oust the original jurisdiction of the Chancery Court to set aside fraudulent conveyance; *Abby v. Commercial Bank of N. O.*, 2 G. 434.

328. *For further instances of chancery giving relief for fraud*, see FRAUDULENT ASSIGNMENTS. VENDOR AND VENDEE, sub-division, Rescission of Contracts. LAND LAWS OF UNITED STATES, 29. *Ante*, 309, *et seq.* FRAUDS AND FRAUDULENT REPRESENTATIONS.

329. *Power to annul private act of Legislature procured by fraud.* A chancery court has jurisdiction to annul a private act of Legislature, authorizing an administrator to sell lands of his intestate, if it be clearly shown that it was obtained by fraudulent representations made to the Legislature as to the condition of the estate, and the necessity for the sale. But if the representation to the Legislature was that the personalty was insufficient to pay debts without serious inconvenience to the widow and child of the intestate, and it be shown that it was insufficient, excluding from it the price of the only slave of the intestate, which had been bought by the widow from the administrator on a credit, the representation is not fraudulent; *Williamson v. Williamson*, 3 S. & M. 715.

B. MISTAKE.

See *post*, sub-division Reformation of Writings.

330. *Same.* The correction of mistakes in deeds or other writings, is one of the acknowledged heads of equity jurisdiction. A court of law cannot do it; *Peques v. Mosby*, 7 S. & M. 340; *Lauderdale v. Hallock*, 1b. 622; *Harrington v. Harrington*, 2 H. 701; *Simmons v. North*, 3 S. & M. 67. A court of equity will grant relief in cases of mistakes as well as of fraud, and in favor of complainants and defendants; *Dismukes v. Terry*, W. 197.

331. *Same: Rule.* Palpable mistakes in writings will be corrected for the purpose of carrying out the intention of the parties; but the proof of the mistake must be clear and beyond doubt; *Harrington v. Harrington*, 2 H. 701. The parol proof to correct the mistake is received with caution and distrust; *Lauderdale v. Hallock*, 7 S. & M. 622.

This power to correct mistakes extends not only to cases where the mistake is confessed, or proven by a written instrument, but also to cases where the mistake is denied, and the

proof exists only in parol. It extends also to deeds and other instruments where the contract is required by the statute of frauds to be in writing, just as in other cases. But when the proof rests entirely in parol, it must be clear and satisfactory; *Simmons v. North*, 3 S. & M. 67.

332. *Between whom corrections will be made.* The correction of the mistake will be made between the original parties to the contract and those claiming under them in privity as heirs, devisees, legatees, voluntary grantees, judgment creditors, or purchasers with notice of the mistake; *Ib.*

333. *Same: Instance.* A. mortgaged land to B., and by mistake the land was described as the northeast quarter of a certain section, instead of the southeast quarter. After the mortgage was recorded and before the mistake was discovered or corrected, a judgment was rendered against A., and the sheriff levied on said southeast quarter, and sold it under the judgment. But the mortgagee having discovered the mistake before the sale, procured a written acknowledgment of it from the mortgagor, and gave notice at the sale of the mistake. It was held that the mortgagee was entitled to have the mistake corrected as against the purchaser with notice; that the lien of the judgment only attached to the actual interest of A. in the land, and that by the mistake the mortgagee had an actual interest in the land omitted from the mortgage, which was superior to the rights of judgment creditors or purchasers with notice; *Ib.*; see *post*, 586.

334. *Modification of the rule.* But neither in equity nor at law can money which has been paid through a mistake in law, be recovered back, if it be not unconscientious for the receiver to return it. Thus, where a junior judgment creditor has, by his superior diligence, caused his execution to be levied on property of the defendant which he discovered, and a sale of said property be made thereunder, if the sheriff pay him the proceeds, though there be older judgments enrolled against the defendant, it will not be unconscientious for him to retain it, and neither the older judgment creditors nor the sheriff can recover it back from him; *Tiffany v. Johnson*, 5 C. 227.

C. CANCELLATION.

335. *Same.* A court of equity has jurisdiction to require the delivery up and cancellation of a bond which, though good on its face is void for having been delivered as an escrow in blank, and has been filled up without authority; *Sessions v. Jones*, 6 H. 123.

336. *Same.* But a court of equity in this State, where promissory notes are not negotiable, so as to deprive the maker of his defence against the assignee, will not, in a case free from fraud, entertain a bill for the cancellation and delivery of such paper. It seems the rule would be otherwise where the assignee would be entitled to recover, notwithstanding any defence existing between the maker and payee; *Hester v. Hooker*, 7 S. & M. 768.

D. DIVORCE.

337. *Same.* Chancery courts have jurisdiction over suits for divorce; *Clark v. Slaughter*, 9 G. 64; and such suits are regulated by the general chancery practice, unless when special provision is made to the contrary; *Fulton v. Fulton*, 7 G. 517. See *MARRIAGE AND DIVORCE*, 34, *et seq.*

E. FORECLOSURE OF MORTGAGES.

338. *Same.* See *MORTGAGEE. Post*, subdivision Mortgage, *ante*, 312.

F. MARSHALLING ASSETS AND SECURITIES.

339. *Same.* See that sub-division, *post*.

G. PRETIUM AFFECTIONIS AS A GROUND OF EQUAL JURISDICTION, SLAVES.

340. *Same.* A chancery court will entertain a bill to recover specifically a chattel which, from its peculiar value or importance to the complainant, cannot be adequately compensated for by pecuniary damages, as if it be an object of regard for its antiquity, or be the production of a distinguished artist. And for the same reason it will entertain a bill to recover a family slave; *McRae v. Walker*, 4 H. 455.

On the subject of the jurisdiction of the court to recover the slaves, when the complainant has a legal title, the decisions have not been uniform. At first the jurisdiction was denied; *Bates v. Bates*, W. 356. Then it was allowed when the slave sought to be recovered, was a family slave; *McRae v. Walker, supra*; and finally it was held, that owing to the peculiar nature of slave property, the jurisdiction would be entertained in all cases; *Murphy v. Clark*, 1 S. & M. 221; *Butler v. Hicks*, 11 S. & M. 78; *Baines v. McGee*, 1 S. & M. 208; *Murphy v. Clark*, 14 S. & M. 187.

But where the sole ground of jurisdiction of a court of equity to enforce a specific delivery of personal property, is the *pretium affectionis*, as in case of a suit for slaves where the complainant has the legal title, then if the property is not in possession of the defendant when the suit is commenced, the court cannot award to the complainant the value of the property. Yet, if the defendant be a trustee for the complainant, either expressly or constructively, the jurisdiction of the court attaches on that ground; and if the trustee has disposed of the property before suit commenced, the court can award damages for its value. And in the meaning of this rule, the purchaser of the property, with notice of a legal or equitable title in another, is a trustee for the owner, whose rights he has thus sought to defeat; *Calhoun v. Burnett*, 40 M. 599.

In all other cases, possession by the defendant, of the property, either at the commencement of the suit or during its pendency, is essential to the jurisdiction of the court to decree a specific delivery, or damages for its conversion; *Brown v. Goldsby*, 5 G. 437.

H. LIENS.

341. *Same.* Equity has a general jurisdiction to enforce liens. See *VENDOR AND VENDEE*, 74 *et seq.* FRAUDULENT ASSIGNMENT, 80. FRAUDS, &C. CIRCUIT COURT, 7. MECHANICS' LIEN. PARTNERSHIP, 49 to 59.

I. OVER NON-RESIDENTS AND PROPERTY OUT OF THE STATE.

342. *Where all parties are non-residents.* In the absence of a statutory provision conferring jurisdiction in the particular case, a chancery court in this State has no jurisdiction where all the complainants and defendants are non-residents; *Kerr v. Bowers*, 1 S. & M. 584; S. C., 3 id. 641. See *ante*, sub-division Attachment, and *ante*, 69.

343. *Over bill to rescind sale of land in another State.* The Chancery Court of this State where the parties are within its jurisdiction, will entertain a bill to rescind a contract for the sale of land, perfected by conveyance to and possession by the vendee, when the land lies in another State; *Parham v. Randolph*, 4 H. 435.

7. As to Estate of Decedents, Wills, Guardians, &c.

A. GENERALLY, HAS NO JURISDICTION, DISTRIBUTION, ACCOUNTS.

344. *Same.* That the jurisdiction of the probate courts over these matters is exclusive, and that chancery has no jurisdiction, see PROBATE COURT, sub-division Jurisdiction.

345. *When distributee is pretermitted.* Chancery has no jurisdiction to entertain a bill by a distributee who has been overlooked in the distribution, seeking to recover his share against the other distributees. The remedy is in the Probate Court; *Gaines v. Smiley*, 7 S. & M. 53. See DESCENT AND DISTRIBUTION, 47 to 49.

346. *Reviewing accounts in Probate Court.* The Chancery Court has no jurisdiction to review the accounts of an administrator, after they have been finally settled in the Probate Court, where the parties have a full and fair opportunity to be heard; *Stubblefield v. McRaven*, 5 S. & M. 130.

347. *Compelling accounts.* A chancery court has no jurisdiction, at the instance of a creditor of a deceased person, to compel persons who have been at various times his administrators, to file an inventory of the assets, and to account fully for their actings and doings in their respective administrations, or to pay the complainant his debt; and if there be no assets on hand, then to compel the administrator of one of the sureties on one of the administrator's bonds, to pay it. The settlement of an administrator's accounts is a matter exclusively for the Probate Court; and a liability on an administrator's bond can be enforced only in the Circuit Court; *Green v. Creighton*, 10 S. & M. 159. See *ante*, 312. *Post*, 350.

348. *Settling accounts.* The obligation of a refunding bond is to refund a due propor-

tion of the deficiency of assets to pay the debts which may afterwards be established against the estate. Whether there is a deficiency of assets, and if there be a deficiency, then the extent of it can only be ascertained by a settlement in the Probate Court; therefore, a court of equity will not, where a refunding bond has been given, set off against the claim of the obligor in the bond, his *pro rata* share of a debt against the estate, until a deficiency of assets, and his consequent liability to refund, have been first established by the Probate Court; *Ratliff v. Davis*, 9 G. 107. See *ante*, 312, 309. *Post*, 349c., 349d., 349e.

B. CREDITOR'S BILL FOR CONFORMITY IN ADMINISTRATION.

349. *Same.* The Chancery Court in England has jurisdiction of a creditor's bill for conformity, and to administer the assets of the estate; and where the decree was pronounced, it would be at the instance of creditors seeking to restrain other creditors from suing the administrator at law, and thereby getting a preference over other creditors. But the laws of this State make ample provision for an equal distribution of assets among creditors by proceedings in the Probate Court, when the estate is insolvent. And hence, equity will not in this State, at the instance of an administrator, a creditor from suing at law, on the ground that the creditor might thereby get a preference; *Sanders v. Douglass*, 3 S. & M. 454.

See PROBATE COURT, 35.

C. WHERE THERE IS NO ADMINISTRATION. FOREIGN ASSETS, ACCOUNTS, BONDS, &c.

349a. *Same.* A court of equity has jurisdiction to decree partition and distribution of a decedent's estate among the heirs when there has been no administration, (citing *Farve's Heirs v. Graves*, 4 S. & M. 717; 4 H. 458; 3 id. 255); *Robb v. Griffin*, 4 C. 579. And so where the intestate died in another State, and the property is removed here; *Archer v. Jones*, 4 C. 583. And so equity has jurisdiction to decree distribution when there has once been an administrator, but he has made a final settlement without there ever having been a distribution of the personality. In this case, one of the distributees, after a final settlement by the administrator, took possession of the estate, and when the other became of age, made partial and unjust distribution to him, claiming the balance of the estate as his own; and it was held that the Chancery Court had jurisdiction to order a fair distribution, and to make the distributee in possession account for the hires; *Wood v. Ford*, 7 C. 57.

349b. *Jurisdiction to enforce resulting trust against an administrator: Accounts.* A court of equity has jurisdiction to entertain a bill by the heirs against the administrator, to compel the latter to deliver up property which he has bought with the funds of the estate; but it has no jurisdiction to settle administrator's accounts; and if a bill be filed for both

purposes, so much of it as relates to the accounting is demurrable; as to that the complainants must pursue their remedy in the Probate Court; *Anderson v. Duke*, 6 C. 87. S. P., as to the accounting, *Foute v. McDonald*, 5 C. 610; *Green v. Creighton*, 10 S. & M. 159; *Searles v. Scott*, 14 id. 94; *Neylans v. Burge*, 1b. 201; *Ratliff v. Davis*, 9 G. 107, digested in *ante*, 309, 312.

349c. *Jurisdiction as to accounts: Legatee compelled to refund on setting aside illegal sale.* A court of equity has no jurisdiction to order an account by an administrator, not even when the legatees are seeking the specific recovery of property sold by an administrator. And it is a defence by the purchaser to such a bill, that he cannot be compelled to give up the property until the money paid by him, and which went to the exoneration of the legacy, has been refunded, but the accounting to show this must be had in the Probate Court; *Ragland v. Green*, 14 S. & M. 194.

349d. *Bill by administrator against distributees to refund: Accounts.* An administrator distributed, in 1863, the assets of the estate, retaining in his hands \$2,000 in "Confederate money," to pay a particular debt, and taking from the distributees refunding bonds. In 1866 he filed his bill against the distributees to compel them to refund a sufficiency to pay this debt, alleging that the money retained had become worthless, and he had no assets with which to pay the debt; but he did not show that his liability for the loss of the money had been settled in the Probate Court: *Held*, that until this was done, he had no claim against the distributees, and that the Probate Court had exclusive jurisdiction to settle that, and the bill must be dismissed; *Neal v. Maxwell*, 40 M. 726. See *ante*, 309, 312, 348.

349e. *Bill by administrator against the heirs to foreclose mortgage: Accounts.* Upon the death of the mortgagor, the mortgagee became his administrator, and filed his bill against the widow and heirs of the mortgagor, to foreclose. The defendants filed a cross bill, in which they set up that enough personality had come to the complainant's hands as administrator, to pay the debt, and asked that his accounts as administrator might be reviewed to show: *Held*, that the matter of the cross-bill was within the exclusive jurisdiction of the Probate Court, and could not be litigated in equity; *Capers v. McCaa*, 41 M. 479.

349f. *Widow's bill to recover her separate estate from administrator.* If an administrator take an inventory, as a part of the intestate's estate, of property belonging to the widow, the latter cannot hold him accountable therefor, in equity; *Ib.*

349g. *Bill by devisee to recover realty.* Equity has no jurisdiction of a bill by a devisee to recover real estate devised to him, there being no question involved but the legal title; *Ragland v. Green*, 14 S. & M. 194.

349h. *Same.* Equity has no jurisdiction of a bill by a creditor of a decedent who was a

resident of another State, against his heirs and widow and others, who removed his personality from that State to this, in which the relief sought is a decree, compelling the defendants to pay complainant's debt out of the property so removed by them; it not being shown that the defendants are insolvent, or that an injunction against a further removal of the property was necessary to secure payment of the debt. In such a case, the defendants are executors *de son tort*, and the complainant's remedy at law is adequate; *Beck v. Ratney*, 6 C. 111.

350. *Over foreign executors, &c.* The Chancery Court has jurisdiction to compel a foreign executor or guardian, removing to this State, to account to the parties interested for the trust estate in his hands; *Bell v. Sud-deth*, 2 S. & M. 532.

See EXECUTOR AND ADMINISTRATOR, 231, *et seq.* PROBATE COURT.

351. *Suit on administrator's and guardian's bond.* A court of chancery has no jurisdiction of a bill against the sureties of an administrator, on his bond, for a devastavit; the remedy is at law by action on the bond; *Buckingham v. Owen*, 6 S. & M. 502; *Green v. Turstall*, 5 H. 638. See *ante*, 347. And the remedy of a ward against the surety on his guardian's bond is ample at law, and it is no reason why he should go into equity, that the guardian is insolvent, and a non-resident, and the administrator of the surety threatens to make a final settlement, before a suit at law on the bond can be prosecuted to final judgment; *Ogden v. Waller*, 2 C. 190. See *post*, 469.

D. OVER EXECUTORS DE SON TORT, AND FRAUDULENT PURCHASERS.

352. *Executor de son tort.* The Chancery Court has jurisdiction to entertain a bill by the heirs and distributees, against persons who have wrongfully assumed to administer the estate, without an appointment from the Probate Court, and to compel such persons to make a settlement and render an account, and to decree to the complainants their shares in the estate. Where no administration has been granted, chancery retains its original jurisdiction over the settlement of estates, but if administration has been granted, the jurisdiction of the Probate Court is exclusive; *Farve's Heirs v. Graves*, 4 S. & M. 707 (citing *McRea v. Walker*, 4 H. 455). See *ante*, 188f.

352a. *Over fraudulent assignee of administrator.* It seems that an improper transfer of assets of the estate made by an executor to an assignee with notice, imposes on the latter a liability in equity to those interested; *Grant v. Lloyd*, 12 S. & M. 191. See EXECUTORS, &c. 222.

E. OVER WILLS.

353. *Same.* The Chancery Court has no original jurisdiction over wills; *Cowden v. Cowden*, 2 H. 806.

It has no jurisdiction to grant an issue *devisavit vel non*, and to set aside a will for the insanity of the testator, or for the fraud of the executor in obtaining it, and procuring it

to be probated in common form. The Probate Court has ample jurisdiction to give relief. In England such power did not exist in the Chancery Court, but in the Ecclesiastical Court; *Hamberlin v. Terry*, 7 H. 143.

354. *Trusts in a will.* The fact that a trust is created by a will, does not exclude the jurisdiction of a court of chancery, if the trust be of such a character that it requires equitable interposition and the Probate Court be unable to grant full and adequate relief; *Wade v. Am. Col. Society*, 7 S. & M. 663.

355. *Same: Instance.* A will directed the transportation of such of testator's slaves as should elect to go to Liberia—there to be emancipated—and that his other estate should be sold, and the money applied, under the direction of the Am. Col. Society, to the transportation of his slaves to Liberia and their support after their arrival there. The slaves elected to go, but the executor refused to carry out the trusts in the will: *Held*, that it was a trust of which a court of chancery would take cognizance, as the full measure of relief could not be granted in the Probate Court; *Id.*

See PROBATE COURT, 36, 38.

F. AS TO SALES WITHOUT REVIVOR, AND FRAUDULENT SALES.

356. *Injunction against execution without revivor.* If execution be issued in favor of the administrator of the plaintiff in the judgment, without revivor, it will be quashed on motion, or on writ of error *corem nobis* with *supersedeas*, and, therefore, equity will grant no relief; *Ammons v. Whitehead*, 2 G. 99.

357. *To set aside sale of realty made under judgment without revivor.* A court of equity has jurisdiction to entertain a bill by the heir, to set aside a sale of his ancestor's land, made under an execution issued and tested after the ancestor's death, where there has been no revivor of the judgment, and the heir is an infant when the sale was made. In such case, however, if the judgment were a lien on the land, the heir must refund the money bid; *Cook v. Toumbs*, 7 G. 685. But a court of equity will not set aside a sale of realty under such circumstances, merely because the heirs had no notice of the judgment, if it appear that it was unsatisfied, and a valid claim against the defendant in the judgment, and no injustice or injury has been done to the complainants; *Harper v. Hill*, 6 G. 63.

358. *Annulling administrator's sale for fraud.* After the term of the Probate Court, at which an administrator's sale has been confirmed, a court of chancery alone has jurisdiction to annul it for fraud; *Smith v. Chew*, 6 G. 153.

See PROBATE COURT, 22 to 24.

G. JURISDICTION UNDER CONSTITUTION OF 1870.

358a. *Same.* The effect of sections 25 and 27, of the Act establishing chancery courts, approved May, 1870, is to transfer

the administration of the probate court law to the Chancery Court, so that the latter may license and decree the sale of real estate for the payment of debts, in the same manner and on the same terms, that the Probate Court was theretofore authorized to do; *Wells v. Smith*, 44 M. 296.

358b. *Same.* The statute requiring a cause to stand over for five months after answer filed, to take testimony, is confined under said Act of 1870, to that part of the practice which is not included within its probate jurisdiction; and hence, the court may try a probate cause the same day that a guardian *ad litem* files his answer; *Id.* See post, 547, 548.

358c. *Sale of land to complete payment for it.* Under art. 138, p. 458, of the Rev. Code of 1857, authorizing an administrator to procure a sale of land, to pay the unpaid purchase money due thereon by the vendee, the sale is made not for the benefit of the creditors at large, but for the vendor; and the statute embraces cases where the vendee has a legal title, as well as where he had an equitable title only. If the entire land be sold, the entire interest passes; if only the interest of the vendee, then only his interest passes; *Wells v. Smith*, 44 M. 296.

8. Miscellaneous as to Jurisdiction.

A. WHEN JURISDICTIONAL FACTS MUST EXIST.

359. *Jurisdictional facts must exist when suit is commenced.* The facts which constitute the ground of a suit, and which are necessary to confer jurisdiction on the court, must exist at the commencement of the suit; if they do not, the defect cannot be supplied by matter which has taken place since the suit commenced; *Brown v. Bk of Mississippi*, 2 G. 454. But this rule does not apply, so as to deprive a complainant of the right to sue, for an omission as to his personal capacity to sue, see GUARDIAN AND WARD, 82.

B. WAIVER OF JURISDICTION.

360. *Waiver of jurisdiction.* Where a court of equity has jurisdiction, and is competent to give relief, a court of law also having jurisdiction; or where the jurisdiction has reference to the person, and the defendant appears and defends without objection by demurrer or answer, he will be taken to have waived objection on that account, and it cannot be insisted on at the hearing; but, if the bill show a case not within the appropriate jurisdiction of a court of equity, the error is fatal at every stage of the cause, and cannot be cured by any consent or waiver of the parties; *Brown v. Bk of Mississippi*, 2 G. 454; *S. P., Cable v. Martin*, 1 H. 558. Where there is an entire want of jurisdiction over the subject matter, the objection can be raised at any time—even in the High Court on appeal. It is only in cases of concurrent jurisdiction, that a demurrer must be filed to raise the objection of a want of jurisdiction; *Green v. Creighton*, 10 S. & M. 159.

See JURISDICTION, 8.

361. *Same: Illustrations of the rule.* On a bill to enjoin a judgment at law, it is too late to raise the question of jurisdiction after answer to the merits. A demurrer or plea should have been filed, setting up the conclusiveness of the judgment; *McAuley v. Mardis*, W. 307. And so where a complainant seeks to enjoin a judgment at law, and prays an account, and the defendant goes into the account, it is too late then on final hearing, for the defendant to set up want of jurisdiction in the court; *Head v. Gervais*, W. 431.

Whether a chancery court has jurisdiction to entertain a bill at the suit of a creditor, whose debt is secured by a deed in trust on personalty, seeking to enjoin a sale thereof, under a judgment against the grantor; *Quere?* But if the bill be brought, and no objection to the jurisdiction be made by demurrer, the suit will be entertained; and in such a case, the decree should not be a perpetual injunction against the judgment creditor, restraining a sale of all the property embraced in the deed; but an account should be ordered to show the amount due to the complainant, and the property should be ordered to be sold to pay it, and the balance, if any, should remain, subject to sale under the execution; *Byrne v. Anderson*, 10 S. & M. 81. See *ante*, 238, 239.

And so the High Court refused to entertain the question of jurisdiction in a case where a partner sued his associate for an account, and alleging his insolvency, made defendants to the bill certain debtors of the defendant partner, by garnishee process, and there was a *pro confesso* against all the defendants, and no objection raised to the jurisdiction in the court below; *Ramsey v. Barbaro*, 12 S. & M. 293.

C. AGAINST DESTROYER OF DEEDS.

362. *Remedy against destroyer of title deeds.* If a party fraudulently destroy the title deeds of another, and make a fraudulent sale of the land, and appropriate the proceeds to his own use, he will be liable, as upon an implied trust, to restore the injured party to his rights, and a court of equity will compel him to do so; *Philips v. Hines*, 4 G. 163.

D. AS TO JUDGMENTS ON ATTACHMENTS.

362a. *Annulling judgment in attachment inter alios.* The Chancery Court has jurisdiction to entertain a bill by a creditor, seeking to annul a judgment in attachment rendered against his debtor, upon the ground that the plaintiff in attachment, did not have a subsisting debt against the debtor, when the attachment was sued out; *Henderson v. Thornton*, 8 G. 448. For the instance, see Attachment, 10.

Da. OVER ITS OWN DECREES AND DECREE OF HIGH COURT.

363. *Jurisdiction after final decree.* The jurisdiction of a court of chancery ceases, after a final decree, when there is nothing to

be done in execution of the decree; but, when in order to give the successful party the benefit of the decree, it is essential that it be executed, jurisdiction does not cease till such execution is had. And it is not necessary to continue the cause upon the docket, in order to preserve the jurisdiction of the court, for the execution of the decree, though it would be the more formal and regular mode of proceeding; *Robins v. Goff*, 4 G. 153. See further on the subject, *ante*, 141, 142a.

363a. *Over interlocutory decrees.* See *ante*, 143.

364. *Jurisdiction over cause sent from High Court for execution.* The power of a chancellor over a decree of the High Court, sent to the Chancery Court for execution, is rather ministerial than judicial; to enforce the execution of the decree rather than to inquire into its validity. He cannot inquire into any fact which, though not expressly, was incidentally and necessarily involved in the decision of the High Court, in rendering the decree; and hence, it will be an unwarranted exercise of power for the chancellor to quash an execution issued from the Chancery Court, to enforce a judgment rendered in the High Court, upon the ground that the person against whom execution was issued, and judgment rendered, in his capacity as administrator, was not in fact administrator at the time of the rendition of the judgment; *Henderson v. Winchester*, 2 G. 290.

E. TO ENFORCE LOST NOTE, AND TO COMPEL DELIVERY OF NOTE.

365. *To collect lost note.* The Chancery Court has jurisdiction of a bill to recover on a lost note (and also on instruments not negotiable), but it will require a bond of indemnity against the note itself, and also against the expense of any other suit on it; *Truly v. Lane*, 7 S. & M. 325; *Wofford v. Board of Police of Holmes County*, 44 M. 579. A court of law has jurisdiction also to enforce a lost note, where, under our statute, the maker can set up all defences between antecedent parties against an innocent endorsee; *Clark v. Reed*, 12 S. & M. 557. A court of chancery will require indemnity where it gives relief on the lost note of a married woman, although it be void, for she has a right to indemnity against the costs she may be subjected to in defending a suit on it, by a casual finder of the note; *Gordon v. Manning*, 44 M. 756.

366. *To enforce delivery of a note.* A court of equity will entertain a bill by an administrator *de bonis non*, against the former administrator and his assignee, to enforce a specific delivery of a note belonging to the estate, and which had been illegally assigned; *Scott v. Searles*, 7 S. & M. 498.

F. ACCOUNTS BETWEEN PARTNERS, RESCISSION OF CONTRACTS, BILL OF PEACE.

367. *Accounts between partners.* See PARTNERSHIP, 53, *et seq.*

368. *Rescission of contracts.* See *post*, sub-division Rescission of Contracts. VENDOR AND VENDER, same sub-division
369. *Bill of peace.* See *ante*, 325.

G. PREVENTING UNCONSCIENTIOUS DEFENCE.

370. *Same.* Where a party has been deprived of his legal right by unfounded and unconscientious litigation, and is without legal remedy, he may come into equity and enjoin the adverse party from availing himself of the advantage which he has obtained, and may, if necessary, have a decree securing him the benefit of the legal right, which he has lost by the unjustifiable conduct of his adversary; and hence, where the defendant, in a judgment at law, improperly obtained an injunction restraining its collection, and kept the same in force until the statute of limitations had barred the issuance of another execution, the plaintiff may maintain a bill in equity to enforce the collection of the judgment; *Davis v. Hoopes*, 4 G. 173; *Sugg v. Thrasher*, 1 G. 135; *Wilkinson v. Flowers*, 8 G. 579; *Marshall v. Minter*, 43 M. 666.

See LIMITATION OF ACTIONS, 135c. *et seq.*

370a. *Unconscientious defence: Mitigation of the rigor of a contract.* A court of equity, like a court of law, must be governed by the real contract of the parties, as they have expressed it. But though this be true, yet the court may go further than a court of law in mitigating the consequences of a breach of the contract, and may condemn the means by which one party has secured an advantage over the other. Hence it will have jurisdiction to enjoin the vendee from setting up as a defence to an action for the purchase money, the following: A. sold land to B., the title to which was in C., who made the deed to B. A. however gave an instrument to B. to the effect, "that he would refund to B. what he had paid of the purchase money, and deliver up to him the notes which he had executed for the balance, if the land should be sold under execution against A. or C." Afterwards the land was sold under execution against C., and B. (the vendee) was substituted to the contract of the purchaser at the sheriff's sale: *Held*, that B. would not be allowed to set up as a defence to the purchase money, anything more than a credit for the sum he had actually paid for the encumbrance; *Champlin v. Dolson*, 13 S. & M. 553.

H. RELIEF AGAINST USURY, TRESPASS.

371. *Same.* A court of equity has jurisdiction to grant relief against an usurious contract, only where there are circumstances connected with the transaction, aside from the usurious agreement, which call for the interposition of the court, on account of the inadequacy of the powers of a court of law to grant full and complete relief; *Kelly v. Weaver*, 8 G. 631; citing *Bond v. Jones*, 8 S. & M. 368; *Smith v. Walker*, 1b. 131. For which see INTEREST AND USURY, 48a, 49. See that title, 48, for the facts of this case; and

44 to 50 for a general digest of the cases on this subject. See *ante*, 296.

372. *Against trespass and nuisance.* See *ante*, 233, *et seq.*

I. RES ADJUDICATA.

373. *Same.* See sub-division Res Adjudicata.

K. SET-OFF.

374. *Same.* It is now a well settled doctrine in equity, that if from the nature of the claim, or situation of the parties, justice cannot be done at law, chancery will allow a set-off, which is not within the statute of set-off; *Graves v. Hull*, 5 C. 419.

375. *Same: Instance.* Where the judgment creditor had promised the debtor, that he would credit on the judgment certain debts which he owed the debtor, and also, the debts of others to the debtor, which the creditor had assumed for them, and the debtor, relying on this, had taken no steps to enforce these claims, whereby they would be lost, unless credited on the judgment; it was held that equity would grant relief by allowing them as a set-off to the judgment; *Ib.* See also this case, in 311 *ante*.

See SET-OFF.

L. MARRIAGE SETTLEMENT, CHAMPERTY.

376. *Settlement on wife by husband.* A conveyance directly to the wife by the husband, if mutually satisfactory to them, should, in the absence of creditors or subsequent purchasers, from the husband, be very reluctantly disturbed at the instance of collateral heirs of the husband; and a court of equity, in such a case, will assist the wife to recover the fruits of her husband's bounty, if the provision be not manifestly and palpably unreasonable; *Wells v. Wells*, 6 G. 638.

378. *Champerty.* See CHAMPERTY, 8.

M. FORECLOSING MORTGAGE.

379. *Decree in personam on foreclosing mortgage.* It is a well settled rule, that upon a bill to foreclose a mortgage, a court of chancery has no jurisdiction to render a decree in *personam* against the mortgagor for an unsatisfied balance, after the mortgaged property has been exhausted. And the rule is the same where a vendor, who has executed a bond to convey title, upon the condition that the purchase money is paid, files his bill to subject the equitable interest of the vendee in the land, to the payment of the purchase money; citing, *Stark v. Mercer*, 3 H. 377; *Tanner v. Hicks*, 4 S. & M. 294; *Dollahite v. Orne*, 2 Id. 590; *Mosby v. Wall*, 1 C. 81; *Cobb v. Duke*, 7 G. 60. And that there are doubts and embarrassments in reference to the title of the land, is no sufficient reason why a court of equity should render such a decree; *Cobb v. Duke*, *supra*. See *ante*, 312. *Post*, sub-division Mortgage.

N. TRUSTEES.

380. *Discretion of trustees controlled.* Where property is vested in a trustee for the

support and maintenance of a married woman and her children, and the trustee is clothed with a discretion to use the *corpus* of the estate for this purpose, a court of equity will control this discretion where it is abused, and compel the trustee to sell a portion of the principal of the estate, where it is necessary for the welfare of the beneficiaries. The court, in determining upon an application to order such sale, will look with favor upon the claims of those who have supplied the beneficiaries with necessities, which could not be procured by the profits of the estate; but it will refuse its aid to secure an enforcement of improvident contracts, and extravagant purchases made by the *cestui que trust*, even if they were sanctioned by the trustee; *Prewett v. Land*, 7 G. 495.

O. PREMATURE BILL.

381. *Bill filed by co-operation of defendant and complainant.* Where a bill is filed by agreement of complainant and defendant with the view of securing a benefit for both, the latter cannot object that the filing is premature by reason of the defendant not being in default; *Cobb v. Duke*, 7 G. 60.

P. VOLUNTEER.

382. *Bill by volunteer attacking a patent for fraud.* The chancery court of this State will not entertain a bill by a volunteer who has no interest, to set aside a patent for land issued from the land office of the United States, upon the ground that it was procured by fraud; *Ross v. Barland*, W. 489.

Q. ASSESSMENT OF DAMAGES, LAWYERS' FEES.

383. *The power to assess damages.* The Chancery Court has no power to assess damages arising from a breach of a covenant to do certain work; and where a mortgage is given to secure the performance of a contract to build a railway, in a suit to foreclose it, the damages must be assessed by a jury; *Petrie v. Wright*, 6 S. & M. 647. See *ante*, 283.

384. *To enforce collection of lawyer's fee.* The complainant filed his bill against the defendant, alleging that a former guardian had employed the complainant to defend certain suits which had been instituted against his ward; and that, when defendant became guardian, he continued complainant in his professional employment, and he prayed that the defendant as guardian might be compelled to pay his fees: *Held*, that complainant's remedy was at law, and that chancery had no jurisdiction; *Pugh v. Dorsey*, 8 S. & M. 379.

R. FORTHCOMING BOND.

385. *Relief against forfeited forthcoming bond.* Whether a court of equity has jurisdiction to grant relief against a forfeited forthcoming bond, on the ground that the execution on which it was given was never legally levied; *Quære?* *Baine v. Williams*, 10 S. & M. 113.

See FORTHCOMING BOND, 21, 44, 45. *Ante*, 308a.

S. EQUITABLE ASSIGNMENT.

386. *Rule of relief as against equitable assignee.* Where there has been an equitable assignment of a contract, and the assignee comes into a court of equity for relief against the maker of the contract, equity will enforce the contract as it was made between the original parties, and give the defendant all the defences he is entitled to as against the assignor. Hence, where a note was made payable to a bank, since the Act of 1840, requiring banks to take their own issues in payment of all debts due to them, the equitable assignee of the note, not having the legal title coming into equity to collect the note, can recover only a decree, to be discharged in the notes of the bank, or in default of the maker's paying in that currency, then the highest market value of the bank notes at any time between the date of the maturity of the note and the trial. In such a case, the law requiring the bank to take its own notes in payment of debts due it, will be considered in a court of equity, as a part of the contract. Whether this would be the rule at law, where the note is payable to the order of the bank, and endorsed by it, so as to convey the legal title; *Quære?* *Baily v. Bacon*, 4 C. 455. See *ante*, 318.

Sa. ENFORCING VERDICT.

387. *Enforcing verdict at law.* A verdict, though no judgment be rendered on it, is competent evidence of the plaintiff's demand, unless it be stayed or set aside; and the plaintiff is entitled to a judgment on it at any time before it is barred by the statute of limitations. And the assignee of a verdict in favor of a bank, afterwards dissolved, has a mere equity in the debt, which cannot be enforced at law, he being no party to the record; nor can judgment be rendered on it in the name of the bank, because it is dissolved, and the assignee may therefore maintain a bill in equity to enforce the collection of the verdict; *Person v. Barlow*, 6 G. 174. See *ante*, 288.

T. TO RECOVER JUDGMENT SOLD FOR COSTS.

388. *Same.* The Chancery Court has jurisdiction of a bill by a plaintiff whose judgment has been sold for costs, to recover it from the purchaser, who refused the plaintiff's tender for redemption, and also to recover the money which the said purchaser has received from the debtor on the judgment; *Harmon v. Barstow*, 1 C. 276.

U. TO RESTRAIN EXECUTION.

389. *Same.* Chancery has jurisdiction where partial payments have been made on an execution to restrain by injunction, the collection again of the amount so paid. An execution is an entire thing, and cannot be superseded in law, in part. If, however, it were entirely satisfied, the remedy by supersedeas would be available; *Skinner v. Jayne*, 2 C. 567. See *ante*, 237, *et seq.*

V. ACTION AT LAW, AND SUIT IN EQUITY AT SAME TIME.

390. *Action at law in personam and suit in equity in rem. at same time.* A bill in equity may be maintained to enforce the vendor's lien, and at the same time an action at law may be maintained to collect the same debt; *Speight v. Porter*, 4 C. 286. These suits are distinct and separate, and for distinct and separate rights, though they seek to enforce the same debt; *Payne v. Harrell*, 40 M. 498. See *ante*, 187.

W. SETTING ASIDE COMMISSIONER'S SALE, DISMISSAL WITHOUT PREJUDICE.

391. *Same.* A decree was rendered on the chancery side of the Circuit Court to foreclose a mortgage on realty, and under it a sale was made by a commissioner, on a credit of six months, and bond and security taken from the purchaser. The bond was forfeited, and an execution issued on it, which was levied on the mortgaged premises, and they were sold to M. for the benefit of K. But the money so made was appropriated under the order of the court, not to the complainant, but to an older judgment against K., from which order the complainant took an appeal. M. sold the land to L., who had notice that M. held the land for K. On this state of facts, the complainant (who was the mortgagee) filed this bill in the Superior Court of Chancery, to have the various sales, including that made by the commissioner, set aside, and his original decree of foreclosure enforced: *Held*, that the Superior Court of Chancery had no jurisdiction, inasmuch as an attempt was made to set aside the commissioner's sale, for an irregularity in it; but the bill was dismissed without prejudice, and the mortgagee left to his remedy by creditor's bill to annul the fraudulent sales to M. and L., and also to enforce whatever lien there might exist on a sale made by a commissioner; *Tooley v. Gridley*, 3 S. & M. 493. See *ante*, 114. *Post*, 539, *et seq.*

XXXI. Marshalling Assets and Securities.

See sub-division Contribution. See also MORTGAGE, 52. *et seq.*

392. *Rule as between creditors.* Where one party has an interest in, or lien on, two estates, and another has a lien or interest extending to one of the estates only, the latter is entitled, if it be necessary to the enjoyment of his rights, to force the other to seek satisfaction out of that estate to which his lien or interest does not extend, if this can be done without prejudice to him who has the double security (citing *Pallen v. Agr. Bank*, *Freeman's Chancery R.*, 419, 424, S. C. 8 S. & M. 357; *Keaton v. Miller*, 9 G. 630).

393. *Another statement of the rule.* When there is a lien on a particular fund, and an older lien on a general fund, of which the particular fund is a part, equity will compel the party having the older lien to resort for its satisfaction to that part of the general

fund not embraced in the second lien, if it can be done without prejudice to the older creditor. But after the older lien has been consummated by a sale under it, it will be too late for the holder of the junior lien to apply for relief; *Drake v. Collins*, 5 H. 253.

394. *Modification of rule where there are separate debtors.* But this rule applies only to parties who are creditors of the same common debtor, and the liens sought to be adjusted are against his estate. It cannot be invoked in favor of one, who is a creditor of one party, against a defendant, who is a creditor of that party and another, as his joint debtors, so as to compel the joint creditor to resort alone to the property of that one of his debtors, who is not a debtor of the complainant, so as to leave the property of the other for the complainant's benefit; *Markham v. Calvett's Ex'or.* 5 H. 427. See *post*, 396.

395. *Rule applied in favor of a volunteer.* And this rule is also applied in favor of a volunteer. Thus, where the grantor in a deed in trust, given to secure debts, afterwards gives his daughter, upon her marriage, a part of the property so conveyed, the donee acquires a good right to the property, subject only to the superior claims of the creditor, secured by the deed; and she may compel that creditor to resort to the other property conveyed in the deed, and exhaust that before appropriating the property given to her by the grantor. And this is so, notwithstanding a stipulation in the deed in trust that the grantor will not part with the property, except to his trustee, when a sale shall be necessary; *Keaton v. Miller*, 9 G. 630.

396. *Rule stated in ante*, 394, *applied.* Where there is a judgment against two partners, which is also a lien on their separate estates, a separate creditor of one of the partners alone, who has a lien on his estate junior to the lien of the judgment against both, will not be heard in a court of equity in a bill seeking to compel the joint creditor to levy his execution out of the separate estate of that partner who is not the debtor of complainant, nor even to compel that creditor to levy one-half of his execution out of that partner's estate. For in the latter case the court cannot know what are the equities between the partners, and will not delay the execution creditor until those equities can be settled; *Markham v. Calvit*, 5 H. 427. See *ante*, 394.

397. *Rule when there are alienees of part of the estate:* Where a judgment binds several distinct estates or parcels of property, an alienee of a part has a right to compel the creditor to levy first on the part not aliened; and if there be several alienations, then the alienees have the right to cause the judgment to be satisfied out of the respective estates aliened, in the inverse order of their alienation, the last aliened being the first subject to levy. But in a bill by an alienee against the creditor to enforce the equity, he must point out and show in his bill that there is other property liable before that for which he seeks exemption; *Agricultural Bank v. Pal-*

lon, 8 S. & M. 357; *Rollins v. Thompson*, 13 S. & M. 522; *Baine v. Williams*, 10 S. & M. 113; *Dillon v. Bennett*, 14 S. & M. 171.

398. *Bill for relief when filed: Parties.* The junior creditor seeking the benefit of the rule must apply for relief before a sale is made of the property, for though the sale might have been prevented, it does not follow that it will be set aside; *Drake v. Collins*, 5 H. 253. And this is so though the junior encumbrancer had sued out an injunction against the sale, and his bill was dismissed and the sale took place after the dismissal and before he appealed; *Baine v. Williams*, 10 S. & M. 113. The only necessary parties to such a bill, it seems, is the party seeking the benefit of the rule and the holder of the superior lien; *Agricultural Bank v. Pallen*, 8 S. & M. 357.

399. *Rule where after alienation of a part the creditor has released a security.* The above rule in favor of the alienee of a part of the property on which a judgment lien exists, is applied, so as to prevent the creditor from collecting from the part aliened an amount equal to the full value of any property on which his lien existed, and which after the alienation to the complainant, the creditor released from his lien; *Dillon v. Bennett*, 14 S. & M. 171 (citing *Agricultural Bank v. Pallen*; *Rollins v. Thompson*, *supra*.)

See CONFLICT OF LAWS, 29.

XXXII. Mortgages.

400. *As to foreclosure of mortgages*, see MORTGAGE, 28 to 38.

401. *As to redemption of mortgages*, see MORTGAGE, 39, 41.

402. *As to distribution of proceeds of mortgage among assignees of mortgage debt*, see MORTGAGE, 52, *et seq.*

403. *That equity has no jurisdiction on a bill to foreclose, to render a decree against mortgagor in personam, for unsatisfied balance*, see *ante*, 312, 379.

404. *Taking accounts on bills to foreclose and redeem.* See *ante*, 7, 9. MORTGAGE, 44, 44a.

405. *Appointing receiver on bill to foreclose.* See MORTGAGE, 37.

406. *Bill to redeem, form.* If the bill contain an averment of an offer by the mortgagor to redeem prior to the day limited for the payment of the debt, which the mortgagee refused upon the express ground that the mortgagor had no right to redeem; and the bill also contain a prayer for an account and a re-delivery of the mortgaged property, this is an untechnical but sufficient offer in the bill to redeem and pay whatever may be due on the mortgage; *Edgerton v. McRea*, 5 H. 183. In a bill by the mortgagor to redeem, or to have the property sold to pay the debt, an offer to pay the mortgage is an essential averment; *Hoops v. Bailey*, 6 C. 328.

406a. *Decree where debt is due by instalment, and some are not due.* Where a mortgage is given to secure a debt falling due by

instalments, the mortgagee, upon default in payment of one instalment, whereby the condition of the mortgage is forfeited, may file a bill to foreclose as to that instalment; and as to the other instalments not then due, he may set them out in the bill, and pray that if they or any of them become due before final decree, that they be embraced in the decree, and relief will be granted by including in the decree all the instalments which are due at the date of the decree. And in such a case it is unnecessary to file a supplemental bill to get relief as to the instalments falling due after the bill is filed (citing *James v. Fisk*, digested in *ante*, 146); *Magruder v. Eggleston*, 41 M. 284.

407. *Decree for the sale of the whole estate where only part of debt is due.* See *ante*, 146.

408. *Decree as to costs.* Where a decree is rendered foreclosing a mortgage, and directing a distribution of the proceeds among the holders of parts of the mortgage debt, the decree should not direct that the costs of the suit should be first paid out of the proceeds, it not appearing that the defendant, who is liable for the costs, has not paid them, nor is unable to do so; *Coulter v. Herrod*, 5 C. 685.

409. *Bill to redeem where mortgagee has sold the property.* If on a bill against the mortgagee, and a purchaser from him, to redeem, a recovery against the latter is defeated by his being a purchaser without notice, the complainant will be entitled to recover from the mortgagee the value of the slave and his hire to the time of the decree, after first deducting the amount due on the mortgage debt; *Henderson v. Warmack*, 5 C. 830.

410. *Bill to foreclose: Defence of forfeited lease.* Where a defence to a bill to foreclose a mortgage, is predicated on the ground that the mortgagor had but a leasehold interest in the mortgaged premises, which he had forfeited by non-compliance with the conditions of the lease, and, in consequence thereof, the lessor had re-entered, and re-leased the premises to those now in possession, the original lease must be produced to show the conditions under which the mortgagor held; otherwise, the court cannot judge whether he ever held on condition; *Morse v. Clayton*, 13 S. & M. 373.

411. *Bill to foreclose maintainable, though mortgagee has power of sale.* See *Wofford v. Board of Police of Holmes County*, 44 M. 579, digested in MORTGAGE, 30.

412. *Right of mortgagor to remove clouds on title before sale.* Where other persons are in possession of the mortgaged premises, claiming title, the mortgagee has a right in his bill to foreclose, to bring these parties into court, and have their claims investigated, and the clouds thereby cast on the title removed, so that he may get the benefit of his security by the sale of an unencumbered title; *Wofford v. Board of Police of Holmes County*, *supra*.

413. *What bill to foreclose must contain.* A bill to foreclose a mortgage, is not suffi-

cient without a prayer for a sale of the property; *Santacruz v. Santacruz*, 44 M. 714.

XXXIII. Multifariousness.

414. *In respect to parties: Same person in different characters.* A suit cannot be maintained against a party in his double capacity of administrator of a deceased party, and as guardian for his minor heirs. Nor can a bill be maintained which joins a demand against the defendant as guardian or administrator, with a demand against him as an individual; *Wren v. Gayden*, 1 H. 365.

415. *Same: Heirs and administrator as defendants: Creditor's bill: Distinct conveyances.* A bill by the creditors of a deceased person to set aside several distinct fraudulent conveyances of real and personal property made by him, in his lifetime, and to subject property held in secret trust for his benefit by third persons, to the payment of his debt, may be properly maintained against the heirs and administrators of the decedent, and all other persons implicated in any of the fraudulent transactions (citing *Butler v. Spann*, 5 C. 234). The creditors are not obliged to subject the personalty first; *Snodgrass v. Andrews*, 1 G. 472.

416. *Same.* All the executors, administrators, and administrators *de bonis non*, of an estate, and their sureties, may be made parties defendant to a bill, by a creditor seeking the aid of a court of equity to enforce his judgment at law against the estate; but it would be multifarious to join with them the executor of a deceased administrator, and the sureties of that executor; *McNeill v. Burton*, 1 H. 510.

417. *Rule: Impossible.* It is impossible to lay down any universal rule as to what constitutes multifariousness. The application of the rule is held to depend on the particular circumstances of the case presented; *Butler v. Spann*, 5 C. 234.

418. *Parties: Complainants.* Unconnected parties having a common interest centering in the point in issue in the cause, may unite as complainants in the bill. Hence, two non-resident complainants, each having separate and distinct claims against a non-resident defendant, may unite in a bill under the foreign attachment law (H. & H. 525 § 63), to subject to the payment of their debts, the property of the non-resident in the hands of a resident defendant; *Comstock v. Rayford*, 1 S. & M. 423. Both the vendor, with covenants of warranty, and the vendee, may unite in a bill to set aside a sale of the land made by the sheriff under an execution against the vendor; they are both interested in the suit, the vendor on account of his covenants, and the vendee as owner; *Winston v. Otley*, 3 C. 451.

See VENDOR AND VENDEE, 236.

419. *Same: Common interest.* A bill is not multifarious when the parties have a common interest touching the matter of the bill, although they claim under distinct titles and

have independent interests; *Butler v. Spann*, 5 C. 234. Thus where the complainants claim under one title and bring their suit against various defendants, who claim the same estate under distinct and separate sales of different parcels thereof made to them separately, when the gravamen of fraud or wrong in the sale is the same and equally applies to all, the bill is not multifarious (citing *Delafield v. Anderson*, 7 S. & M. 630); *Butler v. Spann*, *supra*; *S. P. Forniquet v. Forestall*, 5 G. 87 (citing *Butler v. Spann*, *supra*; *Nevitt v. Gillespie*, 1 H. 108; *Gaines v. Chew*, 2 H. S. C. R. 619).

420. *Same: Instances.* An administrator *de bonis non* may proceed in the same bill against his predecessor and several purchasers from him, of distinct parcels of the realty of his intestate, to annul such sales, upon the ground that they were made by the fraudulent collusion of the administrator and the purchasers, for his benefit; *Forniquet v. Forestall*, 5 G. 87. And so, a bill against the assignee to recover possession of a note secured by mortgage, and illegally transferred, and against the mortgagor, and the purchaser from him of the mortgaged property, and to foreclose the mortgage, is not multifarious; *Miller v. Helm*, 2 S. & M. 687.

421. *Same: Another instance.* It seems, that a bill against several purchasers of land, at distinct and separate sheriff's sales, made under execution emanating from the same judgment, filed to set aside these sales, not on the ground of any infirmity in the judgment, but for inadequacy of price as to all, and as to part because the land was not liable to be sold under execution, is multifarious; but if the judgment creditor was a purchaser of a part, then he, having an interest in affirming all the sales, may be joined with all the other purchasers in the same bill, for his interest in maintaining all the sales furnish a point in which the interest of all the purchasers concentrate; *Delafield v. Anderson*, 7 S. & M. 630.

422. *Same: Instance: Deed multifarious.* A judgment was recovered against the husband and levied on the slave of the wife, which was sold thereunder, and purchased by a stranger. A bill was filed by the wife, asserting her title and seeking a recovery of the slave from the purchaser, and seeking a declaration that the judgment was void as to her slave, and he was not liable to be sold under it. The purchaser and judgment creditor were made parties defendant. On demurrer to the bill it was held to be multifarious as to the judgment creditor, and the bill was dismissed as to him and retained as to the purchaser; *Morris v. Dillard*, 4 S. & M. 636.

423. *Same: Another instance.* A bill was filed by an administrator against the judgment creditor of the surety of the intestate, and also against the surety to have usurious payments made by the complainant to the creditor allowed as payments on the judgment, and also seeking to settle the account between the intestate and the surety, and to

have certain claims of the intestate against the surety allowed: *Held*, that it was multifarious; *Bond v. Jones*, 8 S. & M. 368.

424. *Same*. A complainant cannot demand in the same bill several distinct matters against several defendants. The defendants must have a common interest in the same subject in relation to which relief is sought; *McNeill v. Burton*, 1 H. 510.

425. *Bill by heir for partition and distribution*. An heir cannot join in his bill against the administrator a claim for partition of realty and distribution of personalty; *Carmichael v. Browder*, 3 H. 252.

426. *Alternative bill to recover slave, or enforce lien on him*. A bill may be filed to recover a slave, on the ground that the sale of him, made by an administrator, is void; and if it be regarded as valid, then to enforce the statutory lien for the purchase money; such a bill is not bad for duplicity; *Baines v. McGee*, 1 S. & M. 208; *Murphy v. Clark*, 1 S. & M. 221. And so a bill brought by an administrator *de bonis non* to recover slaves, which, it is alleged, were illegally sold by the administrator in chief, and in case the sale is adjudged good, then to enforce the statutory lien for the purchase money, is not multifarious (citing *Murphy v. Clark*, *supra*); *Pres-tidge v. Pendleton*, 2 C. 80.

427. *Joinder of matter without the jurisdiction of the court*. A bill will not be adjudged multifarious, if the matters in it of proper equity cognizance be properly joined, on account of the bills embracing other matters over which the court has no jurisdiction; *Neulans v. Burge*, 14 S. & M. 201.

428. *Joinder of several distinct matters of account*. It is not a valid objection to a bill, on the ground of multifariousness, that it contains several distinct matters of account between the parties. Thus, when a bill was filed by H. against G. and W., asserting that a judgment in the name of G. & W. against H. was the sole property of G., and seeking the settling of a partnership account between G. and H., and to have the balance due by G. on that account set off against the judgment, and also to have other debts due by G. to H. set off against said judgment, it was held that the bill was not multifarious; *Graves v. Hull*, 5 C. 419.

429. *Object of the rule against*. The object of the rule against multifariousness is said to be, to protect the defendant against expense; and the objection seems to lose its force when it is clear that no increase of expense is incurred by the matters alleged to be multifarious; *Butler v. Spann*, 5 C. 234.

XXXIV. New Trial.

Under this head will be found, also, some decisions in reference to relief generally against judgments at law; but on this subject, see many cases digested in 293 to 310, *ante*.

1. Rule When Relief was Allowable at Law.

430. *Rule*. Equity will not interfere to grant a new trial when the defence might have

been made at law, except under peculiar circumstances; and in cases free from fraud, in the rendition of the judgment, unless the party has been deprived of the opportunity of making his defence, by means beyond his control, and without negligence on his part; *Robb v. Halsey*, 11 S. & M. 140; *Love v. Pass*, 14 S. & M. 158. A new trial will not be granted when the applicant lost his opportunity to defend at law by negligence; *Green v. Robinson*, 5 H. 80; *Land v. Elliott*, 1 S. & M. 608; *Davis v. Pressler*, 5 S. & M. 459; *Hamilton v. Moore*, 3 G. 625; *Bruner v. Planters' Bank*, 1 C. 406; *McRaney v. Coulter*, 10 G. 390. He must show that he used ordinary diligence, and could not make the defence; *Lee v. Hooker*, 7 S. & M. 601; *Cole v. Hundley*, 8 S. & M. 473; *Love v. Pass*, 14 S. & M. 158; *Porter v. Kilpatrick*, 2 C. 414; *Meek v. Howard*, 10 S. & M. 502; *Leggett v. Morris*, 6 S. & M. 723. It is only in extreme cases that a court of chancery will grant a new trial at law; *Porter v. Kilpatrick*, 2 C. 414. See also cases digested in *ante*, 293, *et seq*.

431. *Same: Illustrations: Void contract*. No relief will be granted against a void contract, where a judgment has been rendered thereon at law, and there was a failure to make the defence there without excuse; the rule is otherwise when the judgment itself is void at law, for fraud in its rendition; *Humphries v. Bartee*, 10 S. & M. 282; and so, if the judgment be void, as on a gaming contract; *Lucas v. Waul*, 12 S. & M. 157. See *ante*, 300.

432. *Same: Effect of mistake as to right to make defence at law*. Where the defendant has a good defence at law—as failure of consideration or payment—and he fails to avail himself of it (though his plea setting up the defence be adjudged insufficient on the trial at law), he cannot come into equity for relief, upon the ground that he was advised on the trial at law, that his defence was in chancery. Hence, where a purchaser of land was sued on his note for the purchase money, which was absolute in its terms, he having a bond for title from the vendor, stating that the note was only payable in a certain kind of funds, and on a contingency, it was held that the note and the bond were parts of the same contract, and that the complainant could have made all the defence, based on the bond, in a court of law, and he was not, therefore, entitled to relief; *Williams v. Jones*, 10 S. & M. 108.

And so, if a bill for relief against a judgment at law, aver that the complainant, not having been advised at the time of any legal defence at law, failed to make any, it will be construed to mean a denial of the knowledge of the legal effect of the facts, which he sets up as a defence, rather than a denial of a knowledge of the facts themselves, and for that reason will be bad; *Meek v. Howard*, 10 S. & M. 502.

433. *Same: Mistake in pleading at law whereby defence was lost*. And so if a party lost his defence at law by a failure to plead the proper pleas, he is not entitled to relief in

equity (citing *Green v. Robinson*, 5 H. 80; *Thomas v. Phillips*, 4 S. & M. 358; *Benton v. Crowder*, 7 id. 185). Therefore where property was levied on and an issue made under the statute to try the right to the property, and after this issue was made, and before the trial, the property was taken from the claimant's possession by title paramount to his claim, and also superior to the lien of the execution so levied, and the court rejected proof of this fact, because there was no proper issue made under which it could be admitted: it was held that the claimant was not entitled to relief in equity, as it was his duty to plead this defence by plea *purs d'arien continuance*; *Selser v. Ferriday*, 13 S. & M. 698.

434. *Mutual mistake in agreement as to facts on which trial at law was had.* Where a trial was had at law upon an agreed state of facts, which, by mutual mistake of both parties and the draughtsman of the agreement, was made to embrace a material fact which did not in truth exist, whereby a judgment was rendered against the defendants at law, and afterwards affirmed by the High Court of Errors and Appeals, it will then be too late for the defendants to apply to a court of equity for a new trial, for the reason that the parties might, by the exercise of ordinary diligence, have discovered the mistake before the adjournment of the court in which the cause was tried, and have then applied for a new trial; *Hamilton v. Moore*, 3 G. 625.

435. *Same: Mistake: Accident: Surprise: Judgment as a penalty: Principal complaining of judgment against agent.* An agent in purchasing a tract of land gave his bond in the penalty of \$10,000, conditioned to take up and surrender, free of all costs to the vendor, two notes which the vendor had given to his vendee for the purchase money. At that time costs had already accrued in a suit which had been instituted on one of the notes. The agent paid off the two notes, but did not pay the cost of the said suit, and the vendor then sued the agent in covenant on the bond, alleging as a breach the non-payment of one of the notes. The agent pleaded covenant performed. When the declaration in this suit was filed, it was in blank as to the amount of the note. The plaintiff frequently stated before the trial that his claim was for a small amount only, and his attorney proposed to the defendant's (agent's) attorney at the trial term, to dismiss the suit upon the payment of his fee and the costs, which was declined. The plaintiff then, as he supposed, by the consent of the defendant's attorney (but this was a misapprehension) procured an amendment of the pleading, by filling up the blank as to the amount of the note. The defendant's attorney advised his client to go home, as the burden of proof was on the plaintiff, and he went to trial without knowing of the amendment, but believed and insisted that, notwithstanding the amendment, the burden of proof was on the plaintiff; but the court ruled against him on this point, and judgment was rendered against the defendant for \$5000, the amount

of the note described in the declaration (See *Winn v. Skipwith*, 14 S. & M. 14, digested in EVIDENCE, 342, 343). He made a motion for a new trial, not on the ground of surprise at the amendment, but because the court had ruled improperly that the burden of proof was on the defendant. The High Court afterwards affirmed this judgment and the ruling.

The principals of the agent (he being the defendant in the above stated suit), filed this bill for relief against the judgment, and it was granted on these principles:

1st. The judgment was obtained by a mistake in fact as to the amendment of the declaration; and the effect of this mistake was not impaired because the defendant's counsel mistook the law and made his defence on such mistaken view of the law, and made on application for a continuance, on the ground of the amendment, nor moved for a new trial on the ground of surprise on that account. See *post*, 442.

2d. That, if the surprise at the amendment would have constituted a good ground for a new trial at law, it would with more propriety constitute a good ground for relief in equity against an unconscientious claim, and that the cases are numerous in which courts of law refuse a new trial in cases of this character; yet equity will give the relief promptly.

3d. That the facts of the case bring it within the rule as laid down by Judge Story, "That in all cases where, by accident, mistake or fraud, or otherwise, a party has an unfair advantage in a proceeding at law, which would necessarily make that court an instrument of injustice, and it is therefore against conscience, that he should use that advantage, a court of equity will restrain him from using it." And the facts also brought it within the rule as laid down by Chief Justice Marshall: "Any fact which proves it to be against conscience to use a judgment, and of which the injured party could not have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence of his, or of his agent's will authorize a court of equity to interfere."

4th. That the complainants for relief being principals of the defendant at law, are bound to indemnify him against the judgment; but that not being parties to the suit at law, they are not tied down by the strict technical rules affecting only immediate parties, and are entitled to have their rights protected against an unconscientious advantage taken of their agent.

5th. That under the circumstances of the case, the judgment must be considered as in the nature of a judgment for a penalty; and in such cases a court of equity will treat it only as a security for the actual damages sustained; *Webster v. Skipwith*, 4 C. 341.

435a. *Mistake of counsel in withdrawing plea.* That two of the three complainants, who were defendants in an action at law, were not served with process at the return term of the writ, and that, at the next term to which they had been served with process, they pleaded to the action, and their attorney

unintentionally withdrew their plea, and permitted judgment to be entered against them, is not sufficient reason for not making their defence at law, so as to authorize the granting of a new trial by a court of equity; *Carter v. Lymvin*, 4 G. 171.

436. *Same: Accident.* Where a complainant, in a bill for a new trial, appears to have a good defence, which he was prevented from making, or moving for a new trial, or continuance, by accident, unmixed with negligence, a new trial will be granted; *Ford v. Ford*, W. 505.

437. *Where defence was insufficiently set up at law.* A new trial will not be granted where the defence was set up at law and the defendant failed, having full opportunity to make it successfully; *Yongue v. Billups*, 1 C. 407.

438. *Where one defence could have been made, and relief is sought to make another.* Equity will not relieve against a judgment at law founded on a note given for an illegal contract, upon the ground that since the rendition of the judgment, the plaintiff had neglected to comply with his part of the agreement, whereby the defendant had lost the benefit of the contract on which the judgment was founded. For the illegality of the contract was itself a good defence at law, and the defendant, having failed to make it, will not be permitted afterwards to re-open the judgment, by setting up a subsequent breach of the illegal contract; *Brown v. Poindexter*, 10 S. & M. 596.

439. *Where interested witness was excluded at law.* Relief will not be granted against a judgment at law upon the ground that a material witness for complainant was excluded on the trial at law, on account of interest, as such interest would equally disqualify him in equity; *Selser v. Ferriday*, 13 S. & M. 698.

440. *Another rule as to new trials.* A new trial will not be granted unless the complainant can impeach the verdict on grounds of which he could not avail himself at law, or was prevented from doing it by fraud or accident, or the act of the other party; *Miller v. Doxy*, W. 329.

A new trial will not be granted upon grounds which might have been set up against a recovery, unless the judgment was obtained by fraud; *Benton v. Crowder*, 7 S. & M. 185; *Johnson v. Jones*, 13 S. & M. 580; *Thomas v. Phillips*, 4 S. & M. 358.

441. *Another instance of negligence.* A new trial will be granted where the judgment at law was obtained by fraud, but, in such case, the complainant must clearly show the fraud, and he must not have been guilty of negligence himself. Where the application is made on the ground that the plaintiff at law had told the defendant that he had dismissed his suit, and on that account he did not defend it, it was remarked by the court, that the complainant (defendant at law) should have taken the bare statement of his adversary, that he should have made no inquiry to ascertain its truth, and that he

should retain no evidence to establish the fact that the statement was made, seem to show great negligence on his part; but the bill was dismissed, on the ground that the proof did not sustain the bill; *Land v. Elliott*, 1 S. & M. 608. See *ante*, 305. *Post*, 453.

442. *Negligence in not noticing amendments.* The Circuit Court has power to allow amendments in the declaration, and in the bill of particulars sued on; and where such amendments are made in pursuance of leave granted, it cannot be predicated of them that they are fraudulent, merely because there is a difference in the dates and items of the old and amended bill of particulars. When a defendant is once in court by service of process or plea, it is his duty to notice the proceedings in the cause, and the amendments allowed, and he cannot claim a new trial upon the ground that he failed to notice such amendments, and left the State without putting his attorney in possession of his defence to the new and amended account; *Davis v. Pressler*, 5 S. & M. 459. See *ante*, 435.

443. *Negligence in subpoenaing witnesses at law: Rule.* Equity will not interfere to grant a new trial at law, where the defence might have been made at law, except under peculiar circumstances. And in cases free from fraud in the rendition of the judgment, a new trial will not be granted unless the applicant has been deprived of the opportunity to make his defence by means beyond his control, and without negligence on his part. Hence, where the defence at law was the infancy of the defendant at the making of the contract, and the complainant asked for a new trial in equity, upon the ground that the subpoenas being put into the sheriff's hands at a late day, he was prevented from serving them by accident, and that on the day before the court met, he was taken suddenly ill, and confined to his bed, so that he could not attend and make an affidavit for a continuance; it was held that the bill for a new trial must be dismissed, as the complainant had failed to show why the subpoenas were not issued earlier; *Robb v. Halsey*, 11 S. & M. 140. See *post*, 445, 446.

444. *Waiver of defence to a bill for a new trial.* Where a bill is brought for a new trial to allow the defendant to set up a defence, over which a court of equity has concurrent jurisdiction, if the opposite party fail to set up by plea or demurrer, the judgment at law as a bar to relief in equity, and answer to the merits, the court will grant relief, though the complainant were guilty of negligence; *Love v. Pass*, 14 S. & M. 158; *Endicott v. Penny*, 14 S. & M. 144.

444a. *Where new trial was granted by the judge, but not entered on the minutes.* It is the duty of a party or his counsel to see that all orders and judgments pronounced by the presiding judge in his favor, are entered on the minutes of the court; and hence it is no ground for relief in equity that the judge of the Circuit Court sustained complainant's motion for a new trial, and that the judgment thereon was omitted to be entered by the

clerk on the minutes; *McRaney v. Coulter*, 10 G. 390.

2. Absence of the Applicant as Ground for New Trial.

445. *Absence from high water.* A new trial was granted because the complainant, having a good defence, was prevented by high water from attending the court and making his defence; *Brooks v. Whiston*, 7 S. & M. 513.

446. *Absence from sickness: Party must show diligence.* If a defendant fail to employ an attorney and to subpoena his witnesses, he cannot have a new trial upon the ground that he was dangerously sick at the time at which the trial was had, and could not, therefore, attend to his cause; *Cole v. Hundley*, 8 S. & M. 473; see also, *ante*, 443. It seems it is no ground to the granting of a new trial by a court of equity, that a judgment by default was rendered against defendant, and that when he was served with process, he was too sick to attend court, and so continued until after judgment; it not being shown that the defence to be made required his personal presence, and could not have been made by an agent or attorney, nor that an application was made to the court for delay; *McDonald v. Myles*, 12 S. & M. 279. See *ante*, 443. See *post*, 461.

446a. *Absence of party when his attorney is sick.* See *ante*, 296.

3. Where Notice is Constructive only, and Defendant is Absent.

447. *Same.* Where the service of the writ was made by leaving a copy at the residence of the defendant when he was absent from the State, and he did not return until after judgment by default was entered against him, and he had no actual notice of the suit, he is entitled to a new trial, if he has a just legal defence to a part of the demand, which the plaintiff will not allow; *Jones v. Commercial Bank of Columbus*, 5 H. 43. And the rule is the same if the writ be returned "executed," generally, without stating that it was by copy left at his residence, if it be proven that in fact such service was by copy and not personal; such proof does not contradict the sheriff's return, but only shows how it was made (citing *Jones v. Commercial Bank*, *supra*); *Lapiece v. Hughes*, 2 C. 69; S P., *Southern Express Co. v. Craft*, 43 M. 508. See *ante*, 149; *post*, 564.

448. *Same: Judgment at special term of which defendant had no notice.* When a party has constructive notice of the trial, but no actual notice, he is entitled to a new trial, if the judgment be unjust. Hence, where a case stood for trial at a regular term of the court, held at a time fixed by law, and a special term was called by the judge, and the suit was tried in the absence of the defendant, he being absent from the county and having no notice of the special term, it was held, that he was entitled to a new trial upon his showing that the judgment was unjust; *Joslin v. Coffin*, 5 H. 539.

4. Fraudulent Return of Service of Process; Bad Return; Appearance without authority, as grounds for New Trial.

449. *Same.* A new trial will be granted where, in fact, there was no legal service of process on the defendant at law, and the return on the process was fraudulently altered by the plaintiff's attorney, so as to show service, and in such a case it is no bar to the granting of a new trial that the judgment was afterwards affirmed in the High Court, it not appearing from that record that the fraudulent alteration had been made, for the affirmation of a void judgment gives it no validity whatever; *Wilson v. Montgomery*, 14 S. & M. 205.

450. *Return of service on foreign judgment.* A judgment was rendered in this State on a record of a judgment from another State, and the defendant filed his bill for relief upon the ground that there was no service of process on him to justify the rendition of the foreign judgment against him, notwithstanding the record of such foreign judgment showed such service; but there was no charge of fraud, nor any averment that the process was returned served by mistake, when, in fact, it was not served at all: *Held* that complainant was not entitled to relief; that if the defence could be made available at all, by proof that there was no service of process on him, it could as well have been made at law as in equity; *Scroggins v. Howarth*, 1 C. 514.

451. *Service bad.* The statute directs process on express companies to be served on the president or other head of the corporation, cashier, treasurer, &c. (see *Process*, 25a). The summons in the suit at law against the corporation, was, as shown by the return, served on "Jones, agent of the defendant," without showing that Jones was one of the officers on whom the service was authorized to be made. Judgment by default final was taken against the corporation, and it filed this bill for a new trial, alleging the above facts, and that Jones was not their agent, and that it had a good defence to the action, and denying that it had any notice of the pendency of the suit till after judgment: *Held*, that the service of the process was not good, and did not bring the corporation within the jurisdiction of the court, and did not authorize the rendition of any judgment whatever, and that a new trial should be granted; *Southern Express Co. v. Craft*, 43 M. 508. See *post*, 466.

452. *Appearance without authority.* Complainant's bill alleged that a judgment at law had been rendered against him as endorser of a note, in a suit in which the maker and the other parties to the note were also joined. The bill claimed a new trial on the ground that the service of process as to him was not sufficient, and that he had no knowledge of the pendency of the suit, and that two attorneys filed a plea for him, without his authority or knowledge, and that due notice of the protest of the note was not served on him, as he believes. The bill did not set up any other facts attacking the justice of the judgment, and did not aver that the attorneys were not

responsible in damages. One of the attorneys, whose names were signed to the plea, proved that it was filed by himself or the other attorney, at the request of the maker of the note. The other attorney was not examined: *Held*, that complainant was not entitled to relief; *Harris v. Gwin*, 10 S. & M. 563.

See ATTORNEY AT LAW, 29, 30.

5. Fraud as Ground for a New Trial.

453. *Granted for fraud in rendition of judgment.* A new trial will be granted, or the judgment perpetually enjoined, where it was procured by fraud; *Humphries v. Bartee*, 10 S. & M. 282. See *ante*, 309, 303, 304. See JUDGMENT, 19.

454. *Same.* The rule that holds a party to strict diligence, when he resorts to equity for relief against a judgment at law, the defence to which was purely legal, is fully complied with, where the complainant seeks relief against a judgment rendered on a trial of the right of property, wherein property claimed by him was adjudged to be liable to a judgment rendered in favor of a third party, and which judgment is void for fraud, upon the ground that the judgment against the alleged debtor, and under which the proceedings for the trial of the right to the property took place, was rendered on a feigned debt to a plaintiff, who was a non-resident, and had no participation or knowledge of the proceedings; the complainant being ignorant of these facts until the filing of the bill; *Humphries v. Bartee*, 10 S. & M. 282. Digested more fully in JUDGMENT, 16, 17, 18.

455. *As to effect of negligence of applicant when judgment was obtained by fraud*, see *ante*, 441.

456. *Third party may show judgment fraudulent.* When one is about to be affected by a judgment, to which he is not a party, his remedy is in chancery, and he may there show that it was obtained by fraud; *Humphries v. Bartee*, *supra*.

6. Newly Discovered Evidence.

457. *Rule: Diligence.* It seems well settled in courts of equity, as well as in courts of law, that a party is not entitled to relief after verdict, upon evidence which he might with ordinary care and diligence have procured and used on the trial at law; *Lee v. Hooker*, 7 S. & M. 601.

When there is a complete defence at law, which, by the use of ordinary diligence and precaution, might have been made available, a court of chancery will not interpose to grant relief; *Semple v. McGatagan*, 10 S. & M. 98.

And if the grounds on which relief against a judgment at law is sought, were known to the applicant for a new trial, when the trial at law took place, or might have been known by the use of reasonable diligence, he can obtain no relief in equity; *Love v. Pass*, 14 S. & M. 158; *Porter v. Kilpatrick*, 2 C. 414; *Jordan v. Thomas*, 5 G. 72; *Leggett v. Morris*, 6 S. & M. 723. See *post*, 460.

But a new trial will be granted, where the complainant, after due diligence, was unable to discover the evidence to make his defence available on the trial at law; also, where though the defence was available against the original payee of a note, but the suit was fraudulently brought in the name of an endorsee who has no interest in it, and the fact of his want of interest, was not discovered till after judgment; *Goad v. Hart's Administrator*, 8 S. & M. 787. See *ante*, 454, 303, 304.

459. *Same: Instance.* L. recovered a judgment at law, upon a contract for medical services, by which he bound himself to cure the defendant of a cancer, if the latter would submit to his treatment and follow his directions, and in case defendant failed to do so, L. was to have the contract price. The defendant applied for a new trial, upon the ground that since the trial he had submitted himself to the examination of the most eminent physicians, and in their opinion that he had never been afflicted with cancer. He failed to show why these opinions were not obtained before the trial at law: *Held*, he was not entitled to a new trial; *Lee v. Hooker*, 7 S. & M. 601.

The defendant sought relief against a judgment at law, rendered on a contract with plaintiff, by which he was to pay the plaintiff for his services as a teacher, the sum recovered in the judgment, but with the understanding that the amount which plaintiff should receive from day scholars, should be deducted. The defendant applied for a new trial, upon the ground that he had not been able, until after judgment, to find the list of day scholars who had paid the plaintiff, and that he had since found it; and that the sums received from that source, exceeded the price that the defendant was to pay: *Held*, that the complainant was not entitled to relief, because no diligence was shown in attempting to procure the list before the trial at law: *Semple v. McGatagan*, 10 S. & M. 98.

460. *Applicant must show the diligence.* Relief will not be granted against a judgment at law, on the mere allegation that the grounds of defence was unknown to the applicant at the time of the trial at law; it must also be shown that he used due diligence to discover them, or that the discovery could not have been made by the use of such diligence. Hence, where the surety applied for relief in equity against a judgment at law, upon the ground that by a valid contract between the creditor and the principal, delay in payment had been given to the latter, and that he was ignorant of the defence, at the trial at law, it will be insufficient, as the surety should have shown that he applied to the principal before the trial, for an explanation of the delay, which it was evident to the surety had been given; *Meek v. Howard*, 10 S. & M. 502. See *ante*, 459. See also *ante*, 74.

7. Miscellaneous.

461. *Applicant must show he can probably succeed if new trial be granted.* A court

of equity will not grant a new trial where the proof shows that complainant cannot succeed if a new trial were granted; *Lindsey v. Sellers*, 4 C. 169. And where the application for a new trial is based on the unavoidable absence of the applicant at the trial at law, he must show by proof to a high degree of certainty, the validity of his defence; and if that defence rest on some peculiar law of one of the States of the Union, he must show to the court, by evidence, what that law is; and the omission to do so cannot be removed in the High Court: *McDonald v. Myles*, 12 S. & M. 279. (This instance is probably not correct now, since the courts are required to take judicial notice of such laws.)

462. *Relief against a confessed judgment.* A complainant seeking relief against a judgment at law, which he had confessed at the defendant's (the plaintiff at law) instance, and upon the assurance of the defendant that if it were incorrect in any respect it should be corrected, must show by proof the errors in the debt on which the judgment is based; and in such a case he will be held to as strict, if not a stricter, showing than if the judgment had been rendered against his consent; *Boone v. Poindexter*, 12 S. & M. 640.

463. *By surety setting up judgment inter alios.* It is no ground to relieve a surety on a claimant's bond (given under the statute for the trial of the right to property levied on) from a judgment condemning the property to be sold under the levy, that subsequent to the judgment against him a decree had been rendered in a court of equity in a suit against the claimant, and the execution debtor, by which a mortgage older than the judgment under which the levy was made, was ordered to be foreclosed. This decree is not binding on the plaintiff in the execution, who recovered the judgment against the applicant, as he was no party to it; and the question which is right, the decree itself, or the judgment against the complainant, cannot be inquired into on a bill by the surety to be relieved of the judgment; *Love v. Pass*, 14 S. & M. 158.

464. *Waiver of right to apply for a new trial.* If the complainant have otherwise a right to a new trial, yet if he, after the judgment at law, and when he had full notice of his defence, voluntarily execute a forthcoming bond, and allow it to be forfeited, whereby the judgment is satisfied, this will be a waiver of his right to a new trial. And if the forthcoming bond so executed and forfeited, be irregular, it will make no difference, as a court of equity would have no more power over it than over other judgments which are merely erroneous; *Robb v. Halsey*, 11 S. & M. 140.

465. *Failure to examine witness.* It is no ground for a new trial, that a witness examined on the trial at law, did not state a material fact about which he was interrogated; *Davis v. Pressler*, 5 S. & M. 459.

466. *Proceedings: Decree.* In this case (see ante, 451), the bill was filed asking for a perpetual injunction against the judgment at

law, and "for other and further relief." The service of the process was void. The court say that the complainant was entitled to a perpetual injunction, but inasmuch as both parties were then in court, the merits of the claim and the defence should be passed on by a jury. And it was ordered, that the injunction be perpetually enjoined, and a new trial granted, with permission to the parties to use the depositions in this case in the new trial at law, and such other evidence as either party may see fit to introduce; *Southern Express Co. v. Craft*, 43 M. 508.

XXXV. Parties.

See sub-division Multifariousness.

467. *Bill to foreclose mortgage: Defendants.* If a deed in trust, given to secure a debt, require that the creditor should convey land to the debtor, upon his paying the debt, the assignee of the creditor cannot maintain a bill to foreclose, without procuring the conveyance as required; and the creditor holding the legal title should be made a defendant; *Callett v. Bacon*, 4 G. 269.

Where a bill is filed to foreclose a mortgage, by an assignee of several of the notes secured by the mortgage, the mortgagee is a necessary party; and a decree of foreclosure made without making him a party, will not deprive him of the security on the mortgaged property, for the note which he still holds; *Archer v. Jones*, 4 C. 583.

468. *Same: Junior encumbrance.* A junior encumbrancer to a mortgage, ought to be made a party defendant to a bill to foreclose, so that he may attend to taking the account, and may have an opportunity to redeem; but for no other purpose. If he do not offer to redeem, he cannot, under cover of the bill of the first mortgagee, have his own mortgage foreclosed; *Brown v. Nevitt*, 5 C. 801.

See MORTGAGE, 31, 32, 32a.

469. *Same: Bill by heirs and distributees of a mortgagee.* Where there is no administrator in this State, and the foreign administrator is not chargeable in his inventory with a debt due by a citizen of this State, and there are no debts due by the deceased mortgagee, the distributees may bring a bill in their own names, to foreclose the mortgage. And the rule is the same, where there has been administration here, and it has been closed (citing *Moody v. Harper*, 9 G. 599; *Manly v. Kidd*, 4 G. 141; *Wood v. Ford*, 7 C. 65; *Robb v. Griffin*, 4 C. 579; *Archer v. Jones*, lb. 583; *Farvee's Heirs v. Graves*, 4 S. & M. 707; *McRea v. Walker*, 4 H. 453); *Hill v. Boyland*, 40 M. 618. See post, 473, 484.

470. *Bill by one of several beneficiaries in a mortgage.* All the beneficiaries in a mortgage, where several separate and distinct debts are secured by it, need not be made parties to a bill to foreclose. It will be sufficient if one or more of them file a bill in his or their name, and on behalf of all others who may come in and prove their debts; *Berry v. Bacon*, 6 C. 318.

471. *Same*: As to effect of decree with proper parties omitted, see MORTGAGE, 25.

472. *Same*: Heirs of mortgagee not necessary parties. See MORTGAGE, 32a.

473. *Bill to redeem*. The heirs of a mortgagee may maintain a bill for the recovery of the personal property conveyed in it, and for its hire, and for an account, where there is no administrator of the mortgagor, and he has been dead so long a period that all debts due by him must be barred by the statute of limitations; *Anding v. Davis*, 9 G. 574. See ante, 469. Post, 484.

474. *Bill to enforce vendor's lien*. All the heirs of a deceased vendee are necessary parties to a bill to enforce the vendor's lien; and their liability being joint, and not several, it will be error to take a decree against a part of the heirs to sell their share to pay the whole debt; *Pouns v. Gartman*, 7 C. 133. And the administrator of a deceased vendee is also a necessary party; *Reedy v. Armistead*, 2 G. 353. In a bill to enforce a lien (if such exists) on land sold on a credit by a commissioner in chancery, under a decree to foreclose a mortgage, the original mortgagor is not a necessary party; *Tooly v. Gridly*, 3 S. & M. 493.

475. *Parties where trust deeds are in litigation*. A trustee in a deed in trust to secure debts, is a necessary party to a bill by a creditor to subject the property to the payment of the debt; *Hill v. Boyland*, 40 M. 618.

A trustee, who by the terms of the trust is entitled to possession of the trust property, is the only necessary party complainant to a bill to recover possession of the trust property; *Ferguson v. Applewhite*, 10 S. & M. 301. The trustee and the beneficiaries may also unite in a bill to recover the property; *Marble v. Whaley*, 4 G. 157.

A decree on a bill filed against the trustee and the wife, cannot be rendered ordering a sale of property settled in trust for the benefit of a married woman and her minor children, unless the children be made parties to the bill; *Prewett v. Land*, 7 G. 495.

476. *Bill for specific performance*. Where a vendor, who has executed a bond to make title upon payment of the purchase money, has transferred one of the notes given for the purchase money, and retained the other, he must, in a bill to procure the conveyance of the title (which is vested in another), to his vendee, in order to enable him to collect the purchase money, make both the vendee and the holder of the transferred note parties defendant; *May v. Sullivan*, 8 G. 541.

If the obligor in a bond, conditioned to make title to land, treat the contract as at an end, by conveying the legal title to a third person, the obligee cannot maintain a bill against such third person for a specific performance of the contract. He should proceed against the obligor, if alive; and if dead, against his heirs. Such third party is a stranger to the contract, and in no way bound to convey by the terms of the title bond; *Harrington v. Pinson*, 1 G. 30.

477. *Bill setting up claim to a judgment*. Where a bill is filed to set up the complainant's right to a judgment at law, which has been rendered in the name of the defendant to the bill, the judgment debtor is a necessary party; and a decree rendered, directing him to pay the judgment to the complainant, will be a nullity as to him, if he be no party to the suit; *Clement v. Hawkins*, 8 S. & M. 339.

478. *Bill by alienee to marshal securities*. See ante, 398.

479. *Creditor's bill*. In a creditor's bill to collect a judgment against several defendants, it is not necessary that all the defendants in the judgment should be made defendants. It is sufficient, if such of them as are interested in the property sought to be subjected be made defendants; *Shotwell v. Taliaferro*, 3 C. 105.

Where a creditor undertakes to set aside a sheriff's sale for fraud, on the ground that the purchaser was the attorney of the plaintiff in execution, the latter should be made a party to the bill; *Foster v. Pugh*, 12 S. & M. 416.

See sub-division Creditor's Bill, ante, 130, et seq., and references there made.

480. *Fraudulent sale under trust deed*. Where, in a controversy between a purchaser under a trust deed, and a purchaser under a junior mortgage, it appeared that the sale under the trust deed was fraudulent, as to the *cestui que trust*, it was held that the trust deed was not satisfied thereby, and that no relief could be granted to the purchaser under the junior mortgage on a bill wherein the *cestui que trust* was not a party; *Lawrence v. Hand*, 1 C. 103.

481. *Partnership in land: Bill to settle accounts*. Both the administrator and the heirs of a deceased member of a partnership, formed for the acquisition of land, and not for a subsequent sale or disposition of it as stock in trade, are parties defendant necessary to a bill by the surviving partner, seeking an account of the partnership, and to enforce his lien on the lands for the balance due him, on settlement of the partnership accounts, and to charge the personal estate of the deceased partner for any balance remaining after the lands should be exhausted; *Dilworth v. Mayfield*, 8 G. 40.

482. *Bill by remainderman to recover slaves*. If one of several entitled to slaves in remainder, after the termination of a life estate, join with a tenant for life in an absolute sale, he is not a necessary party to a bill by the other remaindermen to recover the slave so sold; *Stuart v. Swanzy*, 12 S. & M. 684.

483. *Joinder of administrator and heir*. The administrator and heir cannot join in an original bill for an account of the real and personal estate; *Scott v. Calvitt*, 3 H. 148.

484. *Bill by widow and assignee of heir suing for slave*. The widow of a deceased person, who is also assignee of his heirs, may sue in her own name for the recovery of slaves, without making the administrator a co-complainant, where there are no debts due

by the decedent; *Archer v. Jones*, 4 C. 583. See *ante*. 469, 473. *Post*, 495.

485. *Suit by legatee in remainder*. Where the executor had delivered slaves to a legatee for life, this is a full act of administration, and on the death of the tenant for life, those entitled in remainder, may sue the person in possession for their recovery, without making the executor a party; *Ib*.

486. *Heirs parties: Where their land is to be affected*. Where an administrator surrendered the title deed of land of his intestate, and procured the vendor to make another deed to creditors of the estate, in satisfaction of their claims, if the creditors afterwards file a bill, setting up that the land was theirs by title paramount to the said conveyance, the heirs of the intestate are necessary parties; for though the administrator had no right to surrender their land to pay a debt of the estate, yet they might be willing to do so, and no decree affecting their right to the land ought to be made in a bill to which they are not parties; *Pinson v. Williams*, 1 C. 64.

487. *When there are a great number of persons interested*. An unincorporated banking company, consisting of over one hundred members, associated for banking purposes, was organized. Each stockholder executed a mortgage on his individual property, to secure his subscription for stock, and also to secure the general liabilities of the company. The joint agents of the association (*viz.*, the president and directors), for the conduct of its affairs, having the authority to do so, assigned these mortgages to secure the repayment of a loan to the company. A bill was filed by the assignee against these joint agents and one of the stockholders, to foreclose the mortgage executed by that stockholder, and it was held that the bill made the necessary parties; that if all the members of the association had been made parties, from their great number, the bill probably would never have reached a hearing; *Wall v. Boisgerard*, 11 S. & M. 574.

488. *Same: Objection to grant of proper parties, made by plea or answer*. And when in such a case, the articles of partnership provide for an annual election of directors, and the creditor more than a year after he negotiated the loan, filed the bill to foreclose, making the directors, who were in office when the loan was made, defendants, it was held on demurrer to the bill, for want of proper parties, that the demurrer could not be sustained, upon the idea that these directors were out of office, it not appearing that there had been a new election, or if there had been, that the same directors were not elected. The objection that they were not directors in such a case, should have been made by plea or answer; *Ib*.

489. *Right of administrator of vendee to be made party to a bill to set aside the sale*. The heirs of an intestate filed a bill to annul a sale of their realty, made under a judgment fraudulently rendered against the administrator, and bought by him and sold by him to the defendant, who, it was charged, had no-

tice of the fraud. After the cause was submitted to the chancellor on final hearing, the administrator (he having died pending the bill) applied to be made a party defendant to the bill: *Held*, that the application was rightfully refused, since, if the complainant recovered, that decree would not prejudice any defence which the last administrator may have against an action, by his intestate's vendee, to recover the purchase money; *Gartman v. Pouns*, 12 S. & M. 290.

490. *Making new parties*. As often as it is discovered that other persons, not parties, are interested in the suit, they should be made parties; *Carman v. Watson*, 1 H. 333. See *ante*. 156.

491. *Same: Where new parties disclosed in a bill*. Where the answer of an assignee in bankruptcy of the mortgagee, to a bill to foreclose the mortgage, states that he sold the equity of redemption to —, not disclosing any vendee, it shows that no sale was made, as to make a sale, a vendee is necessary; and the court may proceed to trial without making such alleged purchaser a party; *Dennistoun v. Potts*, 4 C. 13.

492. *Effect of defect of parties: Case in judgment*. The Court of Chancery will not entertain a bill, which, owing to a defect in the parties, can administer but partial justice to the persons interested; and hence, if by the terms of the contract for the sale of land, it may be rescinded on certain conditions, the vendee paying the vendor a stipulated rent, a bill for a rescission cannot be maintained, without making the person then entitled to receive the rent a party to the suit; *Bibb v. Wilson*, 2 G. 624.

493. *Reason for omitting a necessary party*. If a bill filed against one of several sureties in a judgment, for the purpose of collecting it, aver that the complainant is informed that the other sureties are dead, and that their representatives are unknown to him, it will be *prima facie* a sufficient reason for omitting them from the bill; *Davis v. Hoopes*, 4 G. 173.

494. *When bill considered as filed by or against a party in two characters*. Where a bill is filed by a complainant to restrain the collection of a judgment against him individually and as administrator of another, it will be intended that the complainant filed it in both characters; and if a bill be afterwards filed against him to collect that judgment—it having been barred by the statute of limitations during the injunction—that bill will also be considered as filed against him in both characters; *Ib*.

495. *When surviving husband may sue for wife's debt*. The surviving husband, where the wife has left no issue, may maintain a suit in equity in his individual capacity, to collect a mortgage debt due the wife by a former guardian, where there are no subsisting debts against her; and the guardian will not be permitted to defeat the suit by showing that there will be an indebtedness of the wife to him on a final settlement of the guardianship accounts in the Probate Court;

Ratliff v. Davis, 9 G. 107. See *ante*, 469, 473, 484.

496. *Defendants improperly joined: Case in judgment.* Where there is no privity between the defendants, each being an entire stranger to the liability of the other, and sought to be charged on different grounds and for different amounts, they cannot be joined in the same bill. Hence, a bill cannot be maintained against the surety of an administrator *ad colligendum*, who is liable only for the principal and interest of the trust fund; and also against a person who upon the death of the collector, succeeded to his estate, and who is sought to be charged with the profits made by the use of the trust fund by the collector in his lifetime, and by the successor since his death; *Boyd v. Swing*, 9 G. 182.

XXXVI. Partition.

See PARTITION.

497. *Right of tenants in common to claim.* Partition is a right which one tenant in common has a right to claim another at any time; *Higginbottom v. Short*, 3 C. 161.

498. *Sale for partition.* If the property be of such a character that it cannot be equally divided, the court will order a sale and divide the proceeds; *Id.*

As to power to sell infant's land for partition, see *ante*, 223.

499. *Not granted unless title be clear.* Partition will not be granted unless complainant's title be clear and undisputed; if it be denied, or is suspicious, the court will not interfere until complainant's title is established at law; *Shearer v. Winston*, 4 G. 149.

500. *Payment of rent no estoppel to deny title.* The defendant in a bill for partition was a half owner of the land, and in possession, and supposing the complainant to be the owner of the other half, he paid him rent; *Held*, this did not prevent him from denying complainant's title in a suit for partition; *Id.*

501. *Title of both parties must be clear.* A court of equity will not decree partition unless the title of both parties be clear; and it will not, therefore, set aside a prior partition in behalf of a party who has a clear title, at the instance of a party claiming a doubtful and controverted title; *Hassam v. Day*, 10 G. 392.

502. *Leave to establish title at law not granted unless applied for.* Where a complainant, seeking partition, goes to final hearing upon the merits of his case, the court will not, of its own motion, retain his bill to give him an opportunity of establishing his title at law; if he desires his bill retained for that purpose, he should apply for it; *Id.*

502a. *Parties must be in possession.* Partition of land can only be made between persons in the actual or constructive possession of the land; other claimants must establish their rights by suit, and obtain actual seisin before they can demand possession. Hence, a mortgagee in possession, is the proper party

to make partition with his co-tenant; and when partition is made, the mortgage on the undivided moiety, attaches in severalty to the part assigned to the mortgagee; *Price v. Crone*, 44 M. 571.

XXXVII. Partnership.

503. *As to remedies between partners, see PARTNERSHIP, 53, et seq.*

503a. *Same.* E. & H. were partners and merchants, and E. & C. were partners in the practice of the law, at the same place; E. & H. sold to E. & C. goods. H. became bankrupt, and G. was appointed assignee; *Held*, that there being no legal remedy to enforce demands existing between these firms, it is competent for E., and the assignee of H., to recover in equity a moiety of the amount due from E. & C. to E. & H.; *Chapman v. Evans*, 44 M. 113.

XXXVIII. Pleadings.

See sub-divisions Answer. Amendment. Demurrer. Bill of Review. Supplemental Bill. Multifariousness.

1. Certainty in Pleadings, and Construction of.

504. *Pleadings must be certain.* Every fact necessary to complainant's right to recover must be alleged with accuracy and clearness, and with certainty as to material circumstances of time, place, &c.; uncertain and ambiguous allegations will be construed most strongly against the pleader; *Warner v. Warner*, 4 G. 547; *S. P., Farr v. Farr*, 5 G. 597. The pleadings in chancery must be as certain as at law; *Prestidge v. Pendleton*, 2 C. 80.

505. *Construction of uncertain pleadings: Taken most strongly against the pleader.* The pleadings are to be taken most strongly against the pleader, for he is presumed to set out his case in his pleadings as favorable as possible to himself; *City of Natchez v. Minor*, 9 S. & M. 544; *Warner v. Warner*, 4 G. 547; *Gibson v. Foote*, 40 M. 788. See *ante*, 174a. *Post*, 508.

506. *Illustrations of the rule as to certainty.* An averment in a bill in equity filed for a new trial at law, that the complainants "are of opinion" that the note upon which the judgment was rendered was altered, is too vague and indefinite, even if confessed, to authorize a decree; *Carter v. Lyman*, 4 G. 171.

And in a bill to foreclose a mortgage, the amount of the mortgage debt should be stated, or an excuse given for the failure to do so; *Prestidge v. Pendleton*, 2 C. 80.

And so if a vendee seek a rescission upon the ground of a defect in the title, he must set out in his bill the nature of the defect complained of; a general allegation that the vendor has no title will not do; *Alexander v. Moyer*, 9 G. 640.

507. *Same.* In a bill by a *femme covert* to annul a sale of a slave made jointly by her and her husband during her infancy, it is not necessary that she should set out the particu-

lar manner in which she acquired title, nor to show in what state her title vested. It is sufficient if the bill allege generally that the slave was the sole and separate property; *Cason v. Hubbard*, 9 G. 35. And when a bill is filed on the theory that a deceased person had only a life estate in slaves, under a distribution made to her as a widow, in the State of Virginia, and the record of distribution says nothing about what estate is vested in the widow, if the bill allege that by the laws of Virginia she was entitled to a life estate only, this will be a sufficient averment that her estate in the slaves was only a life estate; *Archer v. Jones*, 4 C. 563.

And so in a bill to enforce specific performance of articles of partnership, if the complainant show that he was to raise subscriptions and secure patronage for a college, in which he and defendant were to be partners, and that he had been diligent in performing his part of the agreement until prevented by the defendant, it will be a sufficient averment of performance by him; *Whitworth v. Harris*, 40 M. 483.

And so if the facts stated in a bill obviously amount to fraud, a direct averment of fraud is unnecessary; *Parham v. Randolph*, 4 H. 435.

See FRAUDULENT ASSIGNMENTS, 13.

A bill for divorce which charges adultery by the defendant as follows: "That the defendant, at various times and on various occasions since the marriage, committed adultery with a servant girl of complainant's, and other females," is bad, for vagueness and uncertainty. But where reasonable certainty can be otherwise obtained, the courts favor the omission of the name of the party with whom the adultery is alleged to have been committed; *Farr v. Farr*, 5 G. 597.

508. *Instances of pleadings construed against the pleader.* Where an assignee of a bond secured by mortgage filed a bill to foreclose the mortgage, and the defence was that the mortgagor had settled the debt with the mortgagee, the failure of the mortgagor to deny notice of the assignment when he made the settlement, was held a strong presumption that he had such notice; *City of Natchez v. Minor*, 9 S. & M. 544. See ante, 505, 174a.

508a. *Bill need only state a prima facie case.* It is always good pleading to make a *prima facie* case, and leave matters of defence to come from the other side. Hence, in a bill to enforce a vendor's lien, it is not necessary to aver that the vendor took no security for the purchase money; *Dodge v. Evans*, 43 M. 570.

509. *Contradictory averments in the bill.* That the bill on its face gives two contradictory accounts of the same transaction as absolutely true, is not evidence of moral or legal fraud; but on a special demurrer based on that ground, the court would compel the complainant to elect which statement he would adopt; *Murrell v. Jones*, 40 M. 565.

2. Title must be Stated, Correspondence of Allegata and Probata.

510. *Complainant can have relief only on title stated in the bill: Allegata and probata must correspond.* A bill should be framed so as to put in issue the facts essential to the relief; *Carnes v. Hubbard*, 2 S. & M. 108. The *allegata* and *probata* must correspond. The plaintiff cannot set up in his bill a title, and the defendant cannot set up in his answer a defence, and rely on a different title or defence in the proof, and in the argument; *Armstrong v. Stovall*, 4 C. 275; *Bates v. Bates*, W. 356; *Baygents v. Beard*, 41 M. 531; *Bowman v. O'Reilly*, 2 G. 261; *Fatheree v. Fletcher*, 1b. 265; *Bacon v. Ventress*, 3 id. 158. See ante, 204.

511. *Same: Instances in relation to the bill.* If the complainant sets forth, as the basis of his claim, an instrument which he alleges is a deed of gift, and prays for relief on it as such, he cannot claim a decree by insisting on the trial that it is a will; *Bates v. Bates*, W. 356. And so, if in the bill he claim title, under a deed conveying the property to his father during life, remainder to himself, and he fail to establish his deed, he cannot recover upon proof that the father was in possession at his death, and that the complainant is entitled as heir of the father; *Kidd v. Manly*, 4 C. 141. And so, if a deed be attacked in the bill, on the ground of undue influence in obtaining it, it cannot be set aside for being voluntary, and an unreasonable provision for the wife; *Baygents v. Beard*, 41 M. 531. And so, proof that the property in controversy was purchased by the use of the funds of a partnership, of which the complainant was a member, will not sustain a bill alleging that it was purchased with his individual funds; *Rowman v. O'Reilly*, 2 G. 261. And so, if the bill attacked merely the legality of the emancipation of a slave, this will not authorize the legality of his residence in another State, to be questioned; *Shaw v. Brown*, 6 G. 247. And so, where a bill was filed to enforce a vendor's lien against sub-vendees, and the bill attacked an agreement, which was set up as a satisfaction of the debt, upon the ground that it was only conditional, and did not amount to satisfaction, the complainant cannot recover by showing that the agreement was absolute and unconditional, yet was fraudulent and void; *Carnes v. Hubbard*, 2 S. & M. 108. See ante, 204.

512. *Instances in relation to the answer.* If the parent sue the child to recover possession of a slave, which he has delivered to the child upon his marriage, alleging that such delivery was by way of a loan, and the child, in his answer, deny the loan, and assert that the delivery was made in pursuance of a gift made to the child by a third person, and if this asserted title of the child be proved to be unfounded, he will not then be permitted to set up, on the trial, that under the circumstances, the delivery of the slave by the parent was a gift; *Fatheree v. Fletcher*, 2 G. 265.

And if a surety be sued, and he rely in his answer, upon an absolute discharge of both the principal and himself, by a novation of the debt by the principal, he cannot at the hearing insist that the facts show a discharge to him, on account of forbearance of suit granted to the principal, without the surety's consent; *Bacon v. Ventress*, 3 G. 158.

The defendant cannot rely on the trial, on a defence inconsistent with the title which he sets up in himself in the answer; *Harney v. Morton*, 7 G. 411.

513. *Instance held not to be a variance.* A bill was filed by one co-partner against two defendants, whom he alleged were his partners, and together were entitled to one-half the partnership property and liable for one-half the debts; and it appeared by the answer of both defendants and the proof, that one of the defendants was not a partner: *Held*, that the complainant's bill ought not to be dismissed, upon the ground that it did not correspond with the proof, but that he was entitled to a decree against the defendant, who was a partner, for such sum as the proof showed was due; *Bas v. Taylor*, 5 G. 342.

514. *Relief must be in the scope of the bill.* Parties are only entitled to such relief as is within the scope and frame of their bill; and hence, if a bill be filed by a *cestui que trust* against the trustee and one of the *cestuis que trust*, seeking to hold the trustee liable for the profits of the trust estate, and to recover possession, and procure a division of the trust estate, and it be shown by the proof that the trustee is not liable to account, the profits having been received by the *cestui que trust*, who is a defendant, a decree cannot be rendered against such *cestui que trust*; *Tucker v. Cocke*, 3 G. 184.

And so, if a bill be filed to foreclose a mortgage, and it be shown there was an agreement to execute a mortgage, and that a mortgage was executed and tendered, and rejected because not in accordance with the agreement, the court will not on that bill decree a specific performance of the agreement to execute a mortgage, nor reform the mortgage so as to make it comply with the agreement; *Adams v. Johnson*, 41 M. 258.

515. *Relief cannot be granted on a fact stated in bill, but not as a ground for relief.* A decree cannot be made upon a fact stated in the bill, if it be not stated therein as a ground for relief, and no relief be asked for on it, but the relief is asked upon an entirely different ground. Hence, if in a bill by the heirs of the husband against the wife, to set aside a deed made by the husband to the wife, on the ground that it was obtained by the undue influence of the wife, it be stated, that one of the complainants sold out where he lived and removed at the husband's request, to a place near the latter, upon the husband's promise to compensate him for the losses occasioned by the sale and removal, but no amount of damages is stated and no relief is prayed for in the bill, in respect to such damages, but the relief is asked for solely on the ground of undue influence, the court can-

not, on sustaining the deed, give relief to that complainant by decreeing to him a sum to compensate for such losses; *Baygents v. Beard*, 41 M. 531.

3. Miscellaneous.

516. *Prayer of general relief.* If the prayer be for specific relief, or for general relief, any relief may be granted which the facts alleged and proven will justify, though inconsistent with the specific relief asked for; *Dease v. Moody*, 2 G. 617; *S. P., Dodge v. Evans*, 43 M. 570.

517. *Presumption against party failing to make discovery.* See *ante*, 174a.

518. *Setting up statute of limitations by demurrer.* See *ante*, 165, 166.

519. *Plea of the statute of limitations.* The Statute of Limitations of 1844 does not in terms apply to suits in chancery, but its spirit and substance will be applied by courts of equity to analogous cases pending therein; and hence, it is unnecessary that the statute should be technically pleaded in chancery; it will be sufficient if the substantial matter which constitutes the bar, be set out (citing *Mandeville v. Lane*, 6 C. 312; *Goff v. Robbins*, 4 G. 153); *Mitchell v. Woodson*, 8 G. 567. But the defendant must distinctly show by demurrer, plea, or answer, that he intends to rely upon the statute, even though the bill show on its face the bar has attached; *Wilkinson v. Flowers*, 8 G. 579.

A plea setting up the statute of limitations to a bill to foreclose a mortgage, which sets up the bar of the mortgage debt, without setting up the possession by the mortgagor of the property, after the forfeiture of the condition of the mortgage for a period sufficient to bar an action for its recovery, is bad; *Id.*

520. *Pleas in abatement.* Pleas in abatement in chancery must be framed with the same strictness required at common law. They must also be sworn to. Where a temporary disability of the plaintiff to sue is pleaded in abatement, the plea should conclude with the prayer "that the bill remain without day till the disability be removed," and not for a dismissal of the bill; *Beck v. Beck*, 7 G. 72.

521. *Bona fide purchase: How defence set up.* The same strictness in setting up the defence of a *bona fide* purchase for a valuable consideration without notice, is not required when made in answer as when made in a plea. The answer need not aver that the whole of the purchase money was paid before notice of defect in the title; *Servis v. Beatty*, 3 G. 52. An answer setting up the defence of a *bona fide* purchase for a valuable consideration, which avers that the defendant purchased and paid for the property in good faith, without any notice in fact or in law, of the claim of complainant, or of the claim or interest of any person in conflict with the absolute ownership of his vendor, is sufficiently explicit and full; *Wyse v. Dandridge*, 6 G. 672.

A purchaser relying upon want of notice, must deny it; *Stanton v. Green*, 5 G. 576.

522. *Facts admitted not traversable.* Facts admitted by the pleadings cannot be controverted by the evidence; proof is admissible only to settle facts disputed between the parties; *Parkhurst v. McGraw*, 2 C. 134.

523. *Bill to set aside sale: What property embraced in decree.* Where a bill is filed against a resident to set aside a sale made under a mortgage in another State, and to subject the property to a debt of a non-resident debtor, the court cannot, as if it were a foreign attachment bill, embrace in the decree of sale, after setting aside the mortgage, other personal property in the hands of the resident defendant which belongs to the non-resident debtor; *Trotter v. White*, 4 C. 88.

XXXIX. Practice.

524. *Accounts: Practice in relation to stating and exceptions thereto.* See sub-divisions Accounts and Accounting, *ante*, 7, *et seq.*, and Commissioner and Commissioner's Sales, 104, *et seq.*

525. *Amendments to pleadings.* See sub-divisions Amendment, *ante*, 11; *post*, Supplemental Bill.

526. *The answer.* See sub-division Answer, *ante*, 21, *et seq.*

527. *Appeals.* See sub-division Appeals, *ante*, 37.

528. *Assistance, writ of.* See sub-division Assistance, Writ of, *ante*, 53.

529. *Commissioner and commissioner's sales.* See that sub-division, *ante*, 100.

530. *Cross bill.* See that sub-division, *ante*, 133.

531. *Decrees.* See that sub-division, *ante*, 136.

532. *Demurrer.* See that sub-division, *ante*, 157.

533. *Dismissal of bill.* See that sub-division, *ante*, 174.

534. *Exhibits.* See that sub-division, *ante*, 189.

535. *Guardian ad litem.* See INFANTS. See, also, sub-division, Infants.

536. *Injunctions.* See that sub-division, *ante*, 224.

537. *Issue to a jury.* See that sub-division, *ante*, 283.

538. *Objections to jurisdiction.* See sub-division Jurisdiction, *ante*, 360, 361.

539. *Petitions.* A petition in many respects resembles a motion, and there seems to be no positive or precise boundaries between them. But petitions are usually resorted to where a fuller statement is required than can be conveniently contained in a motion. Yet, either the one or the other, is proper *only* when there is a cause pending in court; or in a matter over which a court of chancery has jurisdiction, under some special authority conferred by statute, and which directs that the jurisdiction so conferred, shall be exercised in a summary manner upon petition; *Hill v. Richards*, 11 S. & M. 194.

540. *Same: Case in judgment.* After a

bill in chancery has been dismissed (and after the expiration of the term at which the dismissal was entered), it is no longer in court, and the jurisdiction over it is at an end, and the chancellor cannot entertain any petition or motion in relation to it. Hence, after such judgment, a receiver who had been appointed pending the bill, cannot file a bill for his compensation, against a person who purchased the property which he had held as receiver, and to whom he had delivered it. The court is without jurisdiction to entertain it; whether the remedy was at law alone, or whether he could get relief by original bill, was not decided; *Ib.*

541. *Same.* Nor, after dismissal, can the court make an order requiring parties in possession of the property, which was the subject of the litigation, and which they held under a bond given to procure an injunction against its sale, to deliver it; the remedy then is on the injunction bond (citing *Hill v. Richards*, *supra*); *Starke v. Lewis*, 1 C. 151.

542. *Same.* The precise line between cases in which a party may be relieved upon petition, or in a more formal way by bill, is difficult to define. Petitions are usually for things which are matters of course, or upon some collateral matter which has reference to a suit in court. The mode of application depends very much on the discretion of the court; *Henderson v. Herrod*, 1 C. 434. See *ante*, 114.

543. *Same: Petition to appoint a trustee.* A new trustee, in a deed granting power of sale to pay debts, will not be appointed upon the *ex parte* application of the *cestui que trust*. The application should be by bill, and all interested should be made parties. If the appointment be made on an *ex parte* application, it will be void; *Phipps v. Tarpley*, 2 C. 597.

544. *Process.* The summons in chancery must be executed in the same way as a summons in the Circuit Court; and hence, a general return of "executed," will be irregular (citing *Merritt v. White*, 8 G. 438); *Robertson v. Johnson*, 40 M. 500; *Foster v. Simmons*, 1b. 585. And, if in serving the process, constructive notice be substituted for actual, the return must show the state of facts upon which the law authorizes constructive notice to be given; *Foster v. Simmons*, *supra*.

See PROCESS, 9 to 25b.

545. *Pro confesso.* See that sub-division, *post*.

546. *Revivor.* See that sub-division, *post*.

547. *Trial: Setting the cause for hearing.* It is not necessary that the record should show, that an order was given by either party to set a cause down for hearing. The clerk sets the cause down for hearing upon the order of either party, but the order need not be in writing, and it need not be noticed in the record; *Reynolds v. Nelson*, 41 M. 83.

548. *Same: Setting down for hearing before answer filed for five months.* A defendant is allowed five months after the filing of his answer, to take testimony; and if the cause be set for hearing before the expiration

of that period, the answer is admitted to be true; but, where the answer denies all knowledge of the matters of the bill, and neither admits nor denies them, but calls for proof, it is not necessary that it should be on file five months, to enable the complainant to set the cause for hearing, and obtain a decree by proof establishing his bill; *Ib.* See *ante*, 27*a*, 29.

549. *Same.* If the cause be set down for hearing at the return term by the complainant, on bill and answer, the entire answer is to be taken as true; but, if there be a continuance then of the cause till the next term, held more than five months afterwards, the rule does not apply; *Russell v. Moffitt*, 6 H. 303.

550. *Setting cause for hearing when all defendants not served.* When a cause is not ready for hearing as to all the defendants, by reason of the want of service of process on some, the court should not proceed to final hearing at the instance of those defendants who have been served with process, but the cause should be remanded to the rules; *Hunter v. Walker*, 40 M. 595.

551. *Replication.* No replication to the answer is required in our practice; *Ib.*

552. *Writ of restitution.* The writ of restitution is a common law writ, and issues from the Superior Court when it reverses a judgment, and not from the court whose judgment is reversed. It is unknown in chancery practice; *Starke v. Lewis*, 1 C. 151. See *ante*, 49.

553. *Decree requiring bond to secure ulterior interests.* Where in a decree it becomes necessary to require the complainant, to whom property is delivered under it, to give a bond to bind him to have the property forthcoming, for the benefit of those having an ulterior interest in it which takes effect in possession after complainant's death, it is not essential that the court should appoint a commissioner to ascertain the value of the property, before fixing the amount of the bond; for in such a case, if, at any time, the bond, from any cause, as increase of the property in value, or failure of the surety, become insufficient, the chancellor may require a new bond; *Carter v. Carter*, 6 C. 326.

554. *Testing of pleas and replication.* A demurrer to a plea, or replication in chancery, is not the proper mode of testing its sufficiency; but it should be set down for hearing; *Beck v. Beck*, 7 G. 72.

554*a*. *Lost note: Affidavit of loss.* Complainant did not accompany his bill with an affidavit of the loss or destruction of the note, which was sought to be collected by the bill, and the defendant in his demurrer neglected to make the objection. On failure to answer after the demurrer was overruled, a *pro confesso* was entered on the bill: *Held*, all objection on account of the want of the affidavit, was thereby waived; *Wofford v. Board of Police of Holmes Co.*, 44 M. 579.

554*b*. *Referring case to arbitration.* Where the parties to a cause, without any formal order of the court to submit the cause to

arbitration, do make such submission, and it appears that it was intended by them to make the decision of the arbitrators, the same as the decision of the court, the award, "when returned to and approved by the court," will have the same effect as if made under a regular order or rule of submission, as the final judgment or decree of the court; *Handy v. Cobb*, 44 M. 699. See ARBITRATION AND AWARD, 10.

XL. Pro Confesso.

555. *Necessary.* A decree against a party not answering, without the entry of a *pro confesso* against him, is irregular; *Carman v. Watson*, 1 H. 333. And if the original bill be answered, and there be no answer to an amended bill afterwards filed, it is error to proceed to final hearing, without a *pro confesso* on the amended bill; *Mezeiz v. McGraw*, 44 M. 100.

556. *Against an infant.* A *pro confesso* cannot be taken against an infant; *Hargrove v. Martin, Pleasants & Co.*, 6 S. & M. 61; *S. P., Smith v. Bradley*, 6 S. & M. 485.

See sub-division Infants, 213. See also, INFANTS.

557. *When complainant not entitled to decree on.* The complainant is not entitled to a decree on a *pro confesso* against one of the defendants, when the facts presented and proven by the other defendants show that the complainant is not entitled to any relief against the defendant not answering; *Minor v. Stewart*, 2 H. 912. See *post*, 560.

558. *Same: Effect of pro confesso.* Upon a decree *pro confesso*, all the facts stated are to be taken as true to the same extent as if established by the evidence against the denial of the answer; but the complainant can have only such relief as the facts stated in the bill entitle him to; for it is a well established rule, that if the complainant states an insufficient case in his bill, he cannot have relief, although he establishes a good case in his evidence; *Spears v. Cheatham*, 44 M. 64.

A *pro confesso* will not justify a decree against the defendant, if the bill make no case against him; *Garland v. Hull*, 13 S. & M. 76. But where a defence, though appearing on the face of the bill, is required to be insisted on, as the statute of limitations, a failure to set it up by the defendant, will be a waiver of it; and on *pro confesso*, the complainant is entitled to a decree; *Patterson v. Ingraham*, 1 C. 87; *S. P., Spears v. Cheatham*, 44 M. 64. See *ante*, 164.

The complainant, on entering a decree *pro confesso*, is entitled to have such decree, without further proof, as the facts stated in this bill entitle him to; *Ramsey v. Barbaro*, 12 S. & M. 293.

559. *Pro confesso no evidence against co-defendant.* A *pro confesso* against one defendant, does not entitle the complainant to a decree against another defendant who has answered—it being no evidence against any but the party against whom it is entered;

Holloway v. Moore, 4 S. & M. 594. See *ante*, 198.

560. *Same: Effect of disproving the bill by a co-defendant.* If the bill be disproved by a defendant, who answers, a decree cannot be taken against the defendant who has failed to answer, and against whom a decree *pro confesso* has been entered; *Hargrove v. Martin, Pleusants & Co.*, 6 S. & M. 61. See *ante*, 557.

561. *When decree may be entered on.* A final decree may be entered on a *pro confesso*, at the same term at which the *pro confesso* is entered; *Saunders v. Dowell*, 7 S. & M. 206. See *ante*, 147.

562. *No pro confesso where plea is filed.* A demurrer to the bill was overruled, and leave given to the defendant to plead or answer within ninety days, and within that time he filed a plea, setting up matter of defence. Without any action on the plea, a *pro confesso* was entered against the defendant, and thereupon a final decree was also entered: *Held*, this was manifestly erroneous; *Handy v. Cobb*, 44 M. 699.

563. *Setting aside pro confesso.* The chancellor has power under the statute (H. C. 790), to set aside a *pro confesso*, upon good cause shown, and upon payment of costs, and he should do so, when a proper case occurs; and his refusal to do so may be assigned for error in the High Court; *McGowan v. James*, 12 S. & M. 445.

564. *Same: Instances of setting aside.* The service of process was by leaving a copy at the defendant's residence, he being absent in a distant State. He did not return, or know of the institution of the suit until a final decree on *pro confesso* had been entered against him: *Held*, that it should be set aside upon his application showing these facts, accompanied by a sworn answer, in which it was set out a legal defence to the suit; *Ib.* See *ante*, 149, 447.

564a. *Pro confesso: Revivor.* If, upon overruling a demurrer, a time be fixed in which the defendant is to answer, and the complainant die before the next term (whether within the time fixed for the answer to be filed did not appear), and then a bill of revivor is filed by his administrator, and immediately thereafter, the original bill is taken for confessed, it will be error. The defendant is first entitled to have a day fixed to contest the revivor; *Upshaw v. Hargroves*, 6 S. & M. 286.

XLI. Publication of Notice to Non-residents.

See ATTACHMENT, 64, *et seq.* PROCESS, 15. PROBATE COURT, 50.

565. *Statute must be complied with.* An exact compliance with the statute, in serving notice on non-residents by publication, is required; and hence, where the statute required both publication in a newspaper and posting at the court house door, if the latter be omitted, a decree *pro confesso* is void; *Kerr v. Bowers*, 1 S. & M. 584; S. C., 3 S. & M. 641.

566. *Same.* Notice to non-resident and absent defendants by the publication and mailing of notices, is an inferior mode of constructive notice, and is justified only where a strict compliance with the statute is shown by the record. Before an order of publication can be made, it must be shown, by affidavit or otherwise, that the defendant is absent from the State and cannot be found, or that he is a non-resident. And, in addition, the residence or post office of the defendant must be stated, or it must be shown, that after diligent inquiry they could not be ascertained; a simple statement in the affidavit made to procure the order, that the residence and post office are unknown, will not do; the order directing publication not reciting that any other proof on that subject was made; *Foster v. Simmons*, 40 M. 585.

567. *Act of 1863: Posting notices.* This act which allows publication of notice to be made by posting the same in five public places in the county—in all cases where, by law, the notice is required to be published in a newspaper printed in the county, and where there is no such newspaper so printed,—does not apply to publications in chancery, for the law does not require notices to non-residents, of suits pending in the Chancery Court, to be published in a newspaper printed in the county where the court is held; *Ib.*

568. *Non-residence or absence required.* To justify a decree on publication of notice to the defendant, it must appear that he is a non-resident; that he is a citizen of another State will not alone do. The statute of 1821 only requires publication where personal service cannot be had, and that does not appear from the fact of non-residence in another State; *McKiernan v. Massingill*, 6 S. & M. 375.

569. *Same.* The Act of 1822 (H. C. 764), provides for giving notice to absent defendants, by publication and posting notices, and refers alone to such defendants as are resident in the State, and are temporarily absent. The Act of 1821 provides for publication only against non-resident defendants; *Wash v. Head*, 5 C. 400.

570. *How defendant described.* If the bill be filed against *Beriah Magoffin*, and the publication of notice is to *Branch Magoffin*, it will not do. The statute must be strictly pursued, and the publication made against the defendant by the name and character in which he is sued; *Magoffin v. Mandeville*, 6 C. 354.

571. *Same.* It is no objection to a notice, published to absent or non-resident defendants, that the complainants are described as "administrators," without stating the estate which they represent; *Pouns v. Gartman*, 7 C. 133.

572. *Length of notice under Acts of 1822 and 1848.* The Act of 1822, requiring publication against a non-resident in a suit for divorce, is repealed by the Act of 1848 (Session Laws, p. 148), which provides for publication in chancery cases generally, for one month; *Plummer v. Plummer*, 8 G. 185.

573. *What a month means.* A statute re-

quiring publication once a week for one month, means that a callender month shall intervene the date of the first and last publication, excluding one of these dates and including the other; *Mitchell v. Woodson*, 8 G. 567.

XLII. Quia Timet, Bill of.

574. *The apprehension must be well founded.* In a bill *quia timet*, it is necessary to allege and prove that the complainant will be damaged by the act to prevent which the interposition of the court is prayed for; *Green v. Hankinson*, W. 487. See *ante*, 249.

575. *Relief on.* Equity will relieve a complainant having a right of future enjoyment in personalty, where there is any danger of loss or deterioration or injury to it, in the hands of the party entitled to the present possession, or where there is just ground to believe that it will be removed and placed beyond the reach of the complainant before his right of possession shall accrue (citing 2 Story's Eq. § 848); *Gibson v. Jayne*, 8 G. 164.

XLIII. Receivers.

576. *When appointed in case of a mortgage.* See MORTGAGE, 37, and *post*, 579a.

577. *Who appointed in such a case.* If the mortgagor make application to get the appointment (it having been determined to make one) and offer bond and security for the faithful performance of his duties, the court is not bound to appoint him. It is a matter of discretion in the chancellor to appoint the mortgagor, the mortgagee, or a disinterested person; *Hill v. Robertson*, 2 C. 368.

578. *When appointed in case of a partnership.* See PARTNERSHIP, 56a to 56b.

579. *Appointed pending injunction.* A bill was filed by a creditor secured by a deed in trust, to prevent another creditor from selling the trust estate under a judgment against the grantor. The defendant on filing his answer, asked for a receiver to take care of the fund and make it profitable during the litigation, it appearing that it was insufficient to pay both debts: *Held*, that a receiver should be appointed; *Hambertlin v. Marble*, 2 C. 586.

579a. *When appointment made.* To justify the appointment of a receiver before the merits of the cause are disclosed, as before answer filed, or *pro confesso* entered, there must exist strong special reasons, as where the defendant has withdrawn himself from the jurisdiction of the court, to avoid service of process, or is guilty of fraud, which endangers the property; or in case of suit to foreclose a mortgage, the mortgaged property is a slender and scanty security, entitling the mortgagee to collect and appropriate the rents; and other like cases; *Whitehead v. Woolen*, 43 M. 523.

579b. *Notice of the motion to appoint.* To give the Chancery Court jurisdiction of the appointment of a receiver, it is indispensable that notice of such motion be served on the party to be affected thereby; *Ib.*

580. *Powers and title of receiver.* Whether the court can authorize a receiver to sue in any case in his own name; *Quære?* He has no power to sue at all unless authorized by the court to do so. When the authority is given, he must sue in the name of the party having the legal title, where the demand is a legal one. The authority to sue does not confer on him an equitable title to a legal demand, and thus authorize him to bring suit in chancery on it in his own name. And where a receiver is appointed to collect the assets of a corporation, and unpaid subscriptions for stock in it, the demand, being purely legal, cannot be collected except by action at law; *Freeman v. Winchester*, 10 S. & M. 577.

A receiver as such, is not vested with the legal title of the property committed to his charge, and he can, as such, bring no action at law in his own name, to recover assets held by him in that capacity; *Newell v. Fisher*, 2 C. 392.

581. *Same: Right to sue.* A receiver is accountable to the court which appointed him. Hence it is no objection to a recovery in a court of law by him in the name of another, that the suit is not in his own name, since the court appointing him can make him account for the assets in his hands, whether recovered by him in his own name or in the name of another; *Ib.*

582. *Liability of.* A receiver in chancery is liable for hire if he employ the property about his own business; *Battaile v. Fisher*, 7 G. 321.

583. *Settlement of his accounts: Credit.* And where the property of an intestate comes to his hands, in a suit against the administrator to enforce a lien on it, the receiver is not entitled to a credit in settling his account, for a fee due him as solicitor in that case for the administrator; the allowance of the fee is a matter for the Probate Court. Nor will he be entitled to credit for a sum advanced to pay a charge against his predecessor, if the latter be in arrears, on account of his receivership; *Ib.*

XLIV. Reformation of Writings.

See sub-division Mistake, *ante*, 330, *et seq.*, 212.

584. *Jurisdiction to reform writing.* Equity has jurisdiction to entertain a bill to reform a written contract, by correcting a mistake in drawing it up, and at the same time to enforce a specific performance of the reformed agreement. But to authorize the court to reform the agreement, the evidence of the mistake must be clear and free from doubt; *Mosby v. Wall*, 1 C. 81; *S. P., Harrington v. Harrington*, 2 H. 701; *Lauderdale v. Hallock*, 7 S. & M. 622. See *ante*, 330.

585. *Same: Proof.* In this case the vendor brought a bill to enforce his lien, alleging a misdescription of the land. There were two vendees, and there was a *pro confesso* as to one, and the answer of the other stated he knew nothing of the mistake. The alleged misdescription consisted alone in a mistake

as to the number of the township in which the land was situated, the sub-divisions of the sections being correct, proof that the vendees went into the possession of the land which answered the description stated in the bill to be correct, and enjoyed it, was held sufficient to show the mistake; *Mosby v. Wall*, *supra*. And in this case it was held, that the fact that the vendees (who had only a title bond) had defeated the action of vendor for the purchase money, by showing that he had no title to the land as described in the bond, was held no bar to the relief sought, since a court of law had no jurisdiction to hear evidence to show the mistake; *Ib*.

586. *Correction not made against bona fide purchaser*. Equity will not reform a deed in which, by mistake, the consideration is stated at \$50, instead of \$5,000, so as to give effect to a vendor's lien for the latter amount, as against a *bona fide* purchaser without notice, though he be a purchaser at sheriff's sale, who is generally affected by all equities existing against the defendant in execution; *Kilpatrick v. Kilpatrick*, 1 C. 124. See *ante*, 333.

587. *Evidence*. A mistake in an unsealed instrument may be corrected in an action at law when the instrument is offered as evidence, and if the instrument be under seal, no more evidence will be required to correct it in chancery than would be necessary at law; *Gray v. Roden*, 2 C. 667. See *MISTAKE*, 1.

588. *Correction against executor de son tort*. Where an executor *de son tort* is liable to be sued for a debt secured by a written instrument made by the decedent, a mistake in that instrument may be corrected in that suit; *Ib*.

XLV. Rehearing.

589. *Granting of discretionary*. It is in the discretion of the chancellor to grant or refuse a re-hearing. It is usual to grant it upon a petition signed by two counsel; *Hogat v. Hunt*, W. 216.

590. *Not granted after the term*. A re-hearing cannot be granted after the term at which a final decree has been entered has expired; *Foy v. Foy*, 3 C. 207.

591. *Re-hearing to non-residents*. Under the 4th section of the Chancery Act of 1822, if a non-resident defendant petition for a re-hearing within five years from the date of the decree, it will do. It is not essential that he should also, within that time, answer and secure the costs; *Head v. Wash*, 2 G. 358.

XLVI. Rescission of Contracts.

591a. See *VENDOR AND VENDER*, subdivision Rescission of Contracts.

XLVII. Res Adjudicata.

See *RES ADJUDICATA*. See *ante*, 272.

592. *Parties must be the same*. A bill regularly dismissed on the merits, may be pleaded in bar of a new suit for the same subject matter; but to have this effect the former decree must be an absolute decision on the same

point or matter as that involved in the present suit, and the present bill must be by the same plaintiff, or his representative, against the same defendant, or his representatives, as the former bill was; *Pugh v. Holt*, 5 C. 461.

593. *Same*. A former decree was relied on as an adjudication, but the answer setting up the defence, did not show that it was filed against the present defendant, or any person from whom he derived title; and it was held for this reason to be no bar; *Ib*.

594. *Rule*. All that might have been tried in the first suit, is concluded by the decree; The chancery court discourages a multiplicity of suits. Where a suit is determined, it is an adjudication of all questions, which might have been tried in it: hence, where a divorce has been granted, a suit cannot afterward be brought for alimony, or to set up the wife's claim to allowance, out of property which she had, and which by the marriage became vested in the husband. These matters were proper to be determined in the divorce suit as an incident to the relief therein granted, and the failure of the complainant to cause such an adjudication, is her own fault, and a bar to her claim in any other suit; *Lawson v. Shotwell*, 5 C. 630; *S. P.*, *Stewart v. Stebbins*, 1 G. 66; unless the failure to litigate the right in the first suit was caused by the fraud of the opposite party, and is not at tributable to complainant's negligence; *Stewart v. Stebbins*, *supra*.

595. *Same: Examples*. Where a husband is in possession of trust property, in which the deceased wife was interested, and the trustee filed a bill against the husband alone, to recover possession of the property, but not the rents and profits, and upon a decree *pro confesso* being rendered, after the overruling of the husband's demurrer, he appealed to the High Court, and sought there to have the question of his interest in the wife's share of the profits adjudicated; it was held that the High Court would not take notice of the point, as it was not raised in the court below, and that the husband was at liberty to raise the question in another suit; *Ferguson v. Applewhite*, 10 S. & M. 301.

596. *Same: Another statement of the rule*. A decree rendered in a former suit is a bar to a subsequent suit between the same parties and in the same right, and for the same subject matter; *Manly v. Kidd*, 4 G. 141.

597. *Identity of the parties*. It is not necessary, in order to constitute a former decree a bar to a new suit, that the parties should be precisely the same. It is sufficient if they are substantially identical. And hence, a former decree against the *cestuis que trust* will be a bar to a new bill by the trustee, who seeks to recover the same property, upon the same title, and for their exclusive benefit;

And the rule applies so as to bar the administrator from bringing a new suit, when the former suit was brought by the distributees, and it appears that, from the lapse of time since the intestate's death, there can possibly be no debts existing against him; *Ib*.

598. *Same: Identity as to the right.* When a former decree has been rendered against the complainants, upon their bill, claiming that the property in controversy was limited to them in remainder, to take effect in possession after the death of their ancestor, they cannot afterwards, as distributees, or through an administrator of the ancestor, maintain a bill to recover the same property, by showing that the deed under which they claimed in the former suit, vested an absolute fee in the first taker. The latter bill will be regarded as in the same right as the former; *Ib.*

599. *Parties: Nominal party.* When a substantial right is claimed in behalf of a party suing in chancery, conjointly with another, such party cannot be considered as a merely nominal complainant, and he will be concluded by the adjudication in that case; *Moody v. Harper*, 9 G. 599.

600. *Example.* If the defendant in an action of ejectment, or in an action for *mesne* profits, fail, without sufficient excuse, to set up his claim for valuable improvements made by him on the premises, he cannot afterwards come into equity for relief on that account; *Ib.*

601. *Another example.* A party cannot get relief in equity against a judgment at law, upon the ground that it was obtained by the fraud of his antagonist; if he made a motion for a new trial on that ground, and it was adjudged insufficient, or unsupported by the evidence; in such a case the judgment on the motion is conclusive; *Ib.* See *ante*, 154.

602. *New agreements.* A party will not be permitted to re-litigate a matter once settled, by merely presenting new arguments on a state of facts not materially different from those existing in the first suit; *Ib.*

603. *Another example.* The rule charging parties with the consequences of irregularities in executions, is as stringent against attorneys who issue and control them and purchase at sales made under them, as it is against other purchasers; and hence, when the record in a suit which unsuccessfully attacked the validity of a sale of land, upon the ground that the defendant died before the teste of the execution, and that the judgment had not been revived, disclosed the fact that the purchaser controlled and managed the execution as the agent of the plaintiff; it will be no ground for relitigating the matter in a new bill, that since the determination of the first suit, it has been discovered that the attorney purchased for the plaintiff in execution; *Ib.*

604. *Real parties shown by parol.* It is competent to show by parol who are the real parties in interest, so as to conclude them by the litigation; *Ib.*

XLVIII. Revivor.

See REVIVOR. SCIRE FACIAS. See *ante*, 155.

605. *Revivor in name of collector.* A bill to enjoin a judgment at law, cannot be revived in the name of the administrator *ad colligen-*

dum of the complainant; *Irwin v. Roach*, W. 386.

606. *When injunction bill cannot be revived.* A bill was filed against an executor to restrain him from taking possession of the testator's property until he should give security to have it forthcoming to answer a debt of the complainant when it should be established, and an injunction was granted as prayed for, on the ground that the executor was about to remove the property out of the State to defeat the creditors of the testator. The executor then resigned: *Held*, that the bill thereby abated, as no relief was thereby sought against the estate, and that no relief could be granted against the administrator *de bonis non*; *Vaughn v. Cox*, 5 C. 701.

607. *For judgment on overruling demurrer to bill of revivor.* See *ante*, 156a.

608. *Pro confesso without revivor.* See *ante*, 564a.

609. *As to necessity for revivor on creditor's bill.* See *ante*, 132e, 188.

XLIX. Rules.

610. *Interpretation of by chancellor.* The interpretation put by the chancellor on his own rules, is a safe precedent for the High Court; and where, notwithstanding a rule of practice that no motion to dissolve an injunction on the face of the bill would be received, yet if the chancellor entertain such motion, it will be considered that the rule was inapplicable to that case. And such a rule ought not to apply where no decree could be rendered, if the facts stated in the bill were admitted; *Walker v. Gilbert*, 7 S. & M. 456.

L. Sales.

611. See *ante*, 111, *et seq.*

LI. Special Chancellor.

612. *Selection of.* The vice chancellor was interested in a cause pending in his court, and he called on the chancellor to decide it, who, on looking into the case, discovered that he was also interested in it, and he declined to sit in the cause, and thereupon, the chancellor selected a special vice chancellor from among the members of the bar, by lot: *Held*, that the action of the chancellor was void; that the selection should have been made by the vice chancellor; and a decree rendered by the special vice chancellor selected by the chancellor, was void; *Shotwell v. Taliaferro*, 3 C. 105.

613. *Same.* It is no violation of the maxim, "that no man should be a judge in his own cause," for the chancellor, under the provisions of the statute, to select by lot, a member of the bar to try a cause in which he may be interested, and for the chancellor to sign, and cause to be entered among the proceedings of his court a decree so rendered; the functions of the member of the bar so selected, is rather ministerial than judicial, his decree having no validity till

signed by the chancellor; *Grinstead v. Buckley*, 3 G. 148.

614. *Same: Constitutionality of the statute authorizing the appointment.* The constitutionality of the statute (H. C. 772, art. 12), which authorizes the selection of a member of the bar to try and determine causes in which the chancellor may be interested, and requires the chancellor to sign and cause to be entered and recorded all decrees and orders so made, is a subject on which doubt may be well entertained, and that is a sufficient reason for this court to decline to hold the statute unconstitutional, and especially since it has been extensively acted on in practice, and many important rights have accrued under decrees rendered under its operation; *Ib.*

LII. Special Court of Equity.

615. *That the provisional governor appointed in 1865, had power to establish the Special Court of Equity.* See CONSTITUTIONAL LAW, 111, 112.

616. *Specific performance of contracts for chattels: Jurisdiction.* Only in special cases has a court of equity the power to enforce a specific performance of a contract for the sale of a chattel, or to render a decree for damages for a failure to deliver the property so sold. The Special Court of Equity created in 1865, had no power on this subject, except what properly belonged to a court of equity; and hence, it had no power to enforce the specific performance of an executory contract for the sale of cotton, nor the delivery of cotton where the sale was executed, nor to give damages for the non-performance of the contract, nor for the non-delivery of the cotton; *Scott v. Bilgerry*, 40 M. 119.

617. *Same: Jurisdiction as to partners.* The court had no power to decree a dissolution of a partnership, nor the settlement of a partnership account; *Tharpe v. Marsh*, 40 M. 158.

618. *Jurisdiction to rescind cotton contract.* It had jurisdiction to decree a rescission of a contract by which the defendant agreed to gin a bale of cotton for complainant, and divide the cotton between them; *Fulton v. Woodman*, 40 M. 593.

LIII. Specific Performance.

1. General Rules as to Granting.

619. *Rule: Granting discretionary.* Bills for specific performance, or for rescission of contracts, are addressed to the sound discretion of the court. No certain definite rule can be laid down which would determine whether a party was or was not entitled to relief; *Hester v. Hooker*, 7 S. & M. 768; S. P., *Clement v. Reid*, 9 S. & M. 535. Specific performance is not a matter of right, but of sound legal discretion; *Daniel v. Frazer*, 40 M. 507.

620. *Same: Hard and unconscientious bargains.* Hence, specific performance will not be decreed, unless the contract be fair and

just in all respects. Hard and unconscientious bargains will not be enforced, nor will relief be granted under all circumstances; *Daniel v. Frazer*, *supra*; nor when the complainant seeks to enforce a contract where the price he paid was grossly inadequate; *Clement v. Reid*, 9 S. & M. 535; and so, if the complainant has been guilty of fraud or collusion in the acquisition of his title; *Clement v. Reid*, *supra*. And in the sense of this rule, a bill by a purchaser at execution sale to enjoin another creditor from levying on and selling the land, is a bill for a specific performance; *Clement v. Reid*, *supra*.

621. *Same: Refused when complainant is in fault.* And relief will not be granted when the complainant seeking a rescission has not done all that he stipulated to do, or has not placed himself in a situation to be ready to comply with his part of the agreement upon a compliance by the other side; *Hester v. Hooker*, 7 S. & M. 768.

622. *Example of refusal because bargain is unconscientious.* The purchaser on the morning of the news of the surrender of General Lee, reached the capital of this State, started an agent to complete a trade he had partially made for the purchase of cotton for Confederate States treasury notes. The agent reached the seller's neighborhood in advance of the news, and purchased the cotton, and paid for it in that kind of currency, and on being asked the news by the seller, the agent replied, "Nothing but rumors of no interest." The surrender made the currency worthless: *Held*, that the purchaser was not entitled in equity to a specific performance; *Daniel v. Frazer*, 40 M. 507.

See FRAUDS, &c., 5.

623. *When bill to rescind, and for specific performance both dismissed: Example.* A vendor gave bond for title, and stipulated also to deliver possession of the land upon the payment of a portion of the purchase money by a particular day. The vendee failed to pay at the time stipulated, and asked vendor for a rescission upon the ground of his inability to comply. Soon, thereafter, the vendor resold the land to another party, and delivered possession to him, and then the latter sale was rescinded: *Held*, on bills filed by each party, that neither specific performance nor a rescission could be granted, and the parties would be left to their remedies at law; *Hester v. Hooker*, 7 S. & M. 768.

See VENDOR AND VENDEE, 189, 190, 204.

2. Time as an Element in Granting or Refusing Performance.

624. *Same.* Time is not always considered as of the essence of a contract in equity, and in cases of mutual and dependent covenants, equity will extend the time of performance; *Runnells v. Jackson*, 1 H. 358. See TIME.

625. *Same.* Equity will ordinarily decree specific performance against a party who has got the substance of what he contracted for, though not at the time stipulated; but when time either is expressly made important by the terms of the contract, or it results from

the nature of the agreement, then it is of the essence of the contract, and specific performance will not be decreed if the complainant has not complied by the time stipulated; *Tyler v. McCardle*, 9 S. & M. 230.

624. *Same. Case in judgment.* The holder of a note on which suit was then pending, agreed with the makers, that if they would take up and discharge a note which the holder owed to another, and which was for a less amount than the one sued on, he would dismiss the suit against them and release them from the debt. The makers entered at once into negotiations with the creditor of the holder, with a view of complying with this agreement, but did not actually succeed in getting the note until after judgment was rendered against them. At the trial of the suit pending against the makers, they insisted on the agreement, but the holder refused longer to be bound by it; but he told the makers if they would take up his said note, he would credit the judgment with the amount. The makers afterwards took up the note, and the plaintiff in the judgment gave them credit for the amount. The makers then filed this bill to have satisfaction in full entered on the judgment: *Held*, that time was of the essence of the agreement; that by its terms the plaintiff's note was to be taken up before judgment was entered, as he had promised to *dismiss* the suit on the happening of that event; and that the taking up of the note was not in pursuance of the original contract, but was done in compliance with the proposition of the holder to credit the amount of it on the execution, which he had done, and that the bill must be dismissed; *Ib.*

625. *Same.* A specific performance will not be decreed where the complainant has failed to comply with his contract by the time stipulated, unless he can satisfactorily account for such omission, or unless the other party has assented expressly, or by acquiescence, impliedly, in the delay; *Lewis v. Woods*, 4 H. 86.

626. *Same. Case in judgment.* Complainant purchased land for \$3,600, and was to pay \$1,200 cash, and give his notes for the balance, due and payable in one and two years. He paid \$800 cash, but never executed his notes, and went into possession. The vendor repeatedly demanded the \$400, being the balance of the cash payment, and at the end of sixteen months sold the land to another, and the last purchaser commenced ejectment to recover possession. The complainant then filed his bill, and offered to comply with the contract: *Held*, he was not entitled to relief; *Ib.*

627. *Same: Example of relief granted notwithstanding delay.* A. sold by title bond a tract of land to B., and the purchase money was to be paid in three annual instalments. After all of the instalments were due, it was agreed that B. should have till the 1st of January thereafter to pay for the land, and if not paid then, the contract was to be rescinded. Before the expiration of this

time, B. sold to C., who agreed to pay the purchase money. On failure at the stipulated time to pay, A. wrote to C. that the contract was at an end, but it was not shown that C. received this letter. In June, afterwards, C. called on A., and said he would pay the purchase money in a few days, and A. then made no objection, and did not inform C. that he considered the contract as at an end. In the October following, C. tendered the purchase money, and demanded a deed, when A. informed him that he considered that the contract was rescinded: *Held*, that C. was entitled to a specific performance; that the agreement between A. and B. that if the money was not paid by January, the contract was to be rescinded, was not an actual rescission, but only an agreement to rescind at a future day if the money were not paid, and that A.'s failure to notify C. of his intent to rescind in June was a waiver of the right to rescind for any default occurring up to that time; *Echols v. Butler*, 6 C. 114.

3. Specific Performance, as a Means to Collect Purchase Money.

628. *Enforcing vendor's lien.* A decree for specific performance by enforcing the vendor's lien, establishes no personal responsibility on an alleged vendee, who is made defendant to the bill, and who disclaims all interest in the land, and such disclaimer is therefore no reason for rendering the decree; *Mosby v. Wall*, 1 C. 81.

For specific performance of executory contracts for the sale of land, in order to collect the purchase money, see VENDOR AND VENDEE, sub-division Specific Performance, 68, *et seq.* *Pitts v. Parker*, 44 M. 247.

4. Duty of Party asking Specific Performance to show Compliance on his Part.

629. *Same.* He who seeks specific performance of a contract, must do everything incumbent on him, or he will not succeed; *Stewart v. Raymond R. R. Co.*, 7 S. & M. 568.

Neither vendor nor vendee can maintain a bill for specific performance, without performing, or offering to perform, his part of the agreement; *McAllister v. Moyer*, 1 G. 258; *Eckford v. Halbert*, *Ib.* 273.

See MUTUAL AND DEPENDENT AND INDEPENDENT COVENANTS, 10, *et seq.* VENDOR AND VENDEE, 68, *et seq.*

5. Miscellaneous.

630. *Defective title.* Specific performance of a contract for the sale of a house and lot, will not be decreed if a title can be had to only half the premises; *Terrell v. Farrar*, W. 417.

631. *Of voluntary agreement.* Specific performance of a contract, founded on merely benevolent intentions, will not be decreed; *Mercer v. Stark*, W. 451.

632. *Contract must be certain.* Specific performance will not be decreed unless the contract is certain in its terms; and this rule

applies with additional force, between the legal representatives of the contracting parties; *Montgomery v. Norris*, 1 H. 499.

633. *Violating prior equity.* The court will not, at the instance of the vendee, compel a specific performance of a contract, where the vendor cannot perform without violating a prior equity in favor of a third party; *Russell v. Moffit*, 6 H. 303; *S. P., Curtis v. Blair*, 4 C. 309. See post, 634

634. *Where damages would compensate. and where nothing has been done to carry out the contract.* Specific performance of a contract for the sale of land, will not be decreed where no money has been paid by the vendee, nor anything done in pursuance of the contract, in a case where it appears that the only matter in dispute is the pecuniary value of the land, it being worth more than the contract price; but the vendee will be remitted to his action at law, where he will get compensation in damages. And especially will not this be done, where the vendor has sold to another, who bought in good faith, yet who cannot protect himself as a *bona fide* purchaser for value, for want of a conveyance of the legal title; *Curtis v. Blair, supra*.

635. *Refused, where agreement was fraudulently drawn up.* The complainant sought specific performance of an agreement which was a title bond by the defendant to convey land to him, and providing that the money was to be paid in bank notes greatly depreciated, though the note of complainant which defendant held for the purchase money, was for so many dollars in legal tender. It appeared that the defendant could not read, and she alleged in her answer, that she was imposed on by the complainant, as to the terms of the bond making the debt payable in bank notes, and that the bond so providing for payment was not read to her. One of the subscribing witnesses thought, but was not certain, that it was read to her, and the other was certain that it was not read, and knew also there was no such verbal agreement, when the contract was concluded: *Held*, that the complainant was not entitled to relief; *Williams v. Jones*, 10 S. & M. 108.

636. *Waiver of right to specific performance.* A party may waive his right to a specific performance by parol; but such waiver must be distinctly and clearly proven. Slight circumstances will not establish it. They must show, absolutely and unequivocally, an intention to waive the right; *McCorkle v. Brown*, 9 S. & M. 167.

637. *Waiver: Statu quo: Case in judgment.* Mack sold to Brown & Bybee a section of land for \$8,000, one-half of which was paid in cash, and the vendor gave his bond to make title upon payment of the balance of the purchase money. Soon after the sale Mack, at the request of both vendees, conveyed the northeast quarter of the section to Tate, and this conveyance was endorsed on his bond by the vendees as a part compliance therewith. After this the vendees,

Brown & Bybee, agreed on a division of the land, by which Bybee was to have the southeast quarter of the section for the money he had advanced in making the cash payment, and Brown was to have the whole west half of the section upon the condition that he paid all the balance of the purchase money (\$4,000), due to Mack, and notice of this agreement was given to Mack. Soon afterwards Mack, at the request of Brown alone (who was to have the west half of the section, as before stated), conveyed sixty-eight acres of said west half to one party, and ten acres to another, he, however, receiving \$1,600 paid by these parties as a credit on the note of Brown & Bybee for \$4,000 for the purchase money. Afterwards the balance of the purchase money, viz.: \$2,600 and interest, being unpaid, Mack filed his bill against both Brown & Bybee, to enforce his lien by a sale of all the land, except the quarter section conveyed as aforesaid to Tate, and the other seventy-eight acres conveyed at the request of Brown alone. Bybee resisted the sale of the southeast quarter, which, by the agreement for a division between him and Brown, he was to have, upon the ground that Mack had knowledge of this agreement, and had waived his right to that quarter section; and upon the further ground that he had, by his conveyance of the said seventy-eight acres, at the request of Brown alone, put it out of his power to comply with his contract with Brown & Bybee by a conveyance of the whole land to them. But it was held that neither ground was tenable; that though, as a general rule, a complainant seeking a specific performance must be able and willing to comply with his part of the agreement, yet this rule did not mean a literal, but a substantial compliance, and that such party is entitled to a decree, if he has been guilty of no default, and has taken all proper steps for performance; that the complainant's inability to convey the seventy-eight acres arose not from his fault, but from an attempt to carry out the agreement for a division made between Brown & Bybee; and that as the purchase money for the said seventy-eight acres had gone to the extinguishment of the debt due by both Brown and Bybee for the purchase money, the latter had no right to complain; and that the conveyance of the northeast quarter to Tate, at the request of both vendees, had put it out of their power to put the complainant in *statu quo* if the contract were not performed; *Id*.

See VENDOR AND VENDEE, 250.

638. *Refused for mistake: Case in judgment.* It has been holden that if a purchaser of the whole interest from one of two tenants in common, knows, at the time, that his vendor has only a half interest, and is incompetent to convey the whole, except by consent of the other tenant, and the latter refuses to convey; that the agreement was made in mistake, and that the vendee cannot claim a specific performance as to the one-half interest which the vendor can convey; *Stone v. Buckner*, 12 S. & M. 73.

LIV. Supplemental Bill.

See *ante*, 135.

638a. *Allowance of*. It is improper to allow a supplemental bill, containing matter only which was known to the complainant when he filed the original bill; *Walker v. Gilbert*, 7 S. & M. 456.

639. *Same*. A supplemental bill is proper and allowable to remedy imperfections in the original bill, when the time has elapsed in which amendments are allowed to be made; but a supplemental bill will never be allowed, when the same end can be accomplished by an amendment; nor will it be allowed, where the matter of it could not, under any circumstances, be introduced by amendment; *Clark v. Hull*, 2 G. 520.

640. *Same*. Neither an amended nor supplemental bill, which proposes to change the frame and essential character of the original, should be allowed; and hence, after a bill against an intestate for the recovery of slaves and their hire, has been revived against his administrator in his representative capacity, it will be improper to allow an amended or supplemental bill, by which it is sought to charge the administrator personally for the hire of the slaves, accruing after the intestate's death; *Ib*.

641. *Same*. When an original bill is wholly defective, on account of its failure to allege certain indispensable jurisdictional facts, which were not in existence at the time it was filed, it cannot be made the basis of a supplemental bill, alleging the existence of these facts, and that they have taken place since the commencement of the suit; and hence, if an original bill be brought by a creditor, to subject to his debt the equitable assets of his debtor, before he has recovered judgment at law, the defect cannot be remedied by showing in a supplemental bill, a recovery of the judgment, since the filing of the original bill; *Brown v. Bank of Mississippi*, 2 G. 454.

642. *In Superior Court of Chancery*. A supplemental bill is allowable in the Superior Court of Chancery, after the constitutional amendment abolishing that court, and during the time allowed to that court to wind up the business then pending in it; *Marble v. Whaley*, 4 G. 157.

LV. Transfer of Causes.

643. *Same*. Art. 114, p. 557, of the Rev. Code of 1857, which provides that the chancellor and vice chancellor, at the terms of their respective courts, next preceding the first Monday in November, 1857, shall make orders transferring all cases then remaining undetermined in their respective courts, to the Chancery Court of the proper county, is constitutional; and orders so made, though without consent of the parties, are valid, and vest jurisdiction over the causes in the courts to which the transfers have been ordered; *Marble v. Whaley*, 6 G. 527.

LVI. Venue.

644. *Same*. A bill in chancery by a judgment debtor, seeking to enjoin perpetually all further proceedings, to enforce the judgment, and to recover possession from the sheriff, property levied on by him, to satisfy it, is a suit respecting real or personal property within the meaning of art. 6, § 2, ch. 62, p. 641, of the Rev. Code of 1857, and may be filed in the Chancery Court of the county in which the property levied on may be, irrespective of the venue of the judgment, and the residence of the parties defendant; *Boswell v. Wheat*, 8 G. 610.

LVII. Vice Chancery Court.

645. *Act establishing is constitutional*. The Act of 26th of February, 1842, establishing an inferior court of chancery, is constitutional. The court thereby established is inferior to the Superior Court of Chancery, in that its jurisdiction extends only to a limited district, that causes may be removed from it to the Superior Court of Chancery, and that appeals lie from it to the latter court; *Houston v. Royston*, 7 H. 543.

646. *Election of vice chancellors: Constitutional law*. The constitution provides that all officers shall be elected or appointed for a limited term. The Act of 26th of February, 1842, establishing an inferior court of chancery, provides for the appointment of a vice chancellor, who shall hold his office until the next regular election in 1843, and until his successor shall be elected and qualified; but there is no provision for the election of a successor, and the general election law makes no provision for the election of such an officer: *Held*, that the appointment is valid till the general election in 1843, and the acts of the appointee good till that time; but there being no provision for the election of a successor, the courts cannot make one, and that if the defect be not supplied by subsequent legislation, there can be at that term no election for a successor, and that after November, 1843, there can be no vice chancellor; but the law being constitutional in part, will have operation to that extent; *Ib*.

647. *Venue of vice chancery courts*. The said act establishing the vice chancery courts, provided that suits therein should be brought in the district in which the defendants lived; but if a suit be brought in another district, that it should not be dismissed, but on application of the defendant should be transferred to the Superior Court of Chancery. Hence, in such a case, a plea to the jurisdiction on that ground, should be overruled, and if there be no application to make the change, the Vice Chancery Court should proceed to final hearing; *Trotter v. Erwin*, 5 C. 772.

648. *Same: Plea to jurisdiction*. If the subject matter of a suit in one of the Vice Chancery Courts be within the jurisdiction of the Superior Court of Chancery, a plea to the jurisdiction should not be sustained. The remedy of the defendant is to apply within

the proper time to have the cause transferred to the Superior Court of Chancery; *Harrington v. Mobley*, 4 G. 36.

649. *Same: Venue and jurisdiction.* A Vice Chancery Court has jurisdiction in cases of equity cognizance, wherever the subject of the suit is situated, or the defendant resides in the district in which the court is held; and hence, land may be proceeded against in the district where it is situated, for the purpose of subjecting it to the payment of a debt, notwithstanding the indebtedness alleged to exist did not arise from any dealings in relation to it; *Philips v. Hines*, 4 G. 163.

650. *Jurisdiction after amendment to con-*

stitution. A cause standing in the Vice Chancery Court at the date of the amendment to the constitution abolishing the court, on a decree of a foreclosure of a mortgage, which is unexecuted, is a cause depending in the meaning of the amendment which continues the jurisdiction of the court as to causes therein depending, until the 1st Monday in November, A. D. 1857; *Brandon v. Benjamin*, 10 G. 505. See *ante*, 142a, 811.

LVIII. Writ of Error.

651. See APPEAL. WRIT OF ERROR, sub-division Appeal; and *ante*, 139.

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